Law Council
OF AUSTRALIA

Australian Security Intelligence Organisation Amendment Bill 2020

Parliamentary Joint Committee on Intelligence and Security

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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.

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- 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
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- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

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

Acknowledgement

The Law Council is grateful for the contributions to this submission of the Law Institute of Victoria, the Law Society of New South Wales, the Law Society of South Australia, the Queensland Law Society and the Victorian Bar.

The Law Council also acknowledges the assistance of its advisory committees, particularly the National Criminal Law Committee, National Human Rights Committee and Military Justice Committee.

Executive Summary

1. The Law Council of Australia welcomes the opportunity to provide this submission to the Parliamentary Joint Committee on Intelligence and Security (**Committee**) review of the Australian Security Intelligence Organisation Bill 2020 (**Bill**).

2. The Bill contains two significant expansions of the intelligence collection powers of the Australian Security Intelligence Organisation (**ASIO**) under the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**). They propose to:

    - extend ASIO's compulsory questioning powers for a further 10 years, subject to substantial amendments, including expanding the scope of questioning and lowering the minimum age of questioning to 14 years (Schedule 1 to the Bill); and
    - enable ASIO to use tracking devices under internal authorisations given by its own officials, rather than a warrant issued by the Attorney-General, in circumstances that would considerably exceed ASIO's present warrantless surveillance powers, which generally require the consent of the other person to the use of a tracking device (Schedule 2 to the Bill).[1]

3. The Law Council acknowledges the important role of ASIO in keeping Australia and Australians safe from national security threats, and the need for its powers to be adequate to support this function. However, such powers should not exceed what is necessary and proportionate to respond to identified security threats. Accordingly, the Law Council welcomes the proposal not to renew ASIO's existing powers to detain a person for up to seven days to conduct compulsory questioning (**questioning-and-detention warrants**), which is consistent with the Law Council's longstanding position on the power of detention for intelligence collection purposes.

4. The Law Council also acknowledges that the Committee and successive Independent National Security Legislation Monitors (**INSLMs**) supported the conferral of a compulsory questioning power on ASIO, subject to appropriate limitations and safeguards. The Law Council welcomes the retention of a number of important safeguards in the re-designed compulsory questioning regime, especially an ongoing role for the Inspector-General of Intelligence and Security (**IGIS**) to attend compulsory questioning to conduct 'real time' oversight.

5. However, the Law Council has identified several issues in the details of the proposed measures in both Schedules. These arise primarily from imprecisely defined powers which place extensive reliance on the executive discretion about their exercise, rather than clearly defined limitations on power and other statutory safeguards.

6. In the Law Council's view, the measures in the Bill, if enacted, would represent a significant departure from ASIO's role as an intelligence collection agency and its relationship with law enforcement.

Re-designed compulsory questioning scheme (Schedule 1)

7. The Law Council has significant reservations about limitations in safeguards in nearly all aspects of the proposed re-designed questioning warrant regime and makes 63 recommendations to address these issues. Key recommendations focus on:

    - **Questioning of children**: amendments to the issuing criteria and procedural provisions governing the execution of minor questioning warrants, to ensure that the best interests of the child are given primary consideration, are

[1] ASIO Act, s 26E (warrantless use of tracking devices).

assessed on the basis of sufficient evidence, and are adequately protected throughout the warrant life cycle.

- **Issuing authorities:** amendments to enable judicial involvement in the issuing process, primarily in the form of a 'double lock' authorisation requirement, under which a questioning warrant does not enter into force unless a judicial officer has reviewed and approved the Attorney-General's issuing decision.
- **Post-charge questioning**: a primary amendment to remove the proposal to authorise ASIO to conduct post-charge questioning on the basis of its unacceptable degree of constitutional risk and risk of prejudice to the rights of an accused person to a fair trial. In the alternative, the Law Council recommends amendments to the authorisation process for post-charge questioning, the scope of use immunity, and the definition of 'questioning material'.
- **Lawyers for warrant subjects:** amendments to ensure that warrant subjects can access their lawyer of choice, and that those lawyers can adequately represent their clients' interests during questioning, can access sufficient information to advise their clients on their legal position, and are adequately funded.
- **Prescribed authorities:** amendments to ensure that the classes of persons eligible to be appointed as prescribed authorities do not create a risk of a substantive or perceived conflict of interest, by giving primacy to the appointment of retired judicial officers over lawyers of 10 years' standing.
- **Oral questioning warrants:** amendments to ensure that questioning warrants can only be sought and issued in circumstances that are genuine emergencies, with clear guidance on what constitutes an emergency.
- **Sunset period:** amendments to ensure that the period of effect for the re-designed scheme is commensurate with its significant expansion (namely, five years rather than 10 years); and to guarantee pre-sunsetting reviews of its operation by the Committee and the INSLM, in line with established practice.

Internal authorisation framework: tracking devices (Schedule 2)

8. The Law Council is concerned that two significant threshold issues are unaddressed:

- **Necessity:** there is inadequate information on the public record to support a conclusion that the internal authorisation framework is necessary, in that:
  - it would effectively address the identified operational need; and
  - this need could not be met from the use of existing emergency warrant powers, or the use of Identified Person Warrants under the ASIO Act.
- **Broader implications**: the adoption by ASIO of an internal authorisation framework that was designed for law enforcement purposes may have broader and potentially unintended consequences, which have not been identified or justified in the extrinsic materials to the Bill, namely:
  - ASIO's proposed framework would necessarily have a far broader application than that of the Australian Federal Police (**AFP**) on which it is modelled, due to the differences in the functions of these agencies; and
  - The adoption of an internal authorisation framework by ASIO would result in a significant misalignment with the Ministerial level of authorisation required under the *Intelligence Services Act 2001* (Cth)

(**ISA**) for all other Australian intelligence agencies with collection functions to use tracking devices on Australian persons.

9. The Law Council also makes 14 recommendations to address issues in specific provisions in the proposed authorisation framework, which include:

- overbreadth in the classes of persons who are appointed to request, issue and execute internal authorisations;
- ambiguities and potential unintended consequences with respect to the interaction of ASIO's internal authorisations to use tracking devices with its other statutory authorisation-based powers (including special intelligence operations) and the statutory cooperative scheme between ASIO and ASIS under the *Intelligence Services Act 2001* (Cth) (**ISA**);
- limitations in Ministerial visibility, accountability and control, including the absence of comprehensive breach reporting requirements; and
- an absence of public reporting on the use of the internal authorisations.

Schedule 1—ASIO's compulsory questioning powers

Background to the re-designed scheme

10. Schedule 1 to the Bill proposes to implement a Government response to recommendations of the Committee in its March 2018 report on its review of the ASIO's questioning and detention powers under Division 3 of Part III of the ASIO Act (**the 2017-18 review**).[2]

11. The Committee recommended the retention, for a further fixed period, of ASIO's extraordinary powers to compulsorily question a person who is present in Australia's territorial jurisdiction for intelligence collection purposes (**questioning warrants**). It supported extensive amendments to the existing scheme and expressed its views in a series of design principles that were accompanied by a recommendation for the Government to develop amending legislation and refer it to the Committee for further review.[3]

12. The Committee further recommended the repeal of ASIO's powers to detain a person for the purpose of compulsorily questioning them (**questioning-and-detention warrants**).[4] The Government indicated its acceptance of the Committee's recommendations in April 2019.[5]

13. Some of the Committee's principles for the re-design of ASIO's questioning warrant regime were broadly compatible with recommendations of the second INSLM, the Hon Roger Gyles AO QC, in his 2016 report on his review of questioning and detention powers relating to terrorism (**the 2016 review**).

14. In short, the second INSLM recommended alignment of ASIO's questioning powers with the examination powers of the Australian Criminal Intelligence Commission (**ACIC**) under the *Australian Crime Commission Act 2002* (Cth) (**ACC Act**); and the adoption of a framework to manage the risk of oppression arising from the exposure of a person to multiple coercive questioning powers by ASIO, the ACIC and police.[6]

15. However, the Committee did not endorse the wholesale adoption of the ACC Act examination model. In fact, it supported retaining several elements of ASIO's current questioning regime. The Committee particularly supported retaining: the supervisory role of an independent prescribed authority who presides over questioning; the 'real time' oversight of questioning by the Inspector-General of Intelligence and Security (**IGIS**); and various discrete accountability mechanisms and safeguards, including Ministerial reporting requirements, complaint mechanisms, the provision of interpreters and financial assistance, and the imposition of a humane treatment obligation on persons executing warrants, with an offence for contravention.[7] (As noted below, the Bill proposes to retain these measures.)

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[2] Parliamentary Joint Committee on Intelligence and Security (PJCIS), *ASIO's questioning and detention powers: review of the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979*, (March 2018), recommendations 1-3 ('PJCIS 2018 Report').

[3] Ibid, recommendations 1 and 3 and Chapter 3.

[4] Ibid, recommendation 2.

[5] Australian Government, *Australian Government response to the Parliamentary Joint Committee on Intelligence and Security report: ASIO's questioning and detention powers*, April 2019, 2.

[6] The Hon Roger Gyles AO QC, Independent National Security Legislation Monitor, *Certain questioning and detention powers in relation to terrorism*, (October 2016), 39-52 and recs 7-9 ('INSLM 2016 report').

[7] PJCIS, 2018 Report, 75 at [3.117]-[3.118]. The Law Council also supported modifications to the ACIC examination model, to ensure that there was no loss of existing oversight and accountability provisions and other safeguards, or lowering of issuing thresholds: Law Council of Australia, *Submission to the PJCIS Review of ASIO's questioning and detention powers*, (April 2017), 5-6.

Key changes in the re-designed scheme

16. Many of the proposed amendments in Schedule 1 to the Bill will expand the scope of ASIO's compulsory questioning powers. Key expansions include:

- an extension of the matters that may be the subject of questioning to cover several more heads of 'security' within the meaning of the ASIO Act[8] in addition to the present coverage of terrorism offences – namely, espionage, foreign interference and politically motivated violence (which includes acts that are offences in the nature of terrorism and foreign incursions);[9]
- an explicit power to question charged persons, and persons against whom charges are imminent, regarding the subject-matter of those charges (as well as persons who the subject of an extant or imminent application for a confiscation order under proceeds of crime legislation);[10]
- a reduction in the minimum age of questioning to 14 years from 16 years, with questioning of minors limited to young persons who are suspected of having engaged in prejudicial activities relating to politically motivated violence;[11] and
- the conferral of new powers of apprehension, search, seizure and pre-questioning security screening on police officers assisting ASIO.[12]

17. Other proposed changes include the removal of judicial involvement from the issuing process, with the Attorney-General to be the sole issuing authority, who will also be empowered to issue warrants orally in certain circumstances.[13]

18. Questioning under a warrant will remain subject to supervision by a prescribed authority, who is a retired judicial officer or a Presidential or Deputy Presidential member of the AAT appointed by the Attorney-General. The Bill proposes to expand the classes of persons eligible for appointment as prescribed authorities to include lawyers with at least 10 years' post-admission experience (subject to exclusions for persons who are currently employed or engaged by Commonwealth intelligence agencies; Commonwealth, State or Territory police; or the Australian Government Solicitor).[14]

19. There is no apparent reduction of the statutory issuing thresholds for questioning warrants.[15] The IGIS will also retain its specific, 'real time' oversight functions in relation to the execution of warrants, which include a right to attend questioning and the prior apprehension of a person (where immediate apprehension is authorised under a warrant) and a requirement for questioning to be paused to resolve any

[8] ASIO Act, s 4.

[9] Bill, Schedule 1, item 10, inserting proposed s 34A of the ASIO Act (definitions of 'adult questioning matter' and 'minor questioning matter').

[10] Ibid, inserting proposed ss 34BA(1)(d) and 34BB(1)(e) of the ASIO Act (issue of warrant to question charged persons) and proposed Subdivision E of Division 3 of Part III of the ASIO Act (disclosures of questioning material and derivative material). See also proposed s 34DB (explicit authorisation of post-charge and pre-charge questioning under warrant).

[11] Ibid, inserting proposed ss 34A and 34BB of the ASIO Act (definition and issuing of 'minor questioning warrant'). See also, proposed s 34BC (warrant has no effect if the subject is under 14 years of age).

[12] Ibid, inserting proposed ss 34BE(2)-(3) of the ASIO Act (warrants may authorise immediate apprehension, powers of search and seizure while apprehending a person, and requirement to produce records or things); proposed Subdivision C (police powers of apprehension and search) and proposed s 34D (screening powers).

[13] Ibid, inserting proposed Subdivision B of Division 3 of Part III (requests for, and issuing of warrants).

[14] Ibid, inserting proposed ss 34AD(1)(b) and (c) of the ASIO Act.

[15] Ibid, inserting proposed ss 34BA and 34BB of the ASIO Act (tests for issuing of adult and minor warrants: the Attorney-General must be satisfied that there are reasonable grounds on which to believe that the issuing of the warrant would substantially assist in the collection of intelligence that is important in relation to a questioning matter.)

concerns the IGIS or their staff may raise.[16] The Law Council notes that the practical capacity for the IGIS to perform this function will require appropriate resourcing and supports the ongoing monitoring of the adequacy of resourcing to this Office.

20. While a person will retain a right to contact a lawyer while appearing for questioning under a warrant,[17] existing restrictions on a person's lawyer of choice will be retained, if there are concerns that the lawyer of choice may notify others who are involved in activities prejudicial to security of ASIO's investigation, or may notify others who could tamper with or destroy information relevant to that investigation.[18]

21. The Bill also proposes to retain the power of a prescribed authority to remove a person's lawyer for 'unduly disrupting' questioning.[19] The Bill further proposes to retain restrictions on a person's lawyer accessing information relevant to the initiation or conduct of legal proceedings challenging the issuing of a warrant, or the treatment of a person under the warrant.[20] Existing secrecy offences in relation to the existence of a warrant and the content of questioning and related matters will also be retained.[21]

22. Various safeguards and accountability requirements in the present provisions are retained in the re-designed compulsory questioning regime. These include:

- obligations on the persons notifying or apprehending a questioning warrant subject and on the prescribed authority to explain certain matters to the subject;[22]
- Ministerial reporting on questioning warrants;[23]
- access to interpreters during questioning;[24]
- the availability of financial assistance for questioning warrant subjects in respect of their legal representation costs;[25]
- a requirement for the Minister to have issued a non-disallowable legislative instrument containing a statement of procedures for the conduct of questioning, as a prerequisite to the exercise of power by the Attorney-General to issue a questioning warrant;[26]
- requirements for persons exercising authority under warrants to treat warrant subjects humanely;[27] and
- offences for the contravention of safeguards by persons exercising authority under warrants.[28]

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[16] Ibid, inserting proposed s 34JB of the ASIO Act (IGIS officials may be present at questioning and apprehension), s 34DM (suspension of questioning in response to IGIS concerns), s 34HB (providing information to IGIS). See also proposed ss 34B(5), 34B(6)(b)(i), 34BG(4) and 34BG(5)(b)(ii) (notification of IGIS of oral requests for warrants and variations, and giving IGIS copies of written records). See further, items 25 and 26 (inserting new ss 9B and 19A in the IGIS Act, conferring an express right of entry to places of questioning in inspections and inquiries).

[17] Ibid, inserting proposed s 34F(1) of the ASIO Act (right to contact lawyer).

[18] Ibid, inserting proposed ss 34F(2)-(5) of the ASIO Act.

[19] Ibid, inserting proposed s 34FF of the ASIO Act. See especially proposed ss 34FF(3), (6) and (7).

[20] Ibid, inserting proposed s 34FH of the ASIO Act. See also item 16(2) of Schedule 1 to the Bill, which saves the current regulations made for the purpose of existing s 34ZT (which is preserved in new s 34FH).

[21] Ibid, inserting proposed s 34GF of the ASIO Act.

[22] Ibid, inserting proposed s 34DC of the ASIO Act.

[23] Ibid, inserting proposed s 34HA of the ASIO Act.

[24] Ibid, inserting proposed s 34DN of the ASIO Act.

[25] Ibid, inserting proposed s 34JE of the ASIO Act.

[26] Ibid, inserting proposed ss 34AF, 34BA(1)(e) and 34BB(1)(f) of the ASIO Act.

[27] Ibid, inserting proposed s 34AG of the ASIO Act.

[28] Ibid, inserting proposed s 34GE of the ASIO Act.

Repeal of questioning-and-detention warrants

23. The Law Council welcomes the proposed repeal of ASIO's questioning-and-detention warrants, consequent upon the findings of the Committee and the second INSLM that the conferral of a power of detention on ASIO was not necessary or proportionate to the risk of terrorism.[29] This is an endorsement of the Law Council's longstanding concerns about the conferral of a power of executive detention for intelligence collection purposes.[30]

24. The Law Council further welcomes the removal of the express power of the prescribed authority to make an order for the detention of a person who is appearing under a questioning warrant (for example, an order to detain the person during adjournments between blocks of questioning, so that the person could not leave the place of questioning until all questioning was complete or the warrant expired). The removal of this power is also consistent with the Committee's design principles in its 2017-18 review and the Law Council's position against executive detention of any kind for intelligence collection purposes.[31]

25. However, the Law Council is concerned that the Bill nonetheless retains an effective power of detention. In particular, the Law Council considers that a person's attendance under a questioning warrant and their prior apprehension (if authorised) amounts to a form of detention, in substance and effect. This is because a person is under pain of criminal penalty if they fail to attend for questioning, or if they decline to answer questions while in attendance, or if they attempt to leave the place of questioning without permission from the prescribed authority.[32] A person who is apprehended for the purpose of being brought in for questioning is also subject to the use of force by the police officers exercising the power of apprehension, should the person attempt to resist apprehension or search while apprehended.[33] Accordingly, the Law Council does not endorse the suggestion in the Explanatory Memorandum that a person's attendance for questioning before a prescribed authority, and their prior apprehension, does not amount to detention.[34].

26. Rather, the Law Council supports the evidence of the IGIS to the Committee in 2017 that the near complete abrogation of a person's freedom of movement and personal liberty in these circumstances is functionally tantamount to detention, irrespective of any subjective statutory label that is applied to the power.[35] The substance and effect of the compulsory questioning and apprehension powers – particularly in abrogating a person's right to freedom of movement and significantly limiting their rights to liberty and security of the person while they are being apprehended and questioned – should be reflected in the attendant statutory safeguards and oversight and accountability mechanisms included in the re-designed scheme.

Re-design of questioning warrants

27. Australia is the only country in the Five Eyes alliance to confer a compulsory questioning power on one of its intelligence agencies for the purpose of collecting security intelligence. Although the Law Council is concerned that Australia will

[29] PJCIS, 2018 Report, recommendation 2; and INSLM, 2016 Report, recommendation 7.

[30] A summary of the Law Council's ongoing advocacy on this issue is provided in: Law Council of Australia, *Submission to the PJCIS Review of ASIO's questioning and detention powers*, (April 2017), 7-8.

[31] PJCIS, 2018 Report, 77 at [3.134].

[32] Bill, Schedule 1, item 10, inserting proposed s 34GD of the ASIO Act.

[33] Ibid, inserting proposed s 34CD of the ASIO Act.

[34] Explanatory Memorandum, 8 at [25].

[35] IGIS, *Supplementary submission to the PJCIS Review of ASIO's questioning and detention powers*, (October 2017) 6.

remain an 'outlier' among like-minded countries by retaining this extraordinary power, it acknowledges that the Committee and the second INSLM recommended the continuation of the questioning warrant regime, subject to significant amendments.[36]

28. As explained subsequently in this submission, however, the Law Council is concerned to ensure that the essential distinction is maintained between ASIO's intelligence collection powers and the investigatory powers of law enforcement agencies. This separation is consistent with the views of the Hope Royal Commission on ASIO, which emphasised the importance of ASIO's functions being demonstrably separate to those of law enforcement agencies.[37]

Compatibility with the Committee's 2018 report and the INSLM's 2016 report

29. Given the recommendations of the Committee and the second INSLM, the Law Council is concerned to ensure that the proposed re-design of ASIO's warrant-based questioning scheme in the Bill is compatible with the design principles articulated by the Committee in its 2018 report; and takes account relevant recommendations of the second INSLM in his 2016 report. In this respect, the Law Council has identified several areas of incompatibility with the Committee's design principles in its 2018 report. The key areas of inconsistency are outlined below.

Emergency oral warrants

30. The Committee considered that the new regime should permit warrants to be sought and issued orally, provided that the provisions are limited to circumstances of emergency, and contain a precise and clear prescription of the circumstances in which an emergency application may be made.[38]

31. In contrast, the Bill proposes to permit warrants to be sought and issued orally in circumstances that appear to exceed the ordinary meaning of an 'emergency'. All that is required is a possibility that the time taken to request and issue a warrant in writing would cause **any degree** of prejudice to security. This appears to be a low bar. The provisions contain no specific reference to an emergency (such as an imminent threat to life or safety, or an extremely tight timeframe to collect intelligence to avoid major harm, loss or damage to significant security interests). Nor do they attempt to prescribe any quantum of risk, or degree of prejudice to security (for example, 'a substantial risk of significant prejudice to security').[39]

Prescribed authorities who supervise questioning

32. The Committee supported an expansion of the classes of persons eligible to be appointed as a prescribed authority to lawyers (in addition to retired judges and AAT Presidential and Deputy Presidential members) provided that there were sufficient mechanisms in place to ensure that:

- each lawyer-appointee had 'significantly more than five years' experience as a legal practitioner and would be a person of some eminence'; and

[36] PJCIS, 2018 Report, 26-27 at [2.15]-[2.22] and recommendation 1; and INSLM, 2016 Report, 43 at [9.13] and recommendation 8.

[37] The Hon Justice Robert Hope, Royal Commission into Intelligence and Security, *Fourth Report: Australian Security Intelligence Organisation*, 1976, 210-21.

[38] PJCIS, 2018 Report, 78-79 at [141]-[143].

[39] Bill, Schedule 1, item 10, inserting proposed ss 34B(6) and 34BF(3) of the ASIO Act.

- the independence of each lawyer-appointee was guaranteed, including through provisions to prevent the appointment of persons with actual or perceived conflicts of interest.[40]

33. In contrast, the Bill does not give appointees a fixed term of appointment to a statutory office, but rather their appointments are held at the pleasure of the Attorney-General (who is also the issuing authority for warrants).[41] The matters excluding a person from appointment do not cover the full range of circumstances in which an actual, potential or perceived conflict of interest exists by reason of a person's current or recent employment.[42]

34. Further, while the Attorney-General is required to consider whether a person may have a conflict of interest as a condition to making an appointment, there is no prohibition on the appointment in the event that the Attorney-General considers that a conflict of interest exists.[43] The grounds of termination on the basis of misconduct, incapacity or a conflict of interest are only discretionary.[44] The Bill also provides no guidance on the types of experience and expertise a lawyer must possess to be appointed as a prescribed authority, but rather leaves this to the sole discretion of the Attorney-General.[45]

Questioning of minors

35. The Committee took the view that 'in principle – and with appropriate safeguards – lowering the minimum age of a questioning subject to 14 may be a necessary measure for protecting the community from terrorism'.[46] It specifically identified the following matters as among the essential safeguards for such a measure:

- 'any compulsory questioning of minors must be limited to those who are themselves the subject of investigation. It is not a proportionate response to compulsorily question a 14-year-old who is not the subject of suspicion in relation to the unrelated activities of that minor's friends or family members'.[47]
- 'apprehension should not be available in relation to minors'.[48]
- 'any minor that is the subject of a questioning warrant must have had an assessment conducted prior to the Attorney-General's approval of the warrant as to whether the interests of the child are appropriately protected'.[49]
- 'to the greatest extent possible, the interests of the child should be protected'.[50]

36. In contrast, the Bill:

- appears to enable the questioning of minors who are not knowingly or intentionally engaged in an activity that is prejudicial to the need to protect

[40] PJCIS, 2018 Report, 79-80 at [147]-[148].

[41] Bill, Schedule 1, item 10, inserting proposed s 34AD(1) of the ASIO Act.

[42] Ibid, inserting proposed s 34AD(2) of the ASIO Act. To avoid doubt, the Law Council is referring to conflicts of interest in a broader sense than under legal professional conduct rules for regulatory purposes.

[43] Ibid, inserting proposed s 34AD(5) of the ASIO Act.

[44] Ibid, inserting proposed s 34AD(9) of the ASIO Act.

[45] Ibid, inserting proposed s 34AD(3) of the ASIO Act.

[46] PJCIS, 2018 Report, 80 at [3.151].

[47] Ibid, 80 at [3.155].

[48] Ibid.

[49] Ibid, 80-81 at [3.155]

[50] Ibid, 81 at [3.155].

Australia or Australians from politically motivated violence. (For example, a child who is a mere courier for adults engaged in prejudicial activities);[51]

- appears to enable a child who is engaged in prejudicial activities in relation to a particular matter of politically motivated violence to be compulsorily questioned about any other matter of politically motivated violence of which they may have some knowledge but are not personally involved;[52]
- authorises the exercise of powers of apprehension against a minor;[53]
- does not require the Attorney-General to treat the interests of the child as a primary consideration in considering whether to issue a warrant;[54]
- does not require the Attorney-General to make decisions about the best interests of the child on the basis of sufficient information about their circumstances (or require reconsideration of whether the warrant should continue in force, if further information becomes known after issuing);[55] and
- does not require the Attorney-General to be satisfied that, if the warrant was issued, the best interests of the child would be adequately protected.[56]

Access to lawyers

37. The Committee expressed a view that 'the existing provisions of the ASIO Act should be repealed and replaced with provisions consistent with those relating to legal representation in the ACC Act'.[57] It placed weight on the need for persons subject to compulsory questioning to be 'afforded appropriate access to legal counsel' which it regarded as 'particularly important given the secrecy in which ASIO's questioning takes place, the availability of questioning against innocent persons, and the gravity of the offences for non-compliance'.[58] The Committee placed further weight on the views of the second INSLM and the Law Council (which were also supported by the Attorney-General's Department) that the provisions of the ACC Act 'offer a fair and workable framework for access to legal representation'.[59]
38. In sharp contrast, the Bill proposes to retain the existing provisions of the ASIO Act concerning legal representation for warrant subjects, which apply limitations that have no equivalent in the ACC Act. The relevant provisions in the ASIO Act:
    - restrict the ability of a warrant subject to contact and be represented by their lawyer of choice;[60]
    - severely limit the ability of a person's lawyer to represent the person's interests at questioning (by prohibiting a lawyer from speaking during questioning other than to clarify an ambiguous question, or to request a break) under penalty of an order for their removal;[61] and

[51] Bill, Schedule 1, item 10, inserting proposed s 34BB(1)(b) of the ASIO Act.
[52] Ibid, inserting proposed ss 34BB(1)(c) and 34BD(1)(b)(ii) of the ASIO Act.
[53] Ibid, inserting proposed ss 34BE(2) and 34C(1)-(3) of the ASIO Act.
[54] Ibid, inserting proposed s 34BB(2) of the ASIO Act.
[55] Ibid, inserting proposed s 34BB(3) of the ASIO Act.
[56] Ibid, inserting proposed s 34BB of the ASIO Act.
[57] PJCIS, 2018 Report, 82 at [3.162].
[58] Ibid, 81 at [3.160].
[59] Ibid, 82 at [3.162].
[60] Bill, Schedule 1, item 10, inserting proposed s 34F(4) of the ASIO Act.
[61] Ibid, inserting proposed ss 34FF(3) and (6) of the ASIO Act.

- severely limit the ability of a person's lawyer to access sufficient information to advise their client about their legal position (namely, the legality of the warrant and acts done in purported reliance on the authority of the warrant).[62]

Sunset date and Committee review

39. The Committee stated that 'any proposed legislation should be subject to an appropriate sunset clause' and further that 'it would be appropriate to require the Committee to conduct a further review of the compulsory questioning framework prior to the sunset date'.[63]

40. In contrast, the Bill proposes that the re-designed regime should have a period of effect of 10 years. This is despite the re-designed regime making significant expansions to the questioning matters, conferring a post-charge questioning power and lowering the minimum age of questioning.[64] The Explanatory Memorandum provides no justification for such a prolonged period. Further, the Bill does not propose to amend the functions of the Committee in section 29 of the ISA to require it to conduct a pre-sunsetting review of the questioning regime, to help inform decisions about its renewal or lapsing after the sunset date.

Multiple questioning

41. The Committee stated that it supported the recommendation of the second INSLM for ASIO, the ACIC and other bodies that share information obtained by compulsory questioning to avoid oppression of an individual due to successive exercises of coercive powers against that person. The Committee conveyed its expectation that the Government would consider this recommendation.[65] The Bill does not make provision for such a protocol (for example, a requirement that such a protocol must be in force in order for a questioning warrant to be issued, as is the case with the Statement of Procedures for Questioning). Nor do the extrinsic materials identify whether there is an intention for such a protocol to be made and, if so, published.

Generally beneficial aspects of the re-designed scheme

Attempts to limit the scope of questioning

42. The Law Council acknowledges that certain elements of the Bill attempt to limit the breadth of the re-designed scheme. While the scope of questioning has been expanded from questioning in relation to terrorism offences, that expansion is targeted to three 'heads of security' within the definition of 'security' in section 4 of the ASIO Act (espionage, foreign interference and politically motivated violence) rather than a wholesale expansion to all heads of security, as proposed in 2017.[66]

43. Nonetheless, the effect of this more limited expansion than the original proposal is that ASIO's compulsory questioning powers will be available in very broad circumstances. The concepts of 'espionage' and 'foreign interference' are undefined in the ASIO Act and are not limited to the matters covered by offences in Chapter 5 of the Criminal Code.[67] Their scope and limits for the purpose of the ASIO Act are

[62] Ibid, inserting proposed ss 34FE(6)(b) and 34FH of the ASIO Act.

[63] PJCIS, 2018 Report, 86 at [3.189].

[64] Bill, Schedule 1, item 10, inserting proposed s 34JF of the ASIO Act.

[65] PJCIS, 2018 Report, 85 at [3.182].

[66] Ibid, inserting proposed s 34A of the ASIO Act (definition of 'adult questioning matter'). See further: ASIO, *Submission to the PJCIS Review of ASIO's Questioning and Detention Powers*, (September 2017), 7.

[67] Criminal Code Act 1995, s 90.6, which states that an expression used in Part 5.2 of the Criminal Code (espionage and foreign interference offences) does not affect the meaning of equivalent terms in the ASIO Act, unless the ASIO Act otherwise provides.

unclear and open to interpretation in the absence of meaningful opportunities for judicial review,[68] and there is likely to be overlap with the offences in Chapter 5 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**).

44. The inclusion of these matters in the re-designed questioning warrant scheme will mean that compulsory questioning powers are available to ASIO to investigate threats to Australia's economic or political interests, and not merely the protection of life and safety, as is presently the case for terrorism offences.[69] This breadth will be compounded by the fact that adults who are not the targets of investigations may be compulsorily questioned to obtain information about third parties.[70] The proposed expansion will also mean that there will be greater scope for the exercise of multiple investigative powers by ASIO and the AFP against the same individuals.

45. The Law Council also acknowledges that efforts have been made to limit the security matters about which minors may be compulsorily questioned to incidents of politically motivated violence, in respect of which the minor has likely engaged in prejudicial activities, or is likely to be engaging in such activities, or is likely to do so in the future.[71]

46. Even then, as noted below, the Law Council has identified some drafting issues in the provisions, which may enable questioning warrants to be sought against minors who are not necessarily targets of investigations. For example, the provisions could permit the questioning of minors who are unknowingly or unintentionally engaged in prejudicial activities; or the questioning of minors who are engaged in prejudicial activities in relation to a particular incident of politically motivated violence, about a different incident of which the minor has knowledge but no personal involvement.[72]

Separation of questioning warrants from identified person warrants

47. The Law Council is pleased that questioning warrants have not been integrated into the authorisation framework for identified person warrants (**IPWs**) under Division 2 of Part III of the ASIO Act, as was proposed in 2017. Under the IPW regime, the Attorney-General is empowered to issue a warrant which gives conditional approval to ASIO to exercise multiple special powers (such as search, computer access and surveillance) in relation to a particular person engaged in activities that are prejudicial to security. The Director-General may then authorise the exercise of individual powers within a six-month period of effect.

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[68] See, for example, *Church of Scientology v Woodward* (1982) 154 CLR 25 at 61, in which Mason J commented on that the thresholds for judicial review, in the context of an argument that ASIO exceeded its statutory functions, presented a 'formidable hurdle' to applicants.

[69] The Law Council also commented on the breadth of the espionage and foreign interference offences in Chapter 5 of the Criminal Code: Law Council of Australia, *Submission to the PJCIS inquiry into the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*, (January 2018), 45-52.

[70] In this regard, the Law Council queries whether consideration could be given to limiting the expansion of adult questioning warrants with respect to espionage and foreign interference to persons who are the target of an intelligence investigation by ASIO (that is, they are suspected of personally engaging in prejudicial activities).

[71] Ibid (definition of 'minor questioning matter'). See further: PJCIS, 2018 Report, 80 at [3.155], bullet point 1.

[72] Ibid, inserting proposed ss 34BD(1)(b), 34BD(3)(b) and 34BD(4)(c)-(d) of the ASIO Act. These provisions state that a warrant authorises the imposition of requirements on a person to give information or produce records or things that are, or may be, relevant to intelligence that is important to (as applicable): '**an** adult questioning matter'; or '**a** minor questioning matter' (as defined in proposed s 34A).

The authorisation is not required to be limited to the collection of intelligence that is important in relation to **the** questioning matter(s) specified in the warrant request and assessed by the Attorney-General in applying the issuing test under (as applicable): see proposed s 34BA(1)(b) (adult questioning matter – a matter that is espionage, foreign interference or politically motivated violence); and proposed s 34BB(1)(b) (minor questioning matter – child's engagement in prejudicial activities in relation to politically motivated violence).

48. The Law Council supports the view of the Committee that the integration of questioning warrants into the IPW framework would have made it impossible to avoid a devolution in the level of authorisation for questioning; could have made it possible for multiple questioning authorisations to be given during the period of effect; and may not have been conducive to effective independent oversight by the IGIS.[73]

Retention of 'real time' oversight measures

49. The Law Council strongly supports the retention of the specific, independent operational oversight measures in the existing questioning regime, particularly the provisions enabling IGIS officials to attend questioning (and the apprehension of a person, where that power is authorised) and for questioning to be suspended to address any concerns the IGIS official may raise.[74]

Removal of specific power to monitor lawyer-client communications

50. The Law Council welcomes the removal of a provision in the current regime authorising ASIO to monitor the communications between a questioning warrant subject and their lawyer at the place of questioning.[75] Although the Bill proposes to retain other problematic provisions governing the appointment and role of lawyers for warrant subjects,[76] the Law Council is pleased that this particular provision, which has been of longstanding concern as an undue incursion into client legal privilege, confidentiality and the effective provision of legal advice, will not be retained. Its removal is particularly important in view of the proposed empowerment of ASIO to question persons about the subject matter of charges laid against them, and to enable certain disclosures of that material (and derivative material) to prosecutors.[77]

Questioning and apprehension of children

51. The Bill proposes to expand the matters in relation to which children may be questioned, reduce the minimum age of questioning to 14 years, and authorise the exercise of powers of apprehension against children for the purpose of taking them before a prescribed authority in accordance with a warrant.[78]

52. The Bill proposes to create a specific type of warrant for the questioning of children, known as a 'minor questioning warrant'.[79] These warrants enable a child who is aged at least 14 years to be questioned about a 'minor questioning matter' subject to certain thresholds being met.[80]

53. A 'minor questioning matter' is defined in proposed section 34A as 'a matter that relates to the protection of, and of the people of, the Commonwealth and the several States and Territories from politically motivated violence, whether directed from, or committed within, Australia'.[81] The component term 'politically motivated violence' is

[73] PJCIS, 2018 Report, 57-59 at [3.15]-[3.59] and 77-78 at [3.136]-[3.140].

[74] This is consistent with the views of the PJCIS in its 2018 Report: Ibid, 84 at [3.177].

[75] ASIO Act, s 34ZQ(2).

[76] Bill, Schedule 1, item 10, inserting proposed ss 34F(4), 34FF(3) and 34FF(6).

[77] Ibid, inserting proposed s 34BD(4) and Subdivision E of Division 2 of Part III of the ASIO Act.

[78] Ibid, inserting proposed ss 34BB, 34BC, 34BD(2)-(3) and 34BE of the ASIO Act. See also proposed s 34A (definitions of 'minor questioning warrant' and minor questioning matter').

[79] Ibid, inserting proposed s 34A of the ASIO Act (definition of minor questioning warrant, referring to warrants issued under proposed s 34BB, including warrants varied under proposed s 34BG).

[80] Ibid, inserting proposed s 34A of the ASIO Act (definition of 'adult questioning warrant, referring to warrants issued under proposed s 34BA, including warrants varied under proposed s 34BG).

[81] The High Court has confirmed that the concept of 'relevance' of information to security (which includes politically motivated violence) for the purpose of construing ASIO's functions in section 17 of the ASIO Act is

one of the heads of 'security' in relation to which ASIO may perform its collection, analytical, advisory and dissemination functions under section 17 of the ASIO Act. Both the terms 'security' and 'politically motivated violence' are defined in existing section 4 of the ASIO Act.

Reduction of minimum questioning age for children

Necessity of compulsorily questioning 14 and 15-year-old children

54. The Committee observed in its 2017-18 review that the proposal to reduce the minimum age of questioning to 14 and 15 years is extraordinary, and its necessity must be substantiated by cogent evidence of security threats presented by such persons, and a credible explanation of the specific contribution that compulsory questioning powers will make to the management of those threats.[82]

55. The Law Council notes that the emphasis in the Explanatory Memorandum[83] and the submission of ASIO to the present inquiry into the Bill[84] identify a small number of fact-specific scenarios in which it is said that compulsory questioning would be of utility in collecting intelligence. (For example, the Explanatory Memorandum refers to the 2015 politically motivated shooting of a New South Wales police force employee, Mr Curtis Cheng, by a 15 year-old child. The ASIO submission refers to the disruption by law enforcement agencies of three planned terrorist attacks by children aged 16 and 17 years in Australia in 2015 and 2016, in reliance on security intelligence provided by ASIO. It also refers to a case in which law enforcement agencies advised that child members of an extremist group, aged under 16 years, did not meet the threshold for counter-terrorism offences.)

56. These examples identify certain security threats presented by children, who may therefore be legitimate targets of intelligence investigations. However, they do not contain a clear explanation of how compulsory questioning of 14 and 15 year-olds is anticipated to enable these threats to be managed **more effectively** than via the exercise of ASIO's existing human and technical intelligence collection powers, or police powers of criminal investigation.[85]

57. The Law Council also notes that three of the scenarios provided by ASIO involved children aged 16 and 17 years who were arrested on suspicion of terrorism offences, in reliance on intelligence obtained by ASIO through means **other than** questioning warrants, despite the availability of such warrants under the current legislation. The successful disruption of terrorism-related activities by children, without the use of a questioning power despite its availability, may cast doubt on the necessity of compulsory questioning power in relation to children, including a reduction of the minimum age of questioning.

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assessed broadly, in the context of the anticipatory nature of ASIO's intelligence collection functions: *Church of Scientology v Woodward* (1982) 154 CLR 25 at 61 (per Mason J): 'Intelligence is relevant to security if it can reasonably be considered to have a real connection with that topic, judged in the light of what is known to ASIO at the relevant time'. This can cover the collection of intelligence to determine whether a person is a security risk, provided that ASIO is acting on information that tends to suggest a possibility an individual is a security risk. In other words, provided that the information is not clearly lacking in credibility on its face, it may permissibly be 'checked out and followed up': Ibid. See also, ibid at 73-74 (per Brennan J) at which it was noted that gravity of a risk is relevant to determining whether there is a need to protect Australia and Australians for the purpose of the definition of security. However, 'it may be reasonable, even necessary, to determine the gravity of a risk by intuition rather than by deduction': ibid at 74.

[82] PJCIS, 2018 Report, 80 at [3.152].

[83] Explanatory Memorandum, 9 at [27].

[84] ASIO, *Submission to the PJCIS Review of the ASIO Amendment Bill 2020*, (June 2020), 5 and 7.

[85] The PJCHR also commented on the absence of adequate evidence to substantiate the necessity of lowering the minimum age of questioning: PJCHR, *Scrutiny Report 7 of 2020* (June 2020), 50 at [2.64].

58. Further, the submission of the Department of Home Affairs indicates that one of the policy objectives for reducing the minimum questioning age is to 'hold [children] accountable for dishonest answers' to questioning through the application of offences for warrant subjects who knowingly give false or misleading answers to questions.[86] However, that submission subsequently acknowledges that 'a minor may be less likely to respond rationally when faced with a questioning warrant, and may be more inclined to ignore the serious consequences for failing to comply with a warrant'.[87] The latter acknowledgement tends to suggest that exposure to criminal liability for failure to comply with a warrant may not provide an incentive for some children to respond, or respond truthfully, to compulsory questioning. The Law Council is also mindful of the conclusion of the second INSLM in his 2016 Review that ASIO's questioning warrants should not be conceived as 'a front-line means of disruption of an imminent terrorist attack'.[88]

59. If the Committee takes the view that the evidence presented to the present inquiry indicates that the security threats identified in 2017-18 are enduring (or have increased), and if it further considers that compulsory questioning powers in relation to minors aged 14 or 15 years are needed to manage those threats, then the Law Council emphasises the importance of the ongoing, independent review of the scheme to ensure its continuing necessity and proportionality to manage those threats. The role of the Independent National Security Legislation Monitor (**INSLM**) will be particularly important in monitoring the continuing necessity (or otherwise) of this aspect of a re-designed questioning regime.

Proportionality of compulsorily questioning 14 and 15-year-old children

60. The existence of a legitimate objective for a reduction in the minimum questioning age is not conclusive of the appropriateness of the proposed amendments. The arrangements for the compulsory questioning of children, including very young persons aged 14 years, must also be proportionate to the identified security threat.

61. The Law Council is concerned that the minor questioning warrant regime proposed in the Bill falls considerably short of the essential requirements of proportionality, as it lacks adequate safeguards to ensure that the best interests of minors are protected comprehensively throughout the life cycle of a minor questioning warrant. (That is, from its issuing, notification and execution, to the conduct of 'post-questioning' and 'post-warrant' activities – including subsequent uses made of questioning material, secrecy obligations and provisions limiting lawyers' access to information should their client wish to challenge the warrant or actions taken under the warrant, after questioning is completed.)

62. A key source of this failure is that the Bill does not fully adopt safeguards and other design principles that the Committee specifically identified in its 2017-18 review as being critical to ensuring that the best interests of minors – especially those aged 14 or 15 years – would be protected comprehensively under an expanded questioning warrant regime.[89]

[86] Department of Home Affairs, Submission to the PJCIS Review of the ASIO Amendment Bill 2020, (June 2020), 22.

[87] Ibid, 23.

[88] INSLM, 2016 Report, 51 at [9.48]. Cf Department of Home Affairs, *Submission to the PJCIS Review of the ASIO Amendment Bill 2020* (June 2020), 23.

[89] Ibid, 80-81 at [3.155].

Issuing thresholds for minor questioning warrants

63. In its 2017-18 review, the Committee was concerned to ensure that the issuing thresholds for minor questioning warrants were limited to those persons who were personally engaged in activities that were prejudicial to security, and that warrants did not authorise the compulsory questioning of minors 'in relation to the unrelated activities of the minor's friends and family members'.[90]

64. The Committee was also concerned to ensure that 'to the greatest extent possible, the interests of the child should be protected'[91] and that the Attorney-General should be specifically required to assess, as part of the issuing decision, 'whether the interests of the child are appropriately protected' under a proposed warrant.[92]

65. The Law Council is concerned that the issuing criteria for minor questioning warrants:

- could authorise the questioning of minors who are not necessarily targets in an investigation of a particular incident of politically motivated violence; and
- do not adequately protect the best interests of the child because:
  - there is no requirement for the best interests of the child to be treated as a primary consideration in determining whether to issue a warrant; and
  - there is no requirement for an assessment of the best interests of the child to be based on a sufficient amount of evidence to enable a meaningful and accurate assessment of the child's circumstances.

Potential ability to question children who are not targets of an investigation

66. The Law Council welcomes the stated policy objective to limit the questioning of minors to those who are the targets of ASIO investigations into politically motivated violence.[93] However, the substantive provisions of the Bill do not give full effect to this limitation and may authorise questioning of minors in broader circumstances. The Law Council has identified two key risks of overbreadth, as outlined below:

Questioning of children who are unintentionally engaged in prejudicial activities

67. First, while the minimum threshold for issuing a minor questioning warrant is that the child is likely to have engaged or to be engaging, or is likely to engage in future, in prejudicial activities in relation to politically motivated violence, there is no explicit requirement that the child must be **intentionally** involved in those prejudicial activities.

68. Accordingly, it would be possible for ASIO to obtain a questioning warrant in relation to a child who has been exploited by adults of security concern as a 'mere courier' (for example, by passing on communications or items without knowledge or understanding of their contents or purpose, or any deliberate design to contribute to the objectives or activities of the relevant group).

69. The Law Council considers that the exposure of children as young as 14 to compulsory questioning (including the potential for apprehension and the attendant use of physical force) in relation to activities that were not undertaken with any intent (or potentially knowledge) on their part is not necessary, reasonable or proportionate

[90] PJCIS, 2018 Report, 80 at [3.155]. bullet point 1.
[91] Ibid, 81 at [3.155], bullet point 5.
[92] Ibid, 80-81 at [3.155], bullet point 4.
[93] Explanatory Memorandum, 9 at [27] and 43-44 at [153].

to manage a security threat presented by an act of politically motivated violence that is carried out by, or under the direction of, other persons.

70. The scenarios identified in the Explanatory Memorandum and ASIO's submission to the Committee on the Bill appear to focus on minors who have personally committed a deliberate act of violence, or who have unequivocally and intentionally expressed their support for such acts.[94] The Explanatory Memorandum further states that the minor questioning warrant regime is intended to be 'limited to circumstances where the child is **the target** of an investigation in relation to politically motivated violence'[95] (emphasis added) and that the issuing criteria will 'ensure' its operation is limited accordingly.[96] This focus, and the absence of any justification for the potentially broader application identified above, may suggest that the potential for overbreadth is inadvertent rather than reflective of an identified need.

71. In any event, the Law Council considers that the Bill should be amended to expressly limit the issuing criteria for minor questioning warrants to minors who are the target of an investigation in relation to a matter of politically motivated violence.

72. Alternatively, the provision should be limited expressly to minors who possess the requisite element of intent in relation to their actual or likely prejudicial activities. (That is, the minor has or has likely intentionally engaged in an act of politically motivated violence, or is assessed as likely to be intentionally engaging in such an activity, or is likely to intentionally do so in future.)

73. The Law Council notes that the threshold for assessing the likelihood of a child's **intent** would need to be construed in the context of the anticipatory nature of ASIO's security intelligence collection functions.[97] This would not require conclusive proof of a minor's intent in order to obtain a minor questioning warrant, but rather there would need to be information suggesting a real possibility that the minor's recent, current or anticipated actions were or are deliberate rather than inadvertent. The Law Council submits that, when construed in the context of an intelligence collection function and having regard to the coercive nature of the powers able to be exercised against children aged 14-17 years, a threshold of likely intent is workable and appropriate.

Questioning of children about any incident of politically motivated violence

74. Secondly, the issuing test for a minor questioning warrant requires the Attorney-General to be satisfied that there are reasonable grounds on which to believe that issuing the warrant would substantially assist in the collection of intelligence that is important in relation to **a** minor questioning matter (being a matter of politically motivated violence, from which there is a need to protect Australia and Australians).[98]

75. This is not required to be **the same** matter of politically motivated violence in respect of which the minor is believed to have engaged, or is believed to be engaging or is likely to engage in future.[99] The issuing criteria for exercise of the compulsory production power in relation to records or things, and the police powers of search

[94] Explanatory Memorandum, 9 at [27]; and ASIO, *Submission to the PJCIS Inquiry into the ASIO Amendment Bill 2020*, (June 2020), 5 and 7 (case studies 1 and 2).

[95] Explanatory Memorandum, 9 at [27] and 43-44 at [153].

[96] Ibid, 44 at [155].

[97] See further: *Church of Scientology v Woodward* (1982) 154 CLR 25 especially at [8] (Gibbs J), [21] (Mason J) and [12] (Brennan J).

[98] Bill, Schedule 1, item 10, inserting the definition of a 'minor questioning matter' in proposed section 34A of the ASIO Act.

[99] Ibid, inserting proposed ss 34BB(1)(c) and (d), and ss 34BD(1)(b)(ii) of the ASIO Act.

and seizure of a minor in the course of apprehension, are expressed in the same terms.[100]

76. This creates the possibility that a minor questioning warrant could be sought and issued in relation to a minor who has engaged in certain prejudicial activities about a particular incident of politically motivated violence (such as a supporting or preparing for a particular violent activity or cause) in order to question them about the separate activities of **other people** who are involved in, or associated with, separate acts of politically motivated violence (such as a different violent activity or cause) of which the minor merely has some degree of knowledge but no involvement (for example, because of an unrelated association with the person). A minor could also be required to produce records or things that relate to a separate act of politically motivated violence by another person of which they merely have knowledge. The seizure powers as part of apprehension would also apply in this manner.

77. The Law Council considers that the legal possibility for questioning warrants to be sought and issued in these circumstances contradicts the views of the Committee in its 2018 report that 'it is not a proportionate response to compulsorily question a 14-year old … in relation to the **unrelated activities** of that minor's friends or family members'[101] (emphasis added).

78. The Law Council also notes that the Explanatory Memorandum incorrectly summarises the issuing criteria for minor questioning warrants as requiring the Attorney-General to be satisfied that 'there are reasonable grounds for believing that the minor questioning warrant will substantially assist in the collection of intelligence that is important in relation to **the** questioning matter' (emphasis added).[102] This may suggest that the broader expression used in the provisions of the Bill noted above ('**a** minor questioning matter') was inadvertent and not a deliberate policy position.

79. In any event, the Law Council submits that the issuing criteria, production requirements and powers of search and seizure when a minor is apprehended should be limited expressly to **the** matter of politically motivated violence referred to in proposed paragraph 34BB(1)(b), in respect of which the minor is believed to have (intentionally) engaged in prejudicial activities, or is likely to be doing so, or is likely to do so in the future.

Recommendation 1 – restriction of questioning to children who are targets

- **Proposed paragraph 34BB(1)(b) of the ASIO Act should be amended to require that the minor is:**
  - **the target of an investigation into a security matter comprised of politically motivated violence; or**
  - **is likely to have <u>intentionally</u> engaged in activities that are prejudicial with respect to the threat of politically motivated violence, or to be likely to be <u>intentionally</u> engaging, or likely to <u>intentionally</u> engage in such activities.**
- **Proposed paragraphs 34BB(1)(c), 34BB(1)(b)(ii) and 34BE(3)(b)(ii) of the ASIO Act should be amended to refer to '<u>the</u> minor questioning matter referred to in paragraph 34BB(1)(b)' rather than '<u>a</u> minor questioning matter'.**

[100] Ibid, inserting proposed ss 34BD(1)(b)(ii) and 34BD(4)(d) of the ASIO Act (compulsory production) and proposed s 34CC(5) (search and seizure).

[101] PJCIS, 2018 Report, 80 at [3.155], bullet point 1.

[102] Explanatory Memorandum, 44 at [156].

Inadequate protection of the best interests of the child

80. The Law Council is further concerned that the proposed issuing criteria for minor questioning warrants do not adequately protect the interests of the child, contrary to the views of the PJCIS in its 2017-18 review.[103]

Best interests of the child as a primary consideration

81. The issuing criterion in proposed subsection 34BB(2) merely requires the Attorney-General to 'consider' the best interests of the child in making an issuing decision. There is no statutory requirement for those interests to be given any particular degree of weight – for example, a requirement to treat those interests as a primary consideration.

82. This is contrary to the requirements of Article 3(1) of the *Convention on the Rights of the Child* **(CRC)**, to which Australia is a signatory, which provides that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be **a primary consideration**' (emphasis added).[104]

83. While the Explanatory Memorandum states that 'it is intended' that the Attorney-General would treat the child's interests as a 'primary consideration' in decision-making on a warrant request,[105] the Law Council is concerned that conjecture in the extrinsic materials about the manner in which an unlimited executive discretion might be exercised, or is subjectively intended to be exercised at the time a Bill is introduced to Parliament, cannot rationally be described as a safeguard for the best interests of the child.[106]

84. Rather, if there is an intention for the best interests of the child to be given primacy in the Attorney-General's decision-making about the issuing of a minor questioning warrant, this matter must be given explicit statutory effect as an issuing criterion in proposed section 34BB.

Recommendation 2 – best interests of the child as a primary consideration

- **Proposed subsection 34BB(2) of the ASIO Act should be amended to require the Attorney-General to take into account the best interests of the child as a primary consideration in deciding whether to issue a minor questioning warrant**

Mandatory factual considerations in assessing the best interests of the child

85. Proposed subsection 34BB(3) sets out a list of factors that the Attorney-General must consider in assessing the best interests of the child, which are:

> *(a) the age, maturity, sex and background (including lifestyle, culture and traditions) of the person;*
>
> *(b) the physical and mental health of the person;*
>
> *(c) the benefit to the person of having a meaningful relationship with the person's family and friends;*

[103] PJCIS Report, 80-81 at [3.155], bullet point 4.

[104] *Convention on the Rights of the Child*, [1991] ATS 4, (done at New York, 20 November 1989).

[105] Explanatory Memorandum, 20 at [80].

[106] See also: PJCHR, *Scrutiny Report 7 of 2020* (June 2020), 51 at [2.65].

(d) the right of the person to receive an education;

(e) the right of the person to practise the person's religion;

(f) any other matter the Attorney-General considers relevant.

86. The Law Council considers that there are deficiencies in the coverage of the factual circumstances listed in proposed subsection 34BB(3) to which the Attorney-General must have regard. While the enumerated matters in the provision are relevant to an assessment of the best interests of the child as recognised in the CRC, the United Nations Committee on the Rights of Children has determined that an assessment of the best interests of the child requires a number of further factors to be taken into account. These elements include the care, protection and safety of the child, and the existence of a situation of vulnerability (for example, disability or developmental delay, belonging to a minority, being a refugee or an asylum seeker or being a victim of abuse).[107]

87. As the list of enumerated matters in proposed paragraphs 34BB(3)(a)-(f) are intended to provide statutory direction to the Attorney-General in undertaking a covert assessment of the child's best interests, the Law Council considers that a higher degree of specificity is necessary to facilitate accuracy and consistency of decision-making. As the UN Committee on the Rights of Children has observed, Article 3 of the CRC obliges State parties to ensure that the child's best interests are 'appropriately integrated and **consistently applied** in every action taken by a public institution' including in administrative decision-making (emphasis added).[108]

88. In particular, the Law Council is concerned that the list of enumerated matters in proposed subsection 34BB(3) does not specifically require any consideration of the child's developmental status, such as the existence of developmental delay in speech, literacy or other aspects of cognitive development. These matters are not necessarily co-extensive with the reference in proposed subparagraph 34BB(3)(a) to the child's 'maturity'. Nor does proposed subsection 34BB(3) specifically require the Attorney-General to consider whether the child has a physical or an intellectual, cognitive or developmental disability. A disability is not necessarily co-extensive with the reference in subparagraph 34BB(3)(b) to the child's 'physical and mental health'.

89. Further, proposed subsection 34BB(3) also does not mandate consideration of whether the child is in a situation of vulnerability for any other reason, such as membership of a minority group.

90. The Law Council considers this these circumstances are so central to an assessment of a child's best interests as to warrant an explicit statutory reference.

Recommendation 3 – factual considerations in assessing a child's best interests

- **Proposed subsection 34BB(3) of the ASIO Act should be amended to require the Attorney-General to specifically consider whether the child is in a situation of vulnerability, and the care, protection and safety of the child.**
- **The circumstances of vulnerability that the Attorney-General should be required to consider should include the following matters:**

[107] United Nations Committee on the Convention of the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, 62nd sess. UN DOC CRC/C/GC/14 (29 May 2013), 13-17 at [52]-[79]. See also: Law Council of Australia, *Submission to the PJCIS on the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015*, (December 2015), 10 at [28]-[29].
[108] Ibid, 5 at [14].

- **whether the child has a physical or an intellectual, cognitive or developmental disability (not only their 'physical and mental health');**
- **the child's developmental status, including evidence of any developmental delays in speech, literacy or other aspects of cognitive development (not only their 'maturity'); and**
- **whether the child belongs to a minority group.**

Sufficiency of information provided to, and considered by, the Attorney-General

91. Further, proposed subsection 34BB(4) only requires the Attorney-General to take into consideration the factors specified in proposed subsection 34BB(3) 'to the extent known' (on the basis of intelligence provided by ASIO in its warrant request)[109] and to the extent the Attorney-General considers them to be 'relevant'.

92. The Law Council is concerned that there is no minimum requirement for the Attorney-General to be given sufficient information to make an accurate, evidence-based assessment of the child's individual circumstances; or for ASIO to make all reasonable endeavours to provide information about each of the matters in proposed subsection 34BB(3) in its warrant requests or the accompanying statement of facts and grounds. This could lead to the inaccurate application of the 'best interests' requirement in proposed subsection 34BB(2) because it may enable issuing decisions to be made on inadequate and incomplete evidence of the child's circumstances.

93. The UN Committee on the Rights of the Child has pointed out that 'an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention'.[110] In this regard, the UN Committee has emphasised the importance of all decision-making frameworks starting with a mechanism for the identification of the 'specific circumstances that make the child unique' so that the best interests of individual children can be accurately assessed individually.[111] The UN Committee has also emphasised that 'facts and information relevant to a particular case must be obtained by well-trained professionals in order to draw up all the elements necessary for the best-interests assessment' in a particular case.[112] It has noted that 'information and data gathered must be verified and analysed prior to being used in the child's … best interests assessment'.[113]

94. The Law Council is concerned that the breadth of the discretion in the assessment of 'relevance' in proposed subsection 34BB(4) and the absence of a minimum threshold of sufficient information could lead to the provision being exercised in a manner that disregards matters that are, in fact, relevant to an assessment of the child's best

[109] Bill, Schedule 1, item 10, inserting proposed s 34BA(4)(f) which only requires the Director-General of Security to include in all warrant requests information about the circumstances of the minor listed in proposed subsection 34BB(3) **to the extent the information is known to ASIO**. This provision does not place an onus on the Director-General to ensure that the Attorney-General is provided with **sufficient information** on which to base a decision that the issuing of a warrant would adequately protect the best interests of the child. For example, there is no onus on ASIO to find out whether the child has a disability, or whether the child attends school or an educational institution, and conduct an assessment of the likely impact of the proposed warrant (including particular conditions, such as immediate attendance) on the child's interests.

[110] United Nations Committee on the Convention of the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, 62nd sess. UN DOC CRC/C/GC/14 (29 May 2013), 3 at [4].

[111] Ibid, 12 at [49].

[112] Ibid, 19 at [92].

[113] Ibid.

interests, contrary to the opinion of the UN Committee on the Rights of the Child on the application of the 'best interests' requirement under Article 3 of the CRC.

95. The Law Council acknowledges the anticipatory nature of ASIO's intelligence collection functions may mean that comprehensive or exhaustive information about a child's individual circumstances is not available at the time a warrant application is made, despite reasonable endeavours having been made by ASIO to obtain such intelligence. However, the Law Council emphasises that its recommendation for a 'sufficient information threshold' would be interpreted in the context of ASIO's statutory functions and the intelligence collection purpose of the questioning warrant regime. In other words, concern about the potential for a 'sufficient information threshold' to constitute an unduly onerous and standard are capable of being managed via the application of the normal principles of statutory interpretation.

Recommendation 4 – 'sufficient information' threshold for best interests test

- **Proposed section 34BB of the ASIO Act should be amended to provide that the Attorney-General's assessment of the child's best interests in proposed subsection 34BB(2) must be conducted on the basis of sufficient evidence to make an informed and accurate assessment of the child's circumstances, including in relation to the matters listed in proposed subsection 34BB(3).**

Obligation to re-consider the best interests of the child if further information is obtained

96. In further recognition of the anticipatory nature of ASIO's intelligence-collection functions, the Law Council considers that, after a minor questioning warrant is issued, the Attorney-General and Director-General of Security should be under an express obligation to continue to consider whether the continuation of the warrant is compatible with the best interests of the child, as further information about the child's circumstances becomes known. (For example, when the child is notified of the warrant, or when they attend for questioning and they make a disclosure or their presentation indicates the presence of one or more of the matters in proposed subsection 34BB(3) of the ASIO Act.)

97. This should be given effect by the imposition of an obligation of the Director-General to notify the Attorney-General of any new information about the child's circumstances, and the imposition of an obligation on the Attorney-General to consider whether the issuing grounds continue to be satisfied in light of the new information. The Attorney-General should be under an obligation to revoke the warrant if they are satisfied that the issuing grounds have ceased to exist.

98. This should be an explicit obligation that is separate to proposed section 34J (under which the Director-General must inform the Attorney-General and IGIS if they believe that the grounds for issuing a warrant have ceased to exist, and must take all necessary steps to discontinue action under a warrant).

99. This reflects that proposed section 34J only applies when the Director-General forms the view that the issuing grounds are no longer met. The Law Council considers that the 'best interests of the child' is such an important matter as to require a primary decision by the Attorney-General on the availability of all new information, not merely if the Director-General has made an assessment that the new information about the child's circumstances mean that the issuing criteria are no longer met.

Recommendation 5 – obligation to re-consider the best interests of the child

- **Schedule 1 to the Bill should be amended to provide a specific, mandatory mechanism for the Attorney-General to determine whether the issuing grounds with respect to the best interests of the child continue to be satisfied, if new information emerges about the child's circumstances after a warrant is issued. The Director-General of Security should be required to provide such information to the Attorney-General as soon as possible. The Attorney-General should be required to revoke the warrant if satisfied the issuing grounds have ceased to exist, in light of the new information.**

Absence of a 'last resort' requirement for issuing minor questioning warrants

100. Neither the issuing criteria for a minor questioning warrant in proposed section 34BB, nor the specific criteria for authorising the apprehension of a child in proposed subsection 34BE(2), require the Attorney-General to be satisfied that compulsory questioning or apprehension are measures of last resort to collect the relevant intelligence; or to ensure the child's attendance at questioning; or to prevent the child from tipping off others, or tampering with or destroying relevant information.

101. The Explanatory Memorandum appears to suggest that the minor questioning warrant regime does not engage the requirement in Article 37(b) of the CRC that the detention of children must be a measure of last resort. This appears to reflect an opinion that apprehension is not a form of detention. The basis for this opinion appears to be the purpose for which apprehension is authorised – namely, to take the minor before a prescribed authority for questioning.[114] By extension, this position on the non-engagement of Article 37(b) of the CRC also appears to reflect a view that a child is not under a form of detention while they are attending a place of questioning under a minor questioning warrant.

102. The Law Council is doubtful of the legal accuracy of this view. It considers that the apprehension and compulsory questioning of a child do constitute detention, having regard to the complete abrogation of the child's freedom of movement while they are under apprehension or appearing at a place of questioning. That is, the child is under pain of criminal penalty for leaving during questioning unless their departure is authorised by a direction from the prescribed authority. A child may be subject to the use of force by police officers exercising powers of apprehension should the child resist accompanying the police officer, or attempt to escape.[115]

103. Further, a child may have a reasonable basis on which to believe that they would not be physically free to leave a place of questioning, or to leave the company of an apprehending police officer, if they sought to do so. For example, this belief may arise because of the close physical proximity of the apprehending police officer to the child during apprehension. A child may also form this belief due to the presence of police and security officers at the place of questioning, potentially including the presence of these persons as guards at the exit points at the place of questioning; or

[114] Explanatory Memorandum, 8 at [25].

[115] The Law Council notes, for example, that the UN Human Rights Committee expressed a view in 2008 that 16-hour curfews under control orders in the United Kingdom (with criminal penalties for contravention) engaged the prohibition on arbitrary detention in Article 9 of the International Covenant on Civil and Political Rights. See: United Nations Human Rights Committee, *Concluding observations on the sixth periodic report of the United Kingdom*, 93rd sess, UN Doc CCPR/C/GBR/CO/6 (30 July 2008), 4-5 at [17]. In contrast, where a person is voluntary cooperating with police and has been told that they are free to leave (without being exposed to any penalty for doing so) does not engage the prohibition: United Nations Human Rights Committee, *Jessop v New Zealand*, Communication No 1758/2008, 101st sess, UN Doc CCPR/C/101/D/1758/2008 (21 April 2011) [7.9]-[7.10].

if the location of questioning was a secure facility with locked exit points. There is also no obligation on the apprehending police officer or the prescribed authority to clearly inform the child of their legal status as to whether they are, or are not, free to leave at a particular point in time (for example, while being apprehended or during breaks between questioning and during questioning).[116]

104. For these reasons, the Law Council considers that the compulsory questioning of minors and the associated power of apprehension under minor questioning warrants engage Article 37(b) of the CRC, and must therefore be subject to a requirement that minor questioning warrants are only issued, and the power of apprehension is only authorised and exercised in relation to minors, as measures of last resort.

Recommendation 6 – last resort requirement for minor questioning warrants

- **Proposed paragraph 34BB(1)(b) of the ASIO Act should be amended to substitute a requirement that the issuing of a minor questioning warrant must be a last resort to collect the relevant intelligence.**

Apprehension of, and use of force against, children

105. The Law Council supports the design principle advanced by the Committee in its 2017-18 Review: Children **should not** be subject to powers of apprehension that are authorised as part of the issuing of the questioning warrant, on the basis of the Attorney-General's prediction about the minor's future conduct at the time of issuing.[117]

106. The Explanatory Memorandum does not provide a cogent explanation of the need for minors to be apprehended, in the absence of any failure on the minor's part to voluntarily attend for questioning, or demonstrated non-compliance with the minor's obligations under Division 3 of Part III of the ASIO Act. That is, it does not explain why any risk presented by a minor's potential failure to attend, or their potential to tip off others or tamper with or destroy relevant information, could not be managed adequately via surveillance of the minor until the time of their required appearance; with a separate power of apprehension available to police only once there is sufficient evidence of the minor's specific conduct in closer proximity to the appointed time of questioning, which reasonably suggests that the minor's conduct presents an unacceptable risk of non-appearance, tip-off, tampering or destruction.[118]

107. If the Committee is minded to depart from its 2018 position and endorse provisions empowering the Attorney-General to authorise the apprehension of a minor

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[116] Cf Bill, Schedule 1, item 10, inserting proposed ss 34BH (notification of questioning warrant), 34C (powers of apprehension) and ss 34DC-34DD (prescribed authority must explain certain matters). The person notifying the child of the warrant is only required under s 34BH to explain if there is an immediate attendance requirement, and there is no obligation to explain the child's rights and obligations in relation to apprehension (if authorised). There is also no obligation under s 34C on the apprehending officer to explain the child's obligations to them when exercising the powers of apprehension. The prescribed authority is required under s 34DC(1)(f) to explain the effect of the offences in s 34GD (failure to attend, refusal to answer questions or give information, or giving false or misleading answers or information). But this does not specifically require an explanation of the child's rights and duties in relation to leaving a place of questioning.

[117] PJCIS Review, 80 at [3.155], bullet point 2.

[118] Explanatory Memorandum, 9 at [27] which states that the exclusion of apprehension powers in relation to minors 'would leave a significant gap in ASIO's ability to collect crucial intelligence on threats to Australia's security' but does not explain why the risks presented by a minor's potential non-attendance, or engagement in activities in the nature of tip-off or tampering, could not be managed via other means. (Namely, an intelligence-based assessment of the minor's conduct **after** the warrant is issued and notified, rather than a prediction of their future conduct by the Attorney-General at the time of issuing the warrant.) Cf, Bret Walker SC, Independent National Security Legislation Monitor, *Annual Report: 2012* (December 2012), 106-107 and recommendation V/2. The (then) INSLM considered that the power should not be vested in the Attorney-General alone, at the time of issuing the warrant.

(including the use of force) as part of issuing the warrant, then the Law Council considers it essential that the power of apprehension is recognised as a form of detention and should be subject to a 'last resort' requirement.

108. To avoid doubt, if the Law Council's recommendation 16 (below) is implemented to designate a judicial officer as the issuing authority for powers of apprehension, then references to 'the Attorney-General' in recommendation 7 (immediately below) should be read as references to 'the issuing authority for apprehension'.

Recommendation 7 – removal of power of apprehension against children

Preferred option

- **Proposed section 34BE of the ASIO Act should be amended to provide that the power of the Attorney-General under proposed subsection 34BE(2) to authorise the apprehension of a person does not apply to minor questioning warrants.**

Alternative option

- **If there is no appetite to remove the power of the Attorney-General to authorise the apprehension of children (including the use of force), this power should be subject to a 'last resort' issuing threshold.**

Post-charge questioning of children

109. The Law Council is concerned by the proposal to expose children, including persons as young as 14 or 15 years, to post-charge questioning. (That is, compulsory questioning about the subject matter of any current or imminent charges for criminal offences, with the ability for questioning material and derivative information to be given to prosecutors.)[119]

110. The Law Council does not support the conferral of a power to conduct post-charge questioning of **any person** under a questioning warrant or other process. This reflects the Law Council's outstanding concerns about the unacceptably high level of constitutional risk arising from post-charge questioning, and the potential to cause irreparable prejudice to a person's rights to the privilege against self-incrimination and a fair trial. The Law Council's views have not changed following the enactment in 2015 of post-charge questioning regimes for compulsory examinations conducted under the ACC Act and integrity operations under the *Law Enforcement Integrity Commissioner Act 2006* (Cth) (**LEIC Act**).[120]

111. In addition to these general concerns, the Law Council considers it particularly important that post-charge questioning is not available under minor questioning warrants. This reflects the fact that a minor may, by reason of their developmental status, be unable to understand the adverse implications of their responses to ASIO's questions for their potential criminal liability.

112. While a minor must be questioned in the presence of a lawyer,[121] the Bill imposes extensive restrictions on the ability of that lawyer to uphold the minor's interests in obtaining a fair trial for their related criminal charges. The lawyer would be unable to object to irrelevant or unfair questions, or caution the child that a particular question

[119] Bill, Schedule 1, item 10, inserting proposed ss 34BB(1)(e) and 34BD(4) and new Subdivision E of Division 3 of Part III of the ASIO Act.

[120] See also: Law Council of Australia, *Submission to the PJCIS Inquiry into ASIO's Questioning and Detention Powers*, (April 2017) 6 at [7]. See further: Law Council of Australia, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Law Enforcement Legislation Amendment (Powers) Bill 2015* (June 2015).

[121] Bill, Schedule 1, item 10, inserting proposed s 34FA(1) of the ASIO Act.

is directed to the subject matter of their criminal charges before they are compelled to answer and their privilege against self-incrimination is abrogated.[122]

113. Accordingly, the Law Council recommends that post-charge questioning be prohibited **at least** in relation to minor questioning warrants.

Recommendation 8 – prohibition on post-charge questioning of children

- **If post-charge questioning is to be permitted under the re-designed questioning regime (contrary to recommendations of the Law Council), then proposed section 34BB and proposed subsection 34BD(4) of the ASIO Act should be amended to provide that a minor questioning warrant cannot authorise the post-charge questioning of a child.**

Appointment and role of lawyers for children

114. The Law Council supports the requirements in the Bill that a child must be given access to a lawyer, can only be questioned in the presence of a lawyer, and must be given an opportunity to contact a lawyer of their choice if they attend for questioning without a legal representative.[123] However, as explained below, there are several limitations and omissions that may prevent a child from fully exercising these rights.

Independent assistance to children in selecting and contacting a lawyer

115. The Law Council is concerned that the Bill makes no provisions for minors to be assisted in making decisions about whether to seek to contact a lawyer of their choice, how to select a lawyer, and to be supported in making contact with that lawyer if required. It is conceivable that a child, particularly if aged 14 or 15 years, may not be able to undertake these tasks alone.[124]

116. Further, if a child attends with a non-lawyer representative, such as a parent or guardian, it is possible that this person may not necessarily have sufficient knowledge, skills or language proficiency to provide such assistance to the child.

117. The Law Council emphasises that it would be inappropriate for any ASIO or police personnel to provide assistance to minors in relation to these matters, beyond the provision of physical facilities at the place of questioning (such as a private room without surveillance, an unmonitored telephone and contact details for lawyers).

118. Any other involvement would create at least a perception of conflict of interest. It also risks undermining the best interests of the child, by potentially leading the child to mistakenly believe that ASIO or police officers are present as support persons representing the child's interests, rather than performing their duties to assist ASIO in undertaking its intelligence collection functions under the questioning warrant.

119. The Law Council considers that the Bill should be amended to require the appointment of an Independent Child Advocate, whose functions are to support and assist the minor (as needed by the minor) in various ways. This should include supporting the minor in deciding whether to contact a lawyer of choice and, if so, providing any assistance or guidance the minor may require in selecting and contacting a lawyer.

120. To ensure the substantive and perceived independence of the Independent Child Advocate, such a person should not have any connection with ASIO and law

[122] Ibid, inserting proposed ss 34FF(3) and (6) of the ASIO Act. See also: proposed s 34GD(5)(a) (abrogation of self-incrimination privilege in relation answers to questions).

[123] Bill, Schedule 1, item 10, inserting proposed Subdivision F of Division 3 of Part III of the ASIO Act.

[124] See also: PJCHR, *Scrutiny Report 7 of 2020*, 51-52 at [2.66].

enforcement agencies (such as a relationship of employment or consultancy) and should not have a pre-existing relationship with the child. They should also possess appropriate expertise, in the form of qualifications and professional accreditation as a youth social worker or a child psychologist. The Independent Child Advocate should not be subject to compulsion by the prescribed authority, ASIO or law enforcement agencies to disclose information to them that the Independent Child Advocate obtained from performing their functions in relation to the child (for example, from conversations with the child, the child's lawyer or non-lawyer representative). The Independent Child Advocate also should not be permitted to disclose information against the child's wishes, or against the child's best interests.

121. Recommendation 11 below provides full details of the Law Council's suggestions for the role and functions of the Independent Child Advocate in relation to the questioning of children under minor questioning warrants.

Role of lawyers in the absence of a child's non-lawyer representative

122. Proposed subsections 34FD(2), 34FD(3)(d) and 34FD(4) of the ASIO Act contain provisions permitting children to be questioned in the absence of a non-lawyer representative (such as their parent, guardian or another person chosen by the child who can represent their interests) provided that the child's lawyer is present.[125] In some circumstances, this is so even if the child has specifically requested the presence of their chosen non-lawyer representative.[126]

Assumption that a child's lawyer is equipped to represent their non-legal interests

123. The Law Council is concerned that these provisions impliedly assume that a child's lawyer will be able to effectively represent the totality of the child's non-legal interests, concurrently with representing the child's legal interests, if a non-legal representative for the child is not present.[127] The child's non-legal interests may include, for example, matters relevant to their welfare or wellbeing, such as a need for emotional, psychological or spiritual support.

124. In particular, the Law Council is concerned that proposed subsections 34FD(2), 34FD(3)(d) and 34FD(4) will effectively operate to displace the requirement in the definition of a 'minor's non-lawyer representative' that the prescribed authority must be satisfied that such a person is able to effectively represent the interests of the minor (which is, appropriately, not limited to the minor's legal interests).[128]

125. That is, proposed subsections 34FD(2) and 34FD(3)(d) and 34FD(4) **require** the prescribed authority to give directions that the child can be questioned without their non-lawyer representative, provided that the child's lawyer is present. There is no

[125] Bill, Schedule 1, item 10, inserting proposed 34FD(2)(c) and 34FD(3)(d) and 34FD(4)(c).

[126] This may occur if, for example, the child is subject to an immediate attendance requirement under the minor questioning warrant, which means that the commencement of questioning will not be deferred to enable the non-lawyer representative to arrive: proposed s 34FD(2)(c) of the ASIO Act. Or it may occur if the child is not subject to an immediate attendance requirement, but the child's non-lawyer representative has not arrived within a 'reasonable time' as determined by the prescribed authority, which means that the prescribed authority must issue a direction for questioning to commence in the absence of the non-lawyer representative: proposed s 34FD(3)(d) of the ASIO Act.

[127] See also: Explanatory Memorandum, 92 at [492] which states that 'The requirement that a lawyer for the minor be present ensures that the minor will be appropriately supported even in the absence of a non-lawyer minor's representative'. It does not explain how it is envisaged that a minor's lawyer (who may have only met the minor at the commencement of questioning) will be able to effectively able to represent and support the minor in relation to the full range of a minor's interests and needs (not merely their legal interests) while simultaneously providing legal services to the minor during questioning.

[128] Ibid, inserting proposed ss 34AA(1)(c) and (2)(a) (definition of 'a minor's representative for the subject'). This person is referred to in Subdivision F as the 'minor's non-lawyer representative': proposed s 34FD(1)(b).

requirement under proposed section 34FD for the prescribed authority to be satisfied that the child's lawyer, in fact, meets the requirement of being able to represent the child's interests (being all of the child's interests, not merely their legal interests).

126. Despite the absence of any requirement for the prescribed authority to be satisfied of the particular lawyer's ability to individually represent all of the child's interests, the Explanatory Memorandum asserts that 'the requirement that a lawyer for the minor be present ensures that the minor **will be appropriately supported** even in the absence of a non-lawyer minor's representative' (emphasis added).[129] The Law Council does not consider it reasonable to expect or assume that a child's lawyer will always be equipped to support the entirety of a child's non-legal needs during questioning, while simultaneously providing legal services.[130]

127. Accordingly, the Law Council considers that its recommendation 11 (below) for the presence of an Independent Child Advocate at the questioning of all minors is critical to ensuring that all children will be appropriately supported, and in particular if their chosen non-lawyer representative is unable to be present; or if the child does not wish to have a person who is known to them present as their non-lawyer representative.

Deferring questioning for a 'reasonable time' for the chosen lawyer to arrive

128. If a child is not subject to an immediate attendance requirement under a minor questioning warrant, and they wish to exercise their right to contact and be represented by a lawyer of choice, then the prescribed authority, who is appointed by the Attorney-General under proposed s 34AD(1) to supervise questioning, must defer the commencement of questioning for such period of time as they consider reasonable to enable the lawyer of choice to arrive. If the prescribed authority is satisfied that a reasonable time has elapsed, they may appoint a lawyer for the child and direct that questioning may commence in the presence of the appointed lawyer.[131]

129. The Bill provides no guidance about how a prescribed authority will quantify a 'reasonable' amount of time for this purpose. The concept of reasonableness will necessarily require an objective assessment of the particular facts in each case.

Possibility that a 'reasonable time' could commence from the date of warrant notification

130. The Law Council is concerned by a suggestion in the Explanatory Memorandum that it would be open to a prescribed authority, under proposed subsection 34FC(3), to determine that questioning may commence immediately, with the prescribed authority appointing a lawyer for the child. The Explanatory Memorandum states that it would be open to a prescribed authority to form a view that, 'where a minor has had several days' notice of the questioning … a reasonable time has already been provided' (in the case of warrants without immediate appearance requirements).[132]

131. The Law Council is concerned that the desired interpretation set out in the Explanatory Memorandum fails to meaningfully comprehend the significant vulnerability of children, particularly those aged 14 or 15 years, in being subjected to powers of compulsion by investigative agencies. In such circumstances, there may be many genuine, developmentally appropriate reasons that a child had not attempted to arrange legal representation prior to their appearance despite having

[129] Explanatory Memorandum, 88 at [461].

[130] See also: PJCHR, *Scrutiny Report 7 of 2020* (June 2020), 51 at [2.66] and 53 at [2.68]

[131] Bill, Schedule 1, item 10, inserting proposed s 34FC(3).

[132] Explanatory Memorandum, 87 at [455].

several days' notice of a requirement to attend, where the warrant is not subject to an immediate appearance requirement. This could include because the child may:

- lack the knowledge, skills or confidence to do so;
- not understand their rights under the warrant (particularly since there is no obligation on the official giving notification to ensure that the child understands the matters that must be explained to them at the time of notification);
- be fearful and anxious about attending a compulsory interrogation, and their psychological coping response may be one of avoidance; or
- not tell their family or other responsible adults about the warrant out of fear or shame, and may therefore not have been able to obtain assistance.

132. The Law Council notes that it may be extremely difficult, or impossible, for a child experiencing such a degree of fear, anxiety, confusion or strong emotion to personally explain their behaviour to a prescribed authority (who, under the Bill as drafted, is not obliged to seek the views of the child in making a decision about whether a 'reasonable time' has already elapsed by the time a child attends for questioning). A child may not necessarily have a non-lawyer representative present to make such representations on their behalf if the child is unable to do so directly.

A 'reasonable time' should commence from the time of appearance under a warrant

133. The Law Council recommends that proposed subsection 34FC(3) should be amended to expressly remove any possibility that a prescribed authority may adopt the interpretation suggested in the Explanatory Memorandum. The existence of this possibility creates an unacceptable risk of causing severe harm to a child's rights to legal representation by a lawyer of their choice.

134. If there are concerns about security risks arising from the deferral of questioning to await the arrival of a child's lawyer of choice, those concerns should be managed at the point of ASIO's decision-making in requesting a minor questioning warrant. That is, it is open to ASIO to seek an immediate appearance requirement, under which questioning can commence immediately if the prescribed authority appoints a lawyer for the minor (at least until the minor's chosen lawyer arrives). The Attorney-General would have to specifically approve the immediate appearance requirement.

Recommendation 9 – deferral of the commencement of questioning of minors

- **Proposed subsection 34FC(3) of the ASIO Act should be amended to provide that, if a child is not subject to an immediate appearance requirement and attends for questioning without a lawyer of their choice, the prescribed authority must always be required to defer the commencement of questioning for a reasonable period of time to enable the child's lawyer of choice to be contacted and to arrive.**
- **The 'reasonable period of time' for the purpose of proposed subsection 34FC(3) commences from the time of the child's appearance before the prescribed authority.**

Rights of non-lawyer representatives to make complaints on behalf of the child

135. The Law Council is concerned that a child's non-lawyer representative (such as their parent or guardian) does not have a clear statutory right to raise concerns about the welfare of the child during questioning, or to make complaints on behalf of the child in relation to the child's treatment at questioning. For example, there is no clear legal right for a non-lawyer representative to approach the IGIS (in relation to ASIO) or the

Ombudsman (in relation to the AFP) or the child's lawyer during questioning with any concerns they may have about the treatment of the child.

136. The absence of such rights is compounded by the fact that a non-lawyer representative is subject to removal for 'unduly disrupting' questioning.[133] This may mean that any action the non-lawyer representative may seek to take, beyond observing questioning in silence, could be taken to be a form of 'disruption'. A non-lawyer representative may then be at the discretion of the prescribed authority as to whether their 'disruption' of questions was 'undue' and therefore liable to a direction for their removal from the proceedings.[134]

137. Given the importance of the presence of a non-lawyer representative to the best interests of the child, the Law Council considers it necessary for the Bill to provide a clear right for such persons to raise concerns during questioning. Importantly, a child's parent or guardian will likely have detailed knowledge of the child, and may be able to identify signs of distress, anxiety or illness in the child that may not be evident to others who have only met the child at the place of questioning.

138. The Law Council recommends that there should be a statutory right for non-lawyer representatives to raise concerns with the IGIS or the Ombudsman (as applicable) during questioning; to approach the child's lawyer; and to liaise with the Independent Child Advocate (whose appointment is recommended below). This would ensure that such actions alone cannot be the basis for the prescribed authority making a direction to remove the non-lawyer representative from questioning on the basis of 'undue disruption'.

Recommendation 10 – rights of non-lawyer representatives to raise concerns

- **Proposed section 34FG of the ASIO Act should be amended to provide that a child's non-lawyer representative has a right to any raise concerns they may have about the welfare of the child during questioning. This should include rights to raise matters with the IGIS (in relation to ASIO), the Ombudsman (in relation to the AFP) and the Independent Child Advocate (as recommended below) at any time.**

Recommendation 11 – Independent Child Advocate

- **Schedule 1 to the Bill should be amended to require the appointment of an Independent Child Advocate, who is made available to support all children appearing under a minor questioning warrant, in addition to their non-lawyer representative.**
- **There should be a prohibition on the questioning of a child unless an Independent Child Advocate is present.**
- **The Independent Child Advocate should also function as a point of liaison between a child's non-lawyer representative and the prescribed authority, and the IGIS or Ombudsman, to ensure that there is an accessible channel for the child's non lawyer representative to raise concerns about the child's welfare.**
- **An Independent Child Advocate must:**
  - **be qualified as a youth social worker or a child psychologist;**
  - **be independent of ASIO and all Australian police forces;**

[133] Ibid, inserting proposed s 34FG of the ASIO Act.

[134] Ibid, inserting proposed s 34FG(2) of the ASIO Act.

- **have no pre-existing relationship with the child;**
- **act only in the best interests of the child, and must not disclose information to any other person contrary to wishes or best interests of the child; and**
- **not be subject to compulsion to disclose information to the prescribed authority, ASIO, a law enforcement agency, a court or any other entity exercising coercive information-gathering powers that is obtained in the course of performing their functions as an Independent Child Advocate for a child who is subject to a questioning warrant.**

Reporting requirements for minor questioning warrants

139. While the Law Council is supportive of the requirement for ASIO's public annual reports to include statistical information about questioning warrants issued for each financial year,[135] it considers that the Parliament and the public should be specifically informed of the number of minor questioning warrants that have been issued, in view of the proposed reduction of the minimum age of questioning and the expansion of questioning matters to all elements of 'politically motivated violence'.
This information will be important to facilitate scrutiny of the argument that a reduction of the minimum questioning age is necessary to manage security risks presented by younger children.

140. As questioning warrants are an overt intelligence collection power – in that their exercise is necessarily known to the subject and certain other persons to whom permitted disclosures may be made – the Law Council considers that any requests for secrecy in relation to this information should be approached with significant caution. If any claim for secrecy were to be upheld by the Committee, consideration should be given to an immediate requirement for classified annual reporting, in combination with a requirement for deferred public reporting, rather than permanently withholding this information from the Parliament and the public.

Recommendation 12 – annual reporting on minor questioning warrant statistics

- **New subsection 94(1) of the ASIO Act (item 11 of Schedule 1 to the Bill) should be amended to require ASIO's public annual reporting requirements on questioning warrant statistics to include a breakdown of the following information:**
  - **the total number of minor questioning warrants issued; and**
  - **the individual ages of minor questioning warrant subjects, or the age ranges of those persons (i.e. 14-15 years and 16-17 years).**

Other statutory protections for the rights of the child over the warrant life cycle

141. The Law Council supports consideration of further measures to integrate the consideration of the best interests and other rights of the child throughout the questioning warrant life cycle. The Law Council's preference is for as many matters as possible to be given direct effect in primary legislation (and not left solely to executive discretion from time-to-time about the contents of the ASIO Guidelines or Statement of Procedures for Questioning), to provide a clear and consistent direction to all persons exercising authority under or in relation to a warrant.

[135] Bill, Schedule 1, item 12, inserting new s 94(1) of the ASIO Act.

142. In particular, the Law Council supports further consideration of the following measures being included in primary legislation:

- a requirement in proposed section 34AF for the Statement of Procedures for Questioning to include prescribed minimum requirements for the execution of minor questioning warrants, including:
  - procedures to ensure that the best interests of the child are identified accurately (based on correct and complete information about the child's circumstances) and are treated as a priority over the duration of questioning warrant;
  - specific procedures governing matters including: the giving of notifications to children; the selection and setup of places of questioning for children; transporting children to and from places of questioning; apprehending and searching children; seizing items from children and returning them; the conduct of ASIO officials and others exercising authority under a warrant at the place of questioning; giving children appropriate sustenance and break facilities (including for legal advice, contact with family, hygiene, recreation, rest, management of health conditions, religious practices and study relating to a course of education, as required); special provisions for unaccompanied minors; and special provisions for children with disabilities or health conditions (including necessary accommodations and access to care and assistance and medical treatment);
- the imposition of specific duties on the prescribed authority to:
  - ensure that the child understands the explanations of matters under proposed sections 34DC and 34DD; and
  - take into account the best interests of the child as a primary consideration in making directions about the conduct of questioning, and wherever possible provide the child with opportunities to give their views;
- the imposition of obligations on the officers responsible for notifying children of minor questioning warrants, to ensure that the children understand the required explanation of their rights and obligations under proposed section 34BH, and to ensure that the manner of notification is compatible with the best interests of the child;
- requirements for places of questioning, including a statutory requirement they must be fit and appropriate for children, and should be within a specified distance of a child's normal place of residence;
- limitations on the time of notification and execution of minor questioning warrants that are not subject to an immediate appearance requirement (for example, a general rule against giving notification or undertaking questioning between 9pm and 6am);[136] and

[136] See further: *Crimes Act 1914* (Cth), s 3ZB(3) (limitation on police power of entry to private premises to arrest any person, adult or minor, between the hours of 9pm and 6am, unless the arresting constable believes on reasonable grounds that it is necessary to enter the premises to prevent loss, concealment or destruction of evidence; or that it would be impracticable to arrest the person between 6am and 9pm). As equivalent matters in relation to minor questioning warrants are already covered by the power of the Attorney-General to issue a questioning warrant with an immediate appearance requirement, the Law Council considers that there should be no exceptions to a prohibition on the execution between 9pm and 6am of a questioning warrant that is **not** subject to an immediate appearance requirement. Rather, in these circumstances, the appropriate course of action would be to make a specific application to the Attorney-General for an immediate appearance requirement (either as a part of a request for a new warrant or a variation of an extant warrant).

- amending the humane treatment obligation in proposed section 34AG to make specific reference to the rights of the child.

143. Importantly, including these matters as statutory obligations (including obligations about the contents of the Statement of Procedures) will help to ensure that there are protections in place at all times, rather than being reliant on executive discretion to include them in legislative administrative instruments from time-to-time. They will also provide clarity, on the face of the primary legislation, to all persons involved in the execution of a questioning warrant about their obligations, and in doing so will provide a clear and transparent benchmark against which the IGIS will conduct oversight (and the Ombudsman in relation to the actions of the AFP).

Recommendation 13 – integration of further protections for the rights of the child

- **In view of the reduction of the minimum age of questioning and expansion of minor questioning matters, consideration should be given to amending Schedule 1 to the Bill to include the additional protections outlined at [141] of the Law Council's submission.**

Questioning of persons with disabilities

144. The Law Council is also concerned by the absence of specific statutory protections for vulnerable adults who may be subject to compulsory questioning, such as persons with intellectual, cognitive, developmental or physical disabilities. It considers that specific statutory safeguards should be enacted for these persons.

145. The Law Council is unable to agree with the statement in the Explanatory Memorandum, which suggests that the compulsory questioning framework is compatible with the right of persons with disabilities to support in exercising their legal capacity under Article 12(3) of the *Convention on the Rights of Persons With Disabilities,* to which Australia is a signatory.[137]

146. The Explanatory Memorandum places sole reliance on the beneficial exercise of various general discretions in the Bill, under the statutory framework governing the issuing and execution of adult questioning warrants. For example, it notes the discretion of the Attorney-General in making issuing decisions, and the discretion of the prescribed authority in supervising the conduct of questioning. It also places reliance on the oversight role of the IGIS in relation to questioning (which appears to assume that IGIS officials would be present at every questioning session, despite the absence of a statutory requirement for this to occur).[138] The Law Council is concerned that reliance on the beneficial exercise of executive discretion in a particular manner falls considerably short of providing a safeguard to a core human right.[139]

147. The Explanatory Memorandum also appears to overlook the fact that some statutory limitations in the Bill cannot be overcome via the exercise of discretion under the adult questioning warrant framework.[140] For example:

[137] Cf Explanatory Memorandum, 21-22 at [85]-[86].

[138] Ibid.

[139] The PJCHR has also commented on the absence of specific safeguards for persons with disabilities: PJCHR, *Scrutiny Report 7 of 2020*, 44 at [2.44]. See further: 44-46 at [2.46]-[2.48] and 63 at [2.96].

[140] The PJCHR raised similar concerns, noting that the absence of specific protections 'may result in a person with a disability being subject to exploitation': Ibid, 45 at [2.47].

- there is no provision enabling an adult with a disability to have a non-lawyer representative present, such as a carer or a disability advocate;[141]
- it is possible that an adult with a cognitive, intellectual or developmental disability could be questioned in the absence of a lawyer;[142]
- a prescribed authority also generally cannot give directions that are inconsistent with the questioning warrant,[143] which may limit their ability to give directions that provide adequate support that is tailored to the circumstances of individual warrant subjects in exercising their legal capacity;
- there is no obligation on the prescribed authority to ensure that a person with a disability is given appropriate, independent assistance in exercising their rights to waive having a lawyer present, or to ensure that the person understands the various matters that must be explained to the subject;[144] and
- the secrecy provisions in the Bill may prevent a person with a disability from liaising with a disability advocate or support person, either before or after questioning, with any concerns they may have about the warrant.[145]

Recommendation 14 – safeguards for persons with disabilities

- **Schedule 1 to the Bill should be amended to make specific provision for the protection of the rights of persons with disabilities under adult questioning warrants. This should include requirements in the issuing criteria, procedural arrangements for notification of warrants, the conduct of questioning and the permitted disclosure provisions.**

Issuing authorities for questioning warrants

Authorisation of compulsory questioning and production

148. The ASIO Act currently creates the role of 'issuing authority' for a questioning warrant, and empowers the Attorney-General to appoint a judge of a court created by the Parliament to that role, in a persona designata capacity.[146] The Attorney-General must first consent to the Director-General of Security making a request for a questioning warrant, before that request can be made to the issuing authority.[147] This is in contrast to ASIO's special powers warrants, which are issued by the Attorney-General. It is in further contrast to law enforcement warrants, which are normally issued by a judge (or members of the AAT in limited cases, generally for electronic surveillance warrants under Commonwealth legislation).

149. The Bill proposes to appoint the Attorney-General as the issuing authority for questioning warrants and remove the role of the independent 'issuing authority'. This is consistent with the Committee's design principle in its 2017-18 review.[148]

150. The Law Council indicated to the Committee in 2017 that it would not oppose the appointment of the Attorney-General as the issuing authority for questioning

[141] Cf Bill, Schedule 1, item 10, inserting proposed ss 34AA and 34FC of the ASIO Act, which are limited to non-lawyer representatives in relation to minor questioning warrants.

[142] Ibid, inserting proposed s 34FA(2) of the ASIO Act.

[143] Ibid, inserting proposed s 34DE(2) of the ASIO Act. The exceptions are if the prescribed authority has been given notice of a concern raised by the IGIS under proposed s 34DM and considers that the direction is necessary to address the concern satisfactorily, or if the direction has been approved by the Attorney-General.

[144] Ibid, inserting proposed s 34DC of the ASIO Act.

[145] Ibid, inserting proposed s 34GF of the ASIO Act (especially s 34GF(5): definition of permitted disclosure).

[146] ASIO Act, s 34B (see also the definition of 'judge' in s 4).

[147] Ibid, ss 34D and 34E.

[148] PJCIS, 2018 Report, 75-76 at [3.120]-[3.124].

warrants, in the context of considering two alternatives – namely, internal authorisation by ASIO (analogous to the issuing of summonses by an examiner under the ACC Act) or ministerial-level authorisation by the Attorney-General.[149]

151. However, the judicial issuing of all warrants is the Law Council's preferred option because of the independence (both substantive and perceived) and rigour that judicial authorisation adds to the issuing process.[150]

152. Accordingly, the Law Council is concerned by the proposal to entirely remove statutory judicial supervision from the issuing process for questioning warrants. As explained below, if there is no appetite for warrants to be issued by judicial officers, it would be preferable to retain judicial involvement in the issuing process by giving the Attorney-General the **primary** decision-making role on warrant applications, and conferring a statutory role of **review** on judicial officers.

A statutory 'double lock' authorisation mechanism

153. The Law Council supports the inclusion of a statutory 'double lock' requirement, which is analogous to the role of judges under the *Investigatory Powers Act 2016* (UK) in relation to technical intelligence and law enforcement collection warrants (for example, telecommunications interception and data access, and computer access).[151]

154. That is, the Attorney-General would be responsible for applying the issuing criteria to the facts and grounds as provided in ASIO's warrant request, and making a decision about whether the warrant should be issued.

155. If the Attorney-General decided that the questioning warrant should be issued, the statute should provide that the warrant does not enter into force until a judicial officer has reviewed the issuing decision on the same principles as would be applied by a court on an application for statutory judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**),[152] and has confirmed that the issuing decision was open on the facts and grounds placed before the Attorney-General.

156. If the judicial officer concluded that the issuing decision was not open to the Attorney-General on the facts and grounds provided by ASIO with the warrant request, then the warrant would be cancelled. In this event, the judicial officer would be required to give reasons for their decision to the Attorney-General and ASIO.

157. The Law Council understands that the Committee, in its 2017-18 review, was focused on the role of the primary decision-maker for the issuing of warrants, and did not specifically countenance a mechanism for 'in-built' judicial review in the nature of a 'double lock' authorisation process (which had only recently been enacted in the United Kingdom at the time of the review).[153]

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[149] Tim Game SC, Parliamentary Joint Committee on Intelligence and Security, *Committee Hansard*, Public Hearing, Canberra, 9 August 2017, 3.

[150] The PJCHR and Senate Standing Committee for the Scrutiny of Bills have also raised the absence of judicial issuing of warrants as a concern: PJCHR, *Scrutiny Report 7 of 2020* (June 2020), 37 at [2.18]; and Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 7 of 2020 (June 2020), 3 at [1.12]-[1.14].

[151] See, for example, *Investigatory Powers Act 2016* (UK), ss 23-25 (approval by Judicial Commissioners of issuing decisions by the Secretary of State to issue telecommunications interception warrants).

[152] See: ADJR Act, ss 5 and 6 (applications for review of decisions and conduct relating to decisions). 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.

[153] PJCIS 2018 Report, 75-76 at [3.120]-[3.124].

Merits of a 'double lock' authorisation mechanism

158. The Law Council considers that judicial involvement in a 'double lock' authorisation process is an important counterbalance to the limitations in judicial review rights in relation to issuing decisions, especially in view of the extension of these compulsory questioning powers to ASIO and the significant broadening of the questioning matters to espionage and foreign interference. (The Law Council notes that, while the offences of 'espionage' and 'foreign interference' in Part 5.2 of the Criminal Code are not determinative of the meaning of those terms in the ASIO Act, the significant broadening of those offences by the *National Security Legislation Amendment (Espionage and Foreign Interference Act) 2018* (Cth) is likely to be included by the coverage of the concepts of 'espionage' and 'foreign interference' in the ASIO Act.).

159. Statutory judicial review under the ADJR Act is not available for decisions to issue questioning warrants.[154] Further, judicial review under original jurisdiction of the High Court, or the mirroring jurisdiction of the Federal Court under section 39B of the *Judiciary Act 1903* (Cth), may be of extremely limited utility to a warrant subject. Such review is limited to the grounds of jurisdictional error (which has a very high threshold). Further, it may be impossible for a warrant subject to obtain access to the necessary evidence to substantiate their application, given the likelihood of that information being highly classified and subject to a claim for public interest immunity.[155]

160. In addition, a lawyer for a warrant subject has extremely limited statutory rights to access information for the purpose of commencing review proceedings. This includes the power of the Director-General of Security to redact content from the warrant instrument;[156] the absence of a right of access to documentation other than the warrant instrument (such as the statement of facts and grounds accompanying ASIO's warrant request).[157] The Bill also confers an extremely broad regulation-making power that would enable the Secretary of the Department of Home Affairs to impose prohibitions on the lawyer accessing information after the execution of the warrant, without limitation on the grounds of prohibition.[158]

161. The Law Council considers that a 'double lock' requirement in the issuing process for questioning warrants would go a significant way to addressing these concerns, while also strengthening independence and rigour in the issuing process.

Recommendation 15 – judicial oversight of issuing: 'double lock' requirement

- **The issuing provisions in proposed sections 34BA and 34BB of the ASIO Act, and the variation provisions in proposed section 34BG of the ASIO Act, should be amended to insert a 'double lock' authorisation process analogous to that in the *Investigatory Powers Act 2016* (UK) in which:**

[154] ADJR Act, section 3 and Schedule 1, paragraph (d) (decisions made under the ASIO Act are not decisions to which the ADJR Act applies).

[155] As the High Court remarked in *Church of Scientology v Woodward* (1982) 154 CLR 25 at 61 (per Mason J), the test of establishing that ASIO acted outside the limits of its authority to exercise a collection power or perform a collection function 'presents a formidable hurdle to a plaintiff' including 'because a successful claim of Crown privilege may exclude from consideration the very material on which the plaintiff hopes to base his argument' (in addition to the breadth of the concept of intelligence that 'relates to' security in the context of the anticipatory nature of ASIO's functions). See also: Ibid, 72 and 75-77 (per Brennan J) at which it was noted that 'discovery would not be given against the Director-General [of Security] save in a most exceptional case'.

[156] Bill, Schedule 1, item 10, inserting proposed subsection 34FE(4) of the ASIO Act.

[157] Ibid, inserting proposed paragraph 34FE(6)(b) of the ASIO Act.

[158] Ibid, inserting proposed s 34FH of the ASIO Act. See also the saving provision for the existing regulations in subitem 16(2) of Schedule 1 to the Bill.

- **the Attorney-General makes the primary issuing decision on the questioning warrant;**
- **if the Attorney-General decides to issue the warrant, it does not take effect until it has been reviewed by a judicial officer (appointed persona designata) on the same principles as would be applied by a court on an application for statutory judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), and the judicial officer confirms the primary issuing decision;**
- **if the judicial officer does not confirm the issuing decision, the warrant is cancelled, and the judicial officer must give written reasons to the Attorney-General and ASIO (copied to the IGIS); and**
- **in urgent cases, provision should be made for the Attorney-General's issuing decision to take immediate effect, with provision for a judicial officer to conduct a subsequent review (indicatively, within three days). If the judicial officer does not confirm the issuing decision, the warrant is cancelled, and the judicial officer may order the destruction of the intelligence, or may impose conditions on its retention.**

Authorisation of apprehension

162. The Law Council remains particularly concerned about the absence of judicial involvement in decisions to authorise the immediate apprehension of a person for the purpose of bringing them into questioning in accordance with a warrant.[159]

163. The Law Council remains of the view expressed in its submission to the Committee in 2017[160] that if such a power is to be available, it should be conferred solely upon a judicial officer, as is the case under section 31 of the ACC Act.[161] The Law Council considers that there is no viable justification for subjecting ASIO to a lesser standard of independence in the authorisation process, which is the effect of the Bill as drafted by conferring this power exclusively on a minister. Given that decision-making about apprehension at the time of issuing a warrant necessarily involves the imposition of a significant restraint on a person's liberty based on a prediction about their future conduct, the Law Council considers it important that such a complex and high-risk decision is subject to independent determination by a person who is not a central part of the executive government, as is a Minister of the Crown.

164. If the Law Council's recommendation for the separate judicial authorisation of apprehension is not adopted, the Law Council considers that this would make it critical that, as a bare minimum, its recommendation 15 above (enactment of a double lock issuing process) is implemented. This would mean that, as a bare minimum, the Attorney-General's decision to authorise a power of apprehension is subject to an inbuilt review by a judicial officer as a precondition to the warrant entering into force.

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[159] Cf ibid, inserting proposed subsection 34BE(2) of the ASIO Act. See also: PJCHR, *Scrutiny Report 7 of 2020*, (June 2020), 40 at [2.29].

[160] Law Council of Australia, *Submission to the PJCIS Review of ASIO's questioning and detention powers*, (April 2017), 10.

[161] Cf *Australian Crime Commission Act 2002* (Cth) (**ACC Act**), s 31 (warrants for arrest of examinees are issued by judicial officers).

Recommendation 16 – judicial authorisation of apprehension

- **Proposed subsection 34BE(2) of the ASIO Act (and related provisions) should be amended so that only a judicial officer appointed persona designata (and not the Attorney-General as part of issuing the warrant) may authorise the immediate apprehension of a warrant subject, on the basis of an unacceptable risk they may abscond, tip off others or tamper with or destroy relevant information.**

Issuing criteria for questioning warrants

165. The Bill proposes to retain the existing issuing threshold for questioning warrants.[162] In particular, the Attorney-General must be satisfied that:
    - there are reasonable grounds for believing that the questioning warrant will substantially assist in the collection of intelligence that is important in relation to an adult or a minor questioning warrant (as applicable); and
    - having regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued.[163]

166. the Law Council considers that these thresholds are too low in view of the proposal to significantly expand the questioning matters beyond terrorism, especially to cover espionage and foreign interference.

167. The expansion of ASIO's extraordinary compulsory questioning powers to broader heads of security will mean that questioning warrants can be issued in relation to security matters that will not necessarily involve the same degree of imminence or urgency as the potential commission of a terrorism offence. The Law Council considers that an increase to the issuing threshold for questioning warrants is a necessary corollary of the proposed expansion of the powers.

168. In particular, the Law Council supports explicit statutory criteria addressing matters of necessity (not merely reasonableness) and proportionality (not merely a limited sub-set of factors relevant to proportionality)

Necessity

169. The Attorney-General does not need to be satisfied that issuing a questioning warrant is necessary, except in the case of post-charge questioning.[164] Rather, the Attorney-General need only be satisfied of the reasonableness of the warrant, having regard to any other collection methods that are likely to be as effective.[165]

170. The Law Council acknowledges that the current threshold was inserted to implement a recommendation of the first INSLM in 2012, who considered that the original threshold was too high.[166] It required the Attorney-General, as a condition of consenting to a warrant request being made to an issuing authority, to be satisfied that any other methods of collecting the intelligence would be ineffective.[167]

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[162] ASIO Act, ss 34D(4) and 34E(1)(b).

[163] Bill, Schedule 1, item 10, inserting proposed ss 34BA(1)(b)-(c) and 34BB(1)(c)-(d) of the ASIO Act.

[164] Ibid, inserting proposed ss 34BA(1)(d) and 34BB(1)(e) of the ASIO Act.

[165] Ibid, inserting proposed ss 34BA(1)(c) and 34BB(1)(d) of the ASIO Act.

[166] Bret Walker SC, Independent National Security Legislation Monitor, *Annual Report 2012*, (December 2012), 71-74 and recommendation IV/1.

[167] ASIO Act, former s 34D(4)(b) (in force prior to December 2014) amended to take its current form by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth), Schedule 1, item 28.

171. However, the recommendation of the first INSLM was necessarily tied to the questioning matters being limited to terrorism offences, which inherently involve a degree of urgency.[168] The Law Council considers that the proposed expansion of questioning matters should attract a higher threshold, not merely an equivalent threshold to questioning warrants for the collection of intelligence about terrorism offences. This reflects that matters of espionage and foreign interference may not consistently have the same degree of imminence or urgency as terrorism offences and can span prolonged periods of time.

172. The Law Council notes that there may be an intention for questioning warrants to be reserved for investigations of matters of espionage and foreign interference that involve circumstances of urgency. The hypothetical case studies identified in the submissions of ASIO and the Department of Home Affairs involve time-critical security risks, such as Australian intelligence officer disclosing information to a foreign intelligence agency;[169] or a Commonwealth official who is about to make an unauthorised disclosure of classified information.[170]

173. To ensure that questioning on matters of espionage and foreign interference is limited to circumstances of imminence or urgency, the Law Council considers that ASIO should be required to demonstrate that questioning would be necessary, not merely reasonable. That is, compulsory questioning would be the **only practicable** way to obtain the relevant intelligence before a security threat is likely to materialise.[171] This would not necessarily import a last resort requirement.

Recommendation 17 – an issuing criterion of necessity

- **Proposed paragraphs 34BA(1)(c) and 34BB(1)(d) of the ASIO Act should be amended to require the Attorney-General to be satisfied that it is necessary, in all of the circumstances, for the questioning warrant to be issued (not merely reasonable).**

Proportionality

174. The Bill contains no explicit statutory requirement for the Attorney-General to be satisfied, on reasonable grounds, that the issuing of a questioning warrant is proportionate to the objective of intelligence collection. This includes an assessment of the relative degrees of intrusion and effectiveness of other collection methods; and an assessment of the importance of the particular intelligence to the investigation; and the importance of the investigation to the national interest. This should be weighed against the potential for detriment or harm to the questioning warrant subject.[172] While the issuing criteria in proposed sections 34BA and 34BB address some of the considerations relevant to an assessment of proportionality, they do not address all of the above matters.

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[168] The first INSLM specifically expressed concern that a last resort threshold was too onerous in time-critical circumstances: Bret Walker SC, Independent National Security Legislation Monitor, *Annual Report 2012*, (December 2012), 71.

[169] ASIO, *Submission to the PJCIS Review of the ASIO Amendment Bill 2020* (May 2020), 8 (case study 4, hypothetical case study on foreign interference).

[170] Department of Home Affairs, *Submission to the PJCIS Review of the ASIO Amendment Bill 2020*, (May 2020), 15.

[171] This is analogous to 'B-Party warrants' under subsection 9(3) of the *Telecommunications (Interception and Access) Act 1979* (Cth) under which the Attorney-General must be satisfied that there are no other practicable methods available to ASIO to identify the specific telecommunications services used by the target; or that intercepting communications to or from a specific telecommunications service used by the target would otherwise not be practicable.

[172] Cf, Ibid, inserting proposed ss 34BA(1)(b) and (c) and 34BB(1)(b) and (c) of the ASIO Act.

The need to address proportionality in the issuing criteria, not the ASIO Guidelines alone

175. While the ASIO Guidelines contain a general requirement for ASIO to assess matters of proportionality in its investigative decision-making, the Law Council does not agree with recent suggestions[173] that the existence of a requirement in the Guidelines makes the inclusion of a statutory issuing criterion unnecessary.

176. Such suggestions appear to overlook the fundamental difference between an administrative obligation about the manner of exercise of a power (or requests for authorisation to exercise the power) and a legal limitation on the power itself. That is, the ASIO Guidelines are administratively binding on ASIO,[174] meaning that the consequences of their contravention are purely administrative in nature, such as Ministerial reprimand, internal discipline, or adverse findings by the IGIS and any ensuing public or Parliamentary criticism.

177. In contrast, the inclusion of a statutory proportionality requirement in the issuing criteria for questioning warrants would preclude the issuing of such a warrant (and therefore the exercise of a coercive questioning power against a person) unless the Attorney-General is satisfied that the issuing of the warrant is proportionate to the objective of collecting the relevant intelligence. In other words, it would apply an explicit legal limitation to the availability of the power. Further, a statutory proportionality requirement would provide specific guidance in the context of coercive questioning powers, rather than generalised administrative guidance that collectively covers all types of ASIO's investigations.[175] (Noting also that the contents of the Guidelines in relation to proportionality of investigative techniques have not been updated to reflect the existence of a compulsory questioning power.)

178. A further benefit of a comprehensive statutory proportionality requirement in the issuing criteria for questioning warrants is that this would import international human rights law standards with respect to permissible limitations on rights (such as liberty and security of the person and freedom of movement) directly into the issuing criteria. As such, it would provide a stronger safeguard to the exercise of discretionary power only in a manner that is compatible with Australia's human rights obligations.

Recommendation 18 – an explicit issuing criterion of proportionality

- **Proposed sections 34BA and 34BB of the ASIO Act should be amended to require the Attorney-General to be satisfied, on reasonable grounds, that the issuing of the warrant is proportionate to the objective of collecting the relevant intelligence. This should require an assessment of:**
  - **the relative degrees of intrusion and effectiveness of other collection methods;**
  - **the importance of the intelligence to the investigation;**
  - **the importance of the investigation to the national interest; and**

[173] See, for example: Explanatory Memorandum, 10 at [33], 13 at [48]. See also: Department of Home Affairs, *Supplementary Submission to the Parliamentary Joint Committee on Intelligence and Security Review of the Telecommunications Legislation Amendment (International Production Orders) Bill 2020*, (May 2020), 10. (The Department stated that 'Noting these requirements [in the ASIO Guidelines in relation to proportionality] it is **unnecessary and duplicative** to replicate them in the Bill'. Emphasis added).

[174] ASIO Act, s 8A.

[175] The Parliamentary Joint Committee on Human Rights (PJCHR) also made this point in it is initial review of the Bill: PJCHR, *Scrutiny Report 7 of 2020* (June 2020), 36 at [2.14] and 37 at [2.18].

- **the potential for detriment or harm to the questioning warrant subject (including impacts on their privacy, liberty and security of the person, freedom of movement and rights to a fair trial).**

Exposure of warrant subject to multiple coercive powers

179. The Law Council remains concerned that questioning warrants are not subject to an issuing criterion that requires the Attorney-General to consider the potential for oppression to the warrant subject due to the exercise of multiple, different types of coercive powers against them, including powers exercisable by multiple agencies.[176] The Law Council remains of the view that the risk of oppression is so significant as to warrant specific consideration in the issuing criteria, to ensure its consistent consideration. This is particularly important in view of recent expansions of ASIO's coercive powers, including the conferral of powers to compel technical assistance in 2018 under section 34AAA of the ASIO Act and Technical Assistance Notices and Technical Capability notices in Part 15 of the *Telecommunications Act 2007* (Cth) (**Telecommunications Act**).

180. The Law Council notes that the proposed issuing criteria for adult questioning warrants in the Bill appear broad enough to capture communications providers who are subject to the mandatory industry assistance provisions of Part 15 of the Telecommunications Act). The Law Council also notes that items which are seized from warrant subjects (adult and minor) who are searched during apprehension can be inspected by ASIO under proposed section 34CE. This could include smartphones, tablets, laptops and personal computers. it is possible that ASIO may seek a section 34AAA assistance order in addition to a questioning warrant to compel a warrant subject to provide the password or biometric authentication information to the seized computer (in addition to ASIO having obtained a computer access warrant to access and obtain data from the device, once seized). The Law Council therefore considers it important for the full suite of coercive powers to able to be exercised against a person are considered by the Attorney-General at the time of making a decision on a request for a questioning warrant.

181. The Law Council further notes that, if its recommendation 16 above is implemented to require the judicial authorisation of apprehension at the time a warrant with an immediate attendance requirement is executed, the relevant judicial officers should also be provided with information about the prior exercise of coercive powers and should be required to take this matter into account in assessing the proportionality of a proposed power of apprehension.

Recommendation 19 – potential exposure to multiple coercive powers

- **Proposed sections 34B and 34BA of the ASIO Act should be amended so that ASIO is required to provide the Attorney-General with information about whether the person has been the subject of other coercive powers (including ACIC examinations, police investigative powers and ASIO s 34AAA assistance orders) and preventive restraints on liberty (including control orders and preventative detention orders). The Attorney-General should be required to consider the potential for oppression to the warrant subject, if the questioning warrant was issued.**
- **If the Law Council's recommendation 16 above is implemented to require the judicial authorisation of powers of apprehension, the**

[176] See further: Law Council of Australia, *Submission to the PJCIS Review of ASIO's questioning and detention powers*, (April 2017), 12-13 at [27]-[34].

issuing judge should also be required to consider the previous exercise of coercive powers against the warrant subject in assessing the proportionality of the power of apprehension.

Oral questioning warrants

182. Proposed subsections 34B(5)-(6) and 34BF(3) of the ASIO Act would enable the making of oral requests for questioning warrants, and the oral issuing of such warrants by the Attorney-General. The basis for making these requests and issuing these warrants is the existence of circumstances indicating a possibility that the time taken to request and issue a warrant in writing would be prejudicial to security.

183. The Law Council is concerned that the proposed arrangements for orally requesting and issuing questioning warrants are incompatible with the design principles articulated by the Committee in its 2017-18 Review.[177] The Law Council considers that the proposed thresholds fall considerably short of the Committee's view that any oral issuing mechanisms should be limited to circumstances of emergency, and should provide clear guidance on what would constitute an 'emergency' for the purposes of the relevant provisions.[178] The Law Council considers that any statutory prescription of the circumstances of emergency should also take into account the availability of other powers (exercisable by ASIO or other entities, including the AFP) to disrupt an imminent security threat.

The threshold of 'prejudicial to security'

184. The Bill proposes to authorise the issuing of oral questioning warrants in circumstances in which the applicant (the Director-General of Security) and issuing authority (the Attorney-General) reasonably believe that the delay caused by making a written request or issuing decision may be prejudicial to security.[179]

185. There is no prescription of the degree or likelihood of prejudice to security (for example, a similar formulation to section 29 of the ASIO Act, which enables the Director-General to issue emergency warrants, if there is 'likely' to be 'serious prejudice' to security if the action sought to be authorised does not commence before the Attorney-General could issue a warrant).[180]

186. This would appear to make it legally possible for **any degree** of **possible** prejudice to security interests to provide grounds for the requesting and issuing of an oral questioning warrant. Further, the low threshold of 'prejudice' is assessed by reference to **all heads of security** in section 4 of the ASIO Act, not merely the particular questioning matters relevant to the warrant. In addition to the broad concepts of espionage, foreign interference and politically motivated violence, this also covers sabotage, attacks on Australia's defence system, the promotion of communal violence and serious threats to Australia's territorial and border integrity. It also covers Australia's obligations to any other country in relation to the above matters.

187. While it might be argued that some limitations in ASIO's ability to make requests could be found in provisions of the ASIO Guidelines that make generic references to

[177] PJCIS, 2018 Report, 78-79 at [3.141]-[3.143]

[178] Ibid, 79 at [3.143], bullet point 1. The submissions of the IGIS to the PJCIS 2017-18 Review also emphasised the importance of clear statutory guidance on what constitutes an emergency and how long it continues: IGIS, *Supplementary Submission to the PJCIS Review of ASIO's questioning and detention powers* (October 2017), 6.

[179] Bill, Schedule 1, item 10, inserting proposed ss 34B(5)-(6) and 34BF(1)(b).

[180] ASIO Act, s 29(1)(d)(ii).

proportionality,[181] the Law Council notes that such Guidelines are only administratively binding,[182] meaning that compliance is not a legal pre-condition to the availability of the compulsory power, such that there would be no legal authority for the Attorney-General to issue a warrant in the event of non-compliance by ASIO in the making of request for a questioning warrant.

188. The Law Council submits that the appropriate level of safeguard in the context of an extraordinary coercive questioning power invested in an intelligence agency is the imposition of statutory pre-conditions to its availability. This would mean that non-compliance will invalidate a purported exercise of the power, rather than merely triggering administrative consequences after the event, such as administrative sanction, Ministerial reprimand or adverse findings by the IGIS (as is the case with breaches of requirements of the ASIO Guidelines, as noted above).

Absence of reference to, or guidance on the meaning of, an 'emergency'

189. The Law Council further notes that the proposed provisions governing oral requests and issuing decisions for questioning warrants do not make any express reference to circumstances of emergency, in either their substantive words or in their subheadings. This is in further contrast to section 29 of the ASIO Act, the heading to which makes express reference to **emergency** warrants.[183]

190. Section 9A of the ISA also limits oral Ministerial authorisations to the Australian Secret Intelligence Service (**ASIS**), the Australian Signals Directorate (**ASD**) and the Australian Geospatial-Intelligence Organisation (**AGO**) to an 'emergency situation', and the emergency agency head authorisation provisions in section 9B of the ISA require there to be circumstances in which there is, or is likely to be, a risk of **serious** prejudice to security or a **serious** risk to a person's safety.[184]

191. While the provisions of section 29 of the ASIO Act and section 9A of the ISA could fairly be criticised as providing inadequate guidance on the meaning of an 'emergency',[185] the oral authorisation provisions of the present Bill fall short of even this standard through their complete omission of any reference to an emergency.

192. Rather, the proposed emergency oral questioning warrant provisions appear to reflect a policy intention that **any possible prejudice** to security as a result of the

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[181] *Attorney-General's Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its function of obtaining, correlating, evaluating and communicating intelligence relevant to security (including politically motivated violence)* (2007) (**ASIO Guidelines**), at [10.4] paragraph (a) ('any means used for obtaining information must be proportionate to the gravity of the threat posed and the probability of its occurrence'). But contrast paragraph (e), which states that 'where a threat is assessed as likely to develop quickly, a greater degree of intrusion may be justified'.

[182] ASIO Act, s 8A(1)(a).

[183] Importantly, section 13 of the *Acts Interpretation Act 1901* (Cth) provides that all material in an Act forms part of that Act, with the result that section headings are material to the construction of the provisions in a section. Hence, the inclusion of the word 'emergency' in the heading to section 29 of the ASIO Act is material to the construction of the circumstances in which the Director-General of Security has the power to issue an emergency special powers warrant (rather than the usual issuing process via the Attorney-General).

[184] ISA, s 9B(2)(c).

[185] See, for example, Law Council of Australia, *Submission to the PJCIS Review of the Counter-Terrorism Legislation Amendment Bill (No 1) 2014*, (November 2014), 23-25, in which the Law Council expressed concern that the word 'emergency' in amendments to the Ministerial authorisation provisions of the ISA (which inserted the emergency oral authorisation provisions in section 9A, and the emergency agency head authorisation provisions in section 9B) did not provide sufficient clarity about what circumstances would constitute an emergency. The Law Council notes that the IGIS has identified a need for 'clear guidance on what constitutes an emergency and how long it continues' as a result of their 'experience with emergency authorisations in other contexts' which was said 'demonstrates there can be differences of opinion about what constitutes an emergency and how long it continue': IGIS, *Supplementary Submission to the PJCIS Review of ASIO's questioning and detention powers* (October 2017), 6.

time needed to make a written request and obtain a written issuing decision should be deemed to be an 'emergency' sufficient to justify proceeding via oral means.

Recommendation 20 – issuing threshold for emergency oral questioning warrants

- **Proposed subsections 34B(5)-(6) and 34BF(1)(b) of the ASIO Act should be amended to prescribe a different threshold for the requesting and issuing of oral questioning warrants, namely:**
  - **the Attorney-General is satisfied, on reasonable grounds, that:**
    - **there is an emergency situation, involving an imminent risk of serious prejudice to security or a serious risk to a person's life or safety; and**
    - **issuing the warrant orally is necessary to avoid or minimise the impact of the risk materialising; and**
  - **The warrant request includes an immediate attendance requirement, and the threshold in subsection 34BE(1) is met.**

Period of effect

193. The Law Council is also concerned that a warrant sought and issued orally will have the same 28-day period of effect as for warrants sought and issued in writing.[186]

194. This appears to be incompatible with the nature of an emergency form of authorisation, which would typically be limited to a shorter period that is sufficient to provide interim authority to undertake an activity pending the making of a full, written application and issuing decision. For example, ASIO's emergency special powers warrants and emergency ministerial authorisations under the ISA have a maximum period of effect of 48 hours.[187]

195. The Law Council considers that, if oral questioning warrants are to be genuinely and properly limited to emergencies, this should be reflected in a shorter period of effect that is consistent with ASIO's emergency warrants (namely, 48 hours). ASIO should be required to make a written warrant request if it seeks to conduct compulsory questioning beyond the 48-hour emergency period.

196. As a consequential amendment to the above, the statutory deadline for ASIO to make written records of oral warrant requests and oral issuing decisions should be shortened to the earlier of:

- as soon as possible **before** the warrant subject is given notification; or
- eight hours of the warrant being issued eight hours after the request is made and the warrant issued (not 48 hours as proposed in the Bill).[188]

Recommendation 21 – maximum period of effect for oral warrants

- **Proposed subsection 34BF(4) should be amended to provide that an emergency oral questioning warrant has a maximum period of effect of 48 hours, to enable the immediate exercise of a questioning power for a limited duration that is proportionate to an imminent risk.**
- **Proposed subsections 34B(6) and 34BF(6) of the ASIO Act should be amended consequentially, to shorten the deadline for making a written record of the oral warrant request and issuing decision. This should**

[186] Bill, Schedule 1, item 10, inserting proposed s 34BF(4). See also s 34BG(8) (variations).
[187] ASIO Act, s 29(2); and ISA, s 9A(4).
[188] Bill, Schedule 1, item 10, inserting proposed ss 34B(6) and 34BF(3) of the ASIO Act.

be as soon as possible before the warrant subject is notified of the warrant, and no later than eight hours after the issuing of the warrant.

- **If there is a need for a compulsory questioning power of a longer duration, ASIO should make a written request for a new warrant in accordance with proposed section 34B, and the Attorney-General may issue a written warrant under proposed section 34BA or 34BB (as applicable) subject to the usual 28-day maximum period of effect.**

Post-charge questioning

Fundamental problems with post-charge questioning

197. The Bill proposes to expressly authorise the compulsory questioning of persons who have been charged with an offence, and persons against whom charges are imminent.[189] Proposed Subdivision E of new Division 3 of Part III contains provisions based on those in the ACC Act and the LEIC Act enabling questioning material and derivative material to be disclosed to prosecutors in certain circumstances. Namely, if a court, on application or its own initiative, orders that the material is disclosed to prosecutors, provided that the court is satisfied that the disclosure is required in the interests of justice.[190] However, proposed subsection 34EC(4) provides that a person's charge for an offence is deemed not to be unfair merely because the person has been compulsorily questioned under a questioning warrant in relation to the subject-matter of their charge.

198. The proposal is to abrogate the privilege against self-incrimination and confer use immunity in relation to questioning material, so it could not be directly admitted in evidence against the person at trial (see proposed ss 34GD(5)-(6)).

199. There is scope for derivative use. Where a person has been charged with an offence and is subject to a questioning warrant, proposed Subdivision E of Division 3 of Part III would enable the questioning material to be disclosed to a prosecutor, if a court orders its disclosure to that prosecutor. The court can only make an order for disclosure if satisfied that disclosure is required in the interests of justice (see proposed ss 34EA(1)(b) and 34EC(1)).

200. The definition of 'post-charge' (see proposed s 34A) also covers circumstances in which charges are 'imminent' (defined in proposed s 34A as covering circumstances in which a person has been arrested but not yet charged; and circumstances in which 'a person with authority to commence a process for prosecuting a person has decided to commence, but has not yet commenced, that process'). Consequently, the restriction on disclosures of questioning material would also apply in relation to 'imminent' charges.

201. There appear to be no limitations on disclosures of questioning material to police who are investigating the warrant subject for an offence, but the warrant subject has not yet been charged, and those charges are not 'imminent' (within the defined meaning of that term). There are no apparent limitations on police using the materials derivatively to obtain admissible evidence to support their brief, including to make applications for authorisations to exercise their own intrusive investigative powers.

202. These provisions replicate those in the ACC Act for the ACIC's compulsory examinations.

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[189] Ibid, inserting proposed ss 34BA(1)(d), 34BB(1)(e) and 34BD(4) of the ASIO Act.

[190] Ibid, inserting proposed subsections 34EC(1) and (2).

203. However, High Court decisions flowing from compulsory examination in confiscation cases effectively held that such proceedings inevitably prejudice a fair trial.[191] The High Court has commented critically on such deeming provisions on other contexts and has granted a stay of the compulsory examination notwithstanding the confiscation legislation's provisions limiting stays pending the criminal trial and the direct use immunity.[192] A conclusion that a trial in those circumstances was unfair might not necessarily follow.[193] However, such a trial would overturn both the privilege against self-incrimination and the principle that the prosecution has to prove its case without the assistance of the defendant and indeed could compel the defendant to prove the case against him or herself. This is a disproportionate provision.

204. The Law Council remains opposed to the proposal to explicitly permit 'post-charge' and 'imminent charge' questioning. This proposal carries an unacceptably high degree of risk to both the constitutional validity of the scheme and the erosion of the privilege against self-incrimination and the rights of an accused person to a fair trial.[194]

205. The Law Council's position remains as expressed in its evidence to the Committee in its 2017-18 review, to the second INSLM in his 2016 review, and to the Senate Legal and Constitutional Affairs Committee inquiry into the Law Enforcement Legislation Amendment (Powers) Bill 2015 (which was passed in 2015 and enacted the post-charge questioning powers in the ACC Act and LEIC Act).[195]

206. In short, the Law Council is concerned that, despite various purported safeguards, post-charge questioning overturns the privilege against self-incrimination and creates an overwhelming risk that a person who is compulsorily questioned, in detail, as to the circumstances of an alleged offence, is very likely to prejudice their own defence. An accused person should not be forced to divulge their position prior to trial or to assist law enforcement officers in gathering supplementary information to aid in their prosecution.

207. Accordingly, the Law Council recommends the removal of the power to compulsorily question charged persons, or persons against whom charges are imminent, about the subject matter of those charges. That is, the compulsory questioning of a person under a questioning warrant should be deferred until the disposition of any charges.

208. If the Law Council's primary position is not adopted, the Law Council has identified a number of amendments to the post-charge questioning regime that may lessen (but cannot cure) the risks to the validity of the regime and the rights of the accused person who is the subject of a questioning warrant.

Recommendation 22 – removal of post-charge questioning powers

- **The Bill should be amended to omit proposed ss 34BA(1)(d), 34BB(1)(e) and 34BD(4) and proposed Subdivision E of new Division 3**

[191] *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5, (2015) 255 CLR 46; *Lee v New South Wales Crime Commission* [2013] HCA 39; *Lee v The Queen* [2014] HCA 20.
[192] Ibid.
[193] Cf *Lee v The Queen* [2014] HCA 20 where there was a prohibition on information sharing, whereas here ASIO can share compulsory questioning material if approved by a court.
[194] See also: PJCHR, *Scrutiny Report 7 of 2020*, (June 2020), 54-56 at [2.73]-[2.78]; and Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2020* (June 2020), 5-6 at [1.20]-[1.23].
[195] Law Council of Australia, *Submission to the PJCIS Review of ASIO's questioning and detention powers*, (April 2017), 11-13; Law Council of Australia, Submission to the INSLM Review of Questioning and Detention Powers, (June 2016), 21 at [66]-[69] and 28-32 at [100]-[177]; and Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Law Enforcement Legislation Amendment (Powers) Bill 2015*, (June 2015), 8-19.

of Part III of the ASIO Act, so that questioning warrants cannot authorise the post-charge or post-confiscation questioning of a person. The compulsory questioning of a person under a questioning warrant should be deferred until the disposition of any charges.

Necessary reforms if post-charge questioning is retained

209. If there is an appetite to retain the proposed post-charge questioning component of the re-designed questioning warrant scheme, the Law Council recommends several amendments to remove particularly arbitrary, oppressive or otherwise problematic elements. These recommendations should be understood as being additional to the Law Council's earlier recommendation that the post-charge questioning warrant regime should not apply to minor questioning warrants. The Law Council emphasises that these recommendations would only reduce and could not remove the fundamental problems inherent in post-charge questioning, as outlined above.

Prohibition on disclosing information to prosecution agencies

210. Arising from the concerns identified in paragraphs 198 to 203 above, the Law Council submits there should be should be a prohibition on disclosing any information derived directly or indirectly from compulsory questioning to prosecuting agencies.

Recommendation 23

- **All information derived from compulsory questioning should be quarantined from prosecution agencies.**

Judicial authorisation of post-charge questioning

211. If the Committee supports the retention of the proposed power to conduct post-charge questioning, the Law Council considers there must be strict regulation of who is present at questioning (for example, police should not be present), what use can be made of the information obtained, and the subject matter able to be covered.

212. The Law Council suggests that it would be appropriate to require authorisation from a Federal Court judge of the post-charge questioning, and for that judge to prescribe limitations on the matters which may be covered by the compulsory questioning.[196] The Law Council further notes that the Senate Legal and Constitutional Affairs Committee Report on the Law Enforcement Legislation Amendment Bill 2015 also supported the inclusion of such a requirement in the ACC Act, to provide a further safeguard to the right to a fair trial.[197]

Recommendation 24 – judicial authorisation of post-charge questioning

- **If the power to conduct post-charge questioning is to be retained in the Bill, it should require authorisation from a Federal Court judge. That judge should be required to prescribe limitations on the matters that may be covered by post-charge questioning.**

[196] Law Council of Australia, *Submission to the PJCIS 2017-18 Review*, (April 2017), 12-13 at [24]-[26]; Law Council of Australia, *Submission to the INSLM 2016 Review*, (June 2016), 31-32 at [114]-[117]; and Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Law Enforcement Legislation Amendment (Powers) Bill 2015*, (June 2015), 11 at [32]-[35].

[197] Senate Legal and Constitutional Affairs Committee, *Report on the Law Enforcement Legislation Amendment (Powers) Bill 2015*, (June 2015), 18.

Legal representation for questioning warrant subjects

213. Further, if the Committee is minded to support the conferral of compulsory post-charge questioning powers on ASIO, the Law Council considers that this would make it essential for the Bill to be amended to remove the proposed limitations on the appointment and involvement of a warrant subject's lawyer (as recommended by the Law Council in this submission).[198]

214. The Law Council is opposed in principle to these restrictions on the involvement of a warrant subject's lawyer, whether or not post-charge questioning is permitted. However, the proposal for post-charge questioning makes it critical to the protection of the person's privilege against self-incrimination and to a fair trial that they have the full benefit of adequate legal representation, as is allowed under the ACC Act.

215. The Law Council also emphasises that any inclusion of post-charge questioning will make it particularly important to implement its recommendations in relation to the eligibility and appointment of prescribed authorities, given their role in making directions about the removal of lawyers under proposed subsection 34FF(6), and confidentiality directions in relation to questioning material under proposed paragraph 34DF(1)(d) of the ASIO Act.

Coverage of seized items as 'questioning material'

216. Proposed subsection 34AB(2) of the ASIO Act relevantly defines 'questioning material' as information that is given to a prescribed authority, or records or things that are produced before a prescribed authority when a person appears under a warrant. The concept of 'questioning material' is significant because its disclosure is regulated by the obligations on the prescribed authority to make confidentiality directions under proposed paragraph 34DF(1)(d), and the provisions of proposed Subdivision E of new Division 3 of Part III of the ASIO Act, which only permit its disclosure to a prosecutor if a court makes an order (if it is satisfied that disclosure is in the interests of justice).

217. The definition of 'questioning material' therefore does not cover things that are seized in the conduct of searches of an apprehended person under proposed subsection 34CC(5), in which the police officer conducting the search is permitted to seize a record or thing found on the person, if the police officer reasonably believe that it is relevant to the collection of intelligence that is important in relation to a questioning matter. This is so notwithstanding that ASIO is permitted under proposed section 34CE to inspect the seized record or thing, and make copies or transcripts of a record, for the purpose of exercising its intelligence-collection powers under the questioning warrant.

218. The Law Council considers that the exclusion of seized items from the definition of 'questioning material' significantly enlarges the risk of a warrant subject to a fair trial. This is because, despite being relevant to the questioning matter (and thus the subject matter of the criminal charges), seized items would not be subject to the restrictions on disclosure of questioning material (and derivative material) provided for in proposed Subdivision E (such as the requirement in proposed section 34EA that post-charge questioning material may only be made under an order of the court in proposed section 34EC). This would appear to make it possible for initial

[198] Bill, Schedule 1, item 10, inserting proposed ss 34F(4) (restriction on lawyer of choice), 34FF(3) (limitation on role of lawyer to clarifying ambiguous questions and requesting breaks) and 34FF(6) (removal of lawyer for unduly disrupting questioning). See also, proposed ss 34FE(4), 34FE(6)(b) and 34FH (limitation on ability of warrant subject's lawyer to access relevant information, and absence of requirement for the lawyer to be given sufficient information to provide advice to their client on the legality of the warrant and acts purportedly done under the authority of the warrant).

disclosures to be made at the discretion of ASIO in accordance with sections 18, 19 and 19A of the ASIO Act, and subsequent disclosures to be made at the discretion of the persons or entities to whom ASIO has made disclosures.

219. This result is particularly problematic in the absence of any use immunity in relation to such items under proposed subsection 34GD(6) (which the Law Council recommends below should also be extended to cover seized items).

Recommendation 25 – definition of 'questioning material' to cover things seized

- **If post-charge questioning is retained, proposed section 34AB of the ASIO Act should be amended so that the definition of 'questioning material' covers things that are seized from a person under the powers of search in connection with apprehension in proposed subsection 34CC(5).**

Extension of use immunity to seized items

220. The Law Council is concerned that proposed subsection 34GD(6) of the ASIO Act has the effect of excluding from use immunity items that are seized from a person while they are being searched after being apprehended by police.[199]

221. As explained above, this exclusion appears arbitrary and anomalous, given that seizure can be authorised on the basis that the record or thing seized is relevant to a questioning matter.[200] Further, ASIO can examine and make copies of the relevant record or thing that is seized for the purpose of collecting intelligence under the warrant.[201] It would also be open to ASIO share the items seized, or information extracted from those items, with other agencies (including law enforcement and prosecution agencies) pursuant to sections 19 and 19A of the ASIO Act (see concerns identified above at paragraphs 198 to 203 regarding the sharing of material derived from compulsory questioning).

222. The result of the limited scope of the use immunity in proposed subsection 34GD(6) means that seized items and material obtained from those items (such as data stored on, or accessible from, a smartphone or laptop computer that is seized) could be directly used in evidence in the prosecution of the person. This is even more concerning in view of the ability of ASIO to obtain a section 34AAA assistance order to compel a person to unlock a seized device, and to obtain a computer access warrant to obtain data from the seized device (such as downloading the contents of a person's phone or cloud storage accounts accessible from the phone).

223. The Law Council is concerned by this apparent lacuna, which threatens to neutralise the effect of the limited protections available under the Bill in relation to subsequent uses of information obtained from post-charge questioning. Given the potential for this lacuna to cast serious doubt on the constitutionality of the proposed regime, the Law Council also queries whether constitutional law advice was obtained on the provisions of the Bill, and if so, from whom, and whether that advice was followed in the design of the provisions in the Bill as introduced.

[199] Ibid, inserting proposed s 34GD(6)(a)-(b) (use immunity limited to information given and things or records produced before the prescribed authority while the person is appearing for questioning under the warrant).

[200] Ibid, inserting proposed s 34CC(5) (police power to seize records or things found during a search while a person is being apprehended). See also: proposed s 34CE.

[201] Ibid, inserting proposed s 34CE.

Recommendation 26 – extension of use immunity to seized items

- **Proposed subsection 3GD(6) of the ASIO Act should be amended to extend use immunity to items that are seized under proposed subsection 34CC(5) of the ASIO Act. (This recommendation is not contingent on the retention of a post-charge questioning power.)**

Prescribed authorities

Outline of Law Council position

224. As noted above, the Bill retains the role of the independent prescribed authority who supervises the conduct of questioning by ASIO and has mandatory and discretionary powers to give directions on procedural matters. (For example, the prescribed authority may make directions on the appointment of and removal of lawyers; the provision of interpreters; the extension of questioning time up to the maximum of 24 hours or 40 hours if an interpreter is required; and the confidentiality of questioning materials).[202] This is in contrast to the examination model under the ACC Act, at which the examiner is solely responsible for the conduct of questioning.

225. The Bill proposes to expand the classes of person eligible to be appointed as prescribed authorities.[203] Presently, only retired judges are eligible for appointment in the first instance. The Attorney-General may appoint serving State and Territory judges if an insufficient number of retired judicial officers consent to appointment; and may appoint Presidential or Deputy Presidential members of the AAT in an insufficient number of serving State and Territory judges consent to appointment.[204]

226. While the Law Council is supportive of the proposal to retain the role of the prescribed authority to supervise questioning, it is concerned that proposed section 34AD does not ensure the independence and expertise of prescribed authorities.

227. In particular, the Law Council is concerned that the appointment of lawyers as prescribed authorities may create inherent practical difficulties in ensuring the actual and perceived independence of these persons. The Law Council considers that the persons eligible to perform a supervisory role in questioning should remain as retired judges, or in the event of insufficient numbers, serving State or Territory judges or Presidential or Deputy Presidential AAT members.[205]

228. Consistent with the Law Council's evidence to the Committee in its 2017-18 review, the Law Council would support the appointment of lawyers if the role of the prescribed authority were substituted with the ACC Act model of examinations, in which statutory office-holders ('examiners') were appointed to **conduct** questioning, and the questioning subject was represented by a lawyer whose involvement was not subject to drastic statutory limitations.[206] However, as explained below, the appointment of lawyers to perform the independent **supervisory** role of prescribed authority raises different issues, which create significant difficulties in ensuring the actual and perceived independence of persons other than retired judicial officers, or serving judicial officers of State or Territory courts.

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[202] Ibid, inserting proposed s 34AD of the ASIO Act (prescribed authorities). See generally proposed Subdivisions D and F of Division 3 of Part III of the ASIO Act for their functions.

[203] Ibid, inserting proposed s 34AD of the ASIO Act.

[204] ASIO Act, s 34B.

[205] ASIO Act, s 34B.

[206] Law Council, *Submission to the PJCIS 2017-18 Review*, (April 2017), 10 at 13.

Primary recommendation

229. For this reason, the Law Council's primary recommendation is that there should be no change to the persons eligible for appointment as prescribed authorities under existing section 34B of the ASIO Act. Concerns about the potential for there to be inadequate numbers of retired judges, serving State and Territory judges and Presidential and Deputy Presidential AAT members to serve as prescribed authorities should be monitored in practice under the expanded questioning warrant regime, and re-assessed if necessary to respond to an identified need.

Alternative recommendations

230. However, if there is an appetite to retain the proposal for lawyers to be eligible for appointment as prescribed authorities, the Law Council makes alternative recommendations to address inadequacies in the proposed eligibility criteria, mode of appointment (including the appointing authority) and the grounds of termination.[207]

Appointment of lawyers as prescribed authorities

231. The Bill proposes to enable the Attorney-General (who is proposed to be the appointing authority in addition to being the issuing authority for warrants) to appoint as prescribed authorities admitted lawyers of at least 10 years' standing who hold current practising certificates (in addition to appointing retired judicial officers and Presidential and Deputy Presidential AAT members).

232. The Bill proposes to remove the limitation on the ability of the Attorney-General to appoint a person who is not a retired judge to circumstances in which an insufficient number of retired judges are available.[208] This would make it possible for the Attorney-General to prioritise the appointment of lawyers over retired judges at their sole discretion, including to decline to appoint any retired judges.

233. The Law Council notes that it may be extremely difficult to ensure the substantive and perceived independence of lawyers who are appointed as prescribed authorities from the executive government. The Bill as drafted does not provide adequate safeguards, and the Law Council considers that the risks identified below are best avoided by retaining the existing classes of eligible persons and the hierarchy for their appointment in existing section 34B of the ASIO Act.

Recommendation 27 –persons eligible to be appointed as prescribed authorities

Preferred option

- **The Bill should be amended to substitute the provisions of proposed section 34AD of the ASIO Act with the provisions of existing section 34B, so that lawyers are not eligible for appointment as prescribed authorities. The eligible persons should remain retired judges, or in the alternative serving State or Territory judges, or in the further alternative Presidential or Deputy Presidential AAT members.**

Alternative option

- **If there is an appetite for lawyers to be eligible for appointment as prescribed authorities, proposed section 32AD of the ASIO Act should be amended in line with the Law Council's recommendation 28.**

[207] The Law Council notes that the Senate Standing Committee for the Scrutiny of Bills raised similar issues: *Scrutiny Digest 7 of 2020* (June 2020), 2-3 at [1.8]-[1.11].

[208] Bill, Schedule 1, item 10, inserting proposed s 34AD of the ASIO Act.

Disqualifying matters

234. Proposed subsection 34AD(2) of the ASIO Act prescribes a narrow range of matters disqualifying a person from appointment as a prescribed authority. They focus on the current employment or engagement of a person by specific agencies (namely, ASIO and other intelligence agencies,[209] the AFP and State and Territory police, the Australian Government Solicitor and the Office of the IGIS).

235. While such exclusions are appropriate, the Law Council is concerned that these matters do not adequately cover the circumstances in which an actual, potential or perceived conflict of interest is likely to arise. In particular:

- they are limited to the **current** employment or engagement of a person by one of the above agencies, and do not consider a person's **recent** employment or **future** employment, where known;
- they are limited to a very small number of Commonwealth agencies and State and Territory police. For example, the Bill would not provide legal prohibitions on the following lawyers with 10 or more years' post-admission experience and a current practising certificate:
  - current or recent ministerial or other political advisers; and
  - current or recent employees of the Department of Home Affairs, ACIC, the Attorney-General's Department (other than the part of that Department known as the Australian Government Solicitor), or the Commonwealth Director of Public Prosecutions; and
- they do not recognise the potential for at least a potential conflict of interest to arise by reason of a person's current or recent employment or engagement by **any** government department or agency (particularly noting the diffusion of responsibilities for national security across numerous areas of government).

236. The Law Council notes that it may be extremely difficult to craft an eligibility criterion that effectively excludes all circumstances in which there would be an unacceptable risk of a substantive of perceived conflict of interest by reason of a person's current or recent employment. The Law Council is also concerned that leaving the assessment of a potential conflict of interest to the discretion of the Executive Government would be unsatisfactory. It may invite similar criticisms to those made about appointments to administrative review bodies, including the AAT. Given that prescribed authorities will necessarily perform their functions confidentially, with very limited opportunities for judicial review, the Law Council would prefer to remove the risk of even the perception of such conflicts of interest.

Assessment of potential conflicts of interest

237. The Law Council is also concerned that proposed subsection 34AD(5) of the ASIO Act merely requires the Attorney-General to 'have regard to' the potential for a prospective appointee to have a conflict of interest as a result of their work and other interests. It does not prohibit the Attorney-General from appointing a person despite the existence of an actual, potential or perceived conflict of interest. The Law Council is opposed to the legal possibility for a power of appointment to be available in such circumstances. It is incompatible with the important role performed by a prescribed authority in supervising ASIO's extraordinary powers.

[209] Defined in section 19A of the ASIO Act as being the Australian Secret Intelligence Service, the Australian Signals Directorate, the Australian Geospatial-Intelligence agency, the Defence Intelligence Organisation and the Office of National Intelligence.

Expertise of lawyers eligible for appointment

238. The Law Council supports the intent of proposed subsection 34AD(3) of the ASIO Act, which provides that the appointing authority must not appoint a lawyer of 10 years' standing as a prescribed authority unless satisfied that the person 'has the knowledge or experience necessary to properly perform the duties of a prescribed authority'. The Law Council concurs that it is important for the appointment criteria to require an assessment of a person's skills and experience.

239. However, the Law Council is concerned that the requisite expertise is left solely to the discretion of the appointing authority, and considers that the statute should provide greater guidance about the type of expertise that a prescribed authority must possess. Given the nature of compulsory questioning (and especially in the context of post-charge questioning) the Law Council considers that prescribed authorities should be required to have substantial experience and expertise in criminal law.

240. Consideration should also be given to whether the requirement in proposed paragraph 32AD(1)(c) for a lawyer to possess 10 years' post admission experience (effectively, that of a 'mid-career' lawyer) is commensurate with the significance of the role of a prescribed authority in a secretive questioning process. The Law Council considers that there is an enormous gap between a judge and a lawyer with 10 years' experience. The next step down would be senior counsel or a senior partner in a law firm with significant criminal trial experience (either of whom might be retired or practising). The Law Council recommends that the Bill should limit appointments to persons who have attained a higher level of seniority and expertise.

Recommendation 28 – alternative amendments if lawyers are eligible to be appointed as prescribed authorities

If lawyers are to be eligible for appointment as prescribed authorities, the following amendments to proposed s 34AD of the ASIO Act should be made:

- **proposed s 34AD of the ASIO Act should be amended to include the 'hierarchy of eligibility' established by s 34B of the ASIO Act, in which:**
  - **priority must be given to the appointment of a retired judge;**
  - **if insufficient numbers of retired judges are available, serving judges of State and Territory superior courts may be appointed;**
  - **if insufficient numbers of serving judges are available, serving Presidential or Deputy Presidential AAT members may be appointed; and**
  - **if insufficient numbers of Presidential or Deputy Presidential AAT members are available, lawyers of 20 years' standing who meet the statutory eligibility requirements may be appointed. In particular, the person must be a senior counsel or a senior partner in a law firm with significant criminal trial experience;**
- **proposed s 34AD(2) of the ASIO Act should be amended to provide that the mandatory grounds of disqualification of a person for appointment as a prescribed authority are:**
  - **persons who are currently employed or engaged by any Commonwealth, State or Territory government department or agency, or the parliamentary service of an Australian jurisdiction;**

- **persons who are appointed as the head of any Commonwealth, State or Territory government department, agency or parliamentary department;**
- **persons who are members of the permanent forces of the Australian Defence Force rendering continuous full-time service;**
- **persons who are currently employed or engaged by a member of any Australian legislature;**
- **persons who are a member of any Australian legislature;**
- **persons who have held any of the above forms of employment, engagement, appointment or elected office in the past 10 years; and**
- **persons who have accepted an offer of employment, engagement or appointment or have been elected to office but have not yet commenced in their position.**

- **proposed s 34AD(3) of the ASIO Act should be amended to provide that a lawyer is eligible for appointment as a prescribed authority if:**
  - **in the opinion of the appointing authority, they have appropriate knowledge, expertise and experience to properly perform the duties and functions and exercise the powers of a prescribed authority; and**
  - **this must include significant practical experience in criminal trials.**
- **proposed s 34AD(5) of the ASIO Act should be amended to provide that the appointing authority must not appoint a person as a prescribed authority unless satisfied, on reasonable grounds, that the prospective appointee does not have an actual, potential or perceived conflict of interest by reason of their work or other interests**

Appointing authority

241. The Law Council also considers that the need to ensure the substantive and perceived independence of all prescribed authorities makes it necessary for them to be appointed to a statutory office for a fixed term by the Governor-General, akin to the appointment of examiners under the ACC Act.[210] The Law Council regards the appointment provisions of the ACC Act as a preferable model to the proposal in the Bill. (That is, the Bill proposes to confer the power of appointment on the Attorney-General, who is the issuing authority for questioning warrants, and for appointees to hold office at the Attorney-General's pleasure.) Adopting the ACC Act model would provide a much stronger guarantee of the independence of prescribed authorities.

Recommendation 29 – Governor-General as the appointing authority

- **Proposed section 34AD of the ASIO Act should be amended to provide that the Governor-General is the appointing authority for prescribed authorities, who hold office for a five-year term, consistent with the appointment of ACIC examiners.**

[210] ACC Act, s 46B (appointment of examiners by the Governor-General for a term of five years).

Grounds for termination

242. The Law Council is concerned that the Bill does not require the termination of the appointment of a prescribed authority on the basis of their proven misbehaviour, incapacity, failure to comply with obligations in relation to conflict of interest declarations without a reasonable excuse, or the existence of an actual or potential conflict of interest. Rather, the Bill confers a discretionary power of termination in these circumstances.[211]

243. The Law Council considers that all of these matters should be mandatory grounds for termination. There should be no possibility for an appointing authority to decide to exercise a discretion to enable a prescribed authority to remain in office, despite being satisfied that the prescribed authority has engaged in misbehaviour, lacks physical or mental capacity, is bankrupt (and therefore vulnerable to financial influence) or has a conflict of interest, or fails to comply with their important obligations to declare potential conflicts of interest without a reasonable excuse.

244. The Law Council notes that section 46H of the ACC Act provides that conflicts of interest, failure to comply with requirements to declare interest and bankruptcy are mandatory grounds for the termination by the Governor-General of an examiner's appointment. While subsection 46H(1) of the ACC Act provides for a discretionary power of termination in the event of misbehaviour or incapacity, the Law Council considers that the role of prescribed authorities should be subject to mandatory termination in these circumstances, in view of the fact that their functions are performance on a secretive basis that is not susceptible to statutory judicial review.

Recommendation 30 – Governor-General's mandatory powers of termination

- **Proposed subsection 34D(9) of the ASIO Act should be amended to provide that the Governor-General must terminate the appointment of a prescribed authority if any of the circumstances in paragraphs (a)-(e) are proved to exist (namely, misbehaviour, incapacity, bankruptcy, failure to comply with conflict of interest declaration requirements without reasonable excuse, or the existence of an actual or potential conflict of interest).**

Use of interpreters during questioning

245. The Law Council is concerned that the threshold for appointing an interpreter in the present provisions of the ASIO Act,[212] and as proposed to be retained in the Bill, is inappropriately high in the context of coercive questioning.[213]

246. Namely, proposed section 34DN provides that a prescribed authority must provide an interpreter if they believe on reasonable grounds that the warrant subject is unable to communicate with reasonable fluency in English (whether because of inadequate knowledge of the English language, or because of physical disability).

247. Proposed section 34DO provides that a prescribed authority may refuse a warrant subject's request for an interpreter if the prescribed authority believes, on reasonable grounds, that the warrant subject has adequate knowledge of the English language to communicate with reasonable fluency in that language; or is physically able to communicate with reasonable fluency in the English language.

[211] Cf ibid, inserting proposed s 34AD(9) (discretionary termination of appointment of prescribed authorities).
[212] ASIO Act, ss 34M and 34N.
[213] Bill, Schedule 1, item 10, inserting proposed ss 34DN and 34DO of the ASIO Act.

Interpreters where English is not a warrant subject's first language

248. The Law Council considers that the proposals in the Bill to expand the questioning matters, reduce the minimum age of questioning and permit post-charge questioning make it necessary to revise this threshold. In particular, the Law Council considers that, if a person is being questioned in stressful circumstances under compulsion, they should be entitled to be questioned in their first language.

249. The Law Council is concerned that an assessment by a prescribed authority of a person's 'reasonable fluency in English' is too low a bar. While a warrant subject may have a reasonable degree of fluency in English, their ability to understand and give nuanced answers to compulsory questions in their first language may be considerably greater than their ability to do so in English. This warrant subject would be placed at a disadvantage in their ability to understand and respond to questions.

250. The Law Council therefore considers that all warrant subjects should have access to an interpreter where English is not their first language, unless the prescribed authority is satisfied, on reasonable grounds, that the warrant subject:

- is competent in speaking and understanding English and has informed the prescribed authority that they do not wish to have an interpreter; and
- is highly competent in speaking and understanding English and an interpreter would not assist them to understand or answer questions.

Recommendation 31 – thresholds for the appointment of interpreters

- **Proposed sections 34DN and 34DO of the ASIO Act should be amended to provide that a warrant subject must be given access to an interpreter if English is not their first language, unless the prescribed authority is satisfied, on reasonable grounds, that the subject:**
  - **is competent in speaking and understanding English and has informed the prescribed authority that they do not wish to have an interpreter; or**
  - **is highly competent in speaking and understanding English and an interpreter would not assist them to understand or answer questions.**

Police powers of apprehension, search and seizure

251. The Law Council is concerned that there are insufficient safeguards for the exercise of powers of apprehension, search and seizure in the following respects:

Powers of apprehension

252. Proposed subsection 34C(1) of the ASIO Act provides that, if a questioning warrant authorises the apprehension of the subject of a warrant, 'a police officer may apprehend the subject in order to immediately bring the subject before a prescribed authority for questioning under the warrant'.

253. The Explanatory Memorandum states that the effect of this provision is that, 'if questioning will not be ready to begin when the subject appears before the prescribed authority, the police officer would be unable to apprehend the subject'.[214]

[214] Explanatory Memorandum, 54 at [225].

However, the Law Council is concerned that this limitation is not clear on the face of proposed subsection 34C(1).

Absence of obligation to ensure that questioning will commence on arrival

254. The words 'immediately bring the subject before a prescribed authority' in proposed subsection 34C(1) do not unequivocally limit the application of the apprehension power to circumstances in which the police officer is reasonably satisfied that questioning will be ready to begin before the prescribed authority upon the police officer's arrival at the place of questioning with the warrant subject who has been apprehended.

255. The absence of a clear limitation on the power creates a risk that a warrant subject who has been apprehended may **effectively** remain apprehended or detained upon their arrival at a place of questioning, while they wait to appear before the prescribed authority, if for any reason questioning is unable to commence immediately upon arrival.[215] That is, upon their arrival at the place of questioning after being apprehended and learning that questioning is not ready to commence, a person may not be free to leave the place of questioning because they would be exposed to criminal penalty for doing so; or the person may be given reasonable grounds on which to believe that they would not be physically prevented from leaving if they attempted to do so (for example, due to the presence of police and security officers guarding exit points, the physical proximity of the police officer who apprehended the person, and the potential for exit points to be locked). There are no provisions in the Bill that would prevent a person from effectively being held for a prolonged period of time, in the event that questioning was not ready to commence on their arrival after being apprehended.

Preferred approach

256. The Law Council considers that the preferable way of rectifying this issue would be to adopt an identical approach to the power of judicial officers to order the apprehension of an examinee under section 31 of the ACC Act.

257. Under that provision, the examinee must be brought before a judge of the Federal Court or a Supreme Court of a State or Territory as soon as practicable after being apprehended (pursuant to a judicially issued order for their apprehension). The judge must then determine whether to admit the person to bail; or order the detention of the person to ensure they appear for questioning; or order the release of the person. In this way, the ACC Act expressly identifies and acknowledges that a person is, in substance and effect, detained pending the commencement of questioning, with judicial control over the exercise of that power and its duration.

258. The Law Council observes that the ACC Act model would ensure that, if a person is, in substance and effect, not free to leave a place of questioning (or given reasonable grounds to believe that they were not free to leave) because the prescribed authority is not ready to begin questioning on their arrival, there would be a clear legal basis for any requirement for them to remain at the place of questioning (or to leave).

259. The Law Council further notes that the adoption of the approach in section 31 of the ACC Act would accord with the Committee's design principles in its 2017-18 review. The Committee stated that, if any power of continuing detention is to be retained in

[215] Note 2 to proposed subsection 34C(1) appears to entertain this possibility. It states that the power of apprehension 'ends when the subject appears before a prescribed authority for questioning under the warrant and **not** when the person arrives at the place of questioning (contrary to the suggestion at [225] of the Explanatory Memorandum noted above).

connection with apprehension, it 'must be subject to the discretion of the courts (as is the case under the ACC Act model)' and not the prescribed authority.[216]

Alternative option

260. Alternatively, proposed subsection 34C(1) could be amended to include a condition that unequivocally limits the availability of the power of apprehension to circumstances in which there is a reasonable belief that questioning will be ready to commence before the prescribed authority immediately upon the arrival of the person (in the company of the apprehending police officer) at the place of questioning.

261. Since it is ASIO, not the apprehending police officer, which controls the preparations for questioning and therefore the readiness for questioning to commence, this could potentially be in the form of obligations on ASIO to provide directions about when the power of apprehension should be exercised.

Recommendation 32 – timing for the exercise of immediate apprehension powers

- **The Bill should be amended to implement one of the following options.**

  Preferred option – ACC Act model of judicial authorisation

  - **The provisions of the Bill authorising the apprehension of a person should be omitted and replaced with new provisions that adopt the model in section 31 of the ACC Act. This would require all apprehensions to be authorised by a judicial officer, and would require apprehending officers to bring the person before a judicial officer as soon as practicable after being apprehended. The judicial officer would be required to make an order granting bail or authorising continued detention of the person pending the commencement of questioning; or to make an order for the unconditional release of the person.**

  Alternative option – express limitation on power of apprehension

  - **Proposed subsection 34C(1) of the ASIO Act should be amended to make the apprehension power for questioning warrants with immediate appearance requirements subject to an express condition, which limits the availability of the power to circumstances in which there are reasonable grounds for believing that questioning will be ready to commence immediately upon the arrival of the warrant subject at the place of questioning in the company of a police officer.**

Powers of seizure under apprehension and pre-question screening

Scope of power of seizure when a person is under apprehension

262. The power under proposed subsections 34BE(3) and 34CC(5) to seize things when a person is apprehended is overly broad, in that the police officer need only have a 'reasonable belief' that a record or thing may be relevant to '**an** adult questioning matter' or 'a minor questioning matter' (as applicable), and not **the** particular adult or minor questioning matter in respect of which the warrant is issued.[217] The Law Council is concerned that this may unintentionally enable the seizure of things that

[216] PJCIS, 2018 Report, 77 at [3.134]-[3.135].

[217] Bill, Schedule 1, item 10, inserting proposed ss 34CC(5)(b) and 34BE(3)(b).

are unrelated to the warrant, and the subsequent examination and use of those things by ASIO for intelligence-collection purposes.[218]

263. This threshold for seizure also risks creating a perverse incentive for ASIO to give police who are exercising powers of apprehension under a questioning warrant minimal briefing about the subject-matter of the warrant, so the belief of those police officers about the potential relevance of items or things seized could be taken to be 'reasonable' in the minimal factual circumstances known to that police officer at the time of apprehension.

264. The outcome of such action would be to achieve an extremely broad application of the power of seizure, and by extension, a commensurately broad application of ASIO's power to examine seized things for its intelligence collection purposes, which may exceed the specific questioning matter in respect of which the warrant is issued.

265. It should also be noted that it would be open to ASIO to obtain a computer access warrant under section 25A of the ASIO Act (or to rely on the authority of an existing computer access warrant that is broad enough to authorise access) to obtain access to data that is held on, or is accessible from, an item that is seized from a questioning warrant subject, such as their smartphone, tablet or personal computer. It would further be open to ASIO to obtain an assistance order under section 34AAA of the ASIO Act to require the warrant subject to provide their passcode or authentication information (including biometric information) to enable ASIO to gain access to the contents of the phone in accordance with a computer access warrant.

266. Further, the breadth of the seizure provisions connected with apprehension (and subsequent intelligence collection-related uses of seized items under proposed section 34CE) is compounded by the absence of use immunity for seized items under proposed subsection 34GD(6). That is, not only can an extremely wide range of things be seized from a person while they are apprehended – and not only may ASIO make use of those things for intelligence-collection purposes (including accessing data under warrant) – but a person will also be deprived of use immunity in relation to those things. This makes it particularly important for the Law Council's recommendation 26 (above) to be implemented, to extend use immunity to seized items.

Recommendation 33 – limitation of seizure powers to the questioning matter

- **Proposed paragraphs 34BE(3)(b) and 34CC(5)(b) of the ASIO Act should be amended to limit the power of seizure to records or other things found during the search of the warrant subject, which the police officer reasonably believes are relevant to the collection of intelligence that is important in relation to <u>the</u> adult questioning matter, or the minor questioning matter, in respect of which the warrant is issued under sections 34BA and 34BB (not <u>any</u> adult or minor questioning matter within the definitions of those terms in proposed section 34A of the ASIO Act).**

Retention of things seized from persons under apprehension

267. Proposed subsection 34CE(1) of the ASIO Act authorises ASIO to examine records or things seized by police when searching an apprehended person under proposed section 34CC. ASIO can make copies and transcripts of a record for the purpose of collecting intelligence in accordance with the questioning warrant.

[218] Ibid, inserting proposed s 34CE.

268. As noted above, it would also be open to ASIO to obtain a computer access warrant (and potentially also a section 34AAA assistance order) to gain access to data held on, or accessible from, a seized item that is a communications device, where seizure is effected on security grounds pursuant to proposed subsections 34CC(5) and (6). The relevant data accessed under the warrant could further be used in the investigation (and potentially disclosed to law enforcement and prosecutorial agencies in connection with the investigation or enforcement of offences against the warrant subject, or other persons).

269. ASIO is also permitted under proposed subsection 34CE(2) to retain a record or thing for such time as is reasonable; or if its return would be prejudicial to security, then ASIO may retain the record or thing until its return would no longer be prejudicial to security.

Potential for prolonged or indefinite retention of seized items

270. The Law Council is concerned that the power to retain a record or thing until its return would no longer be prejudicial to security may enable the retention of a record or thing for a prolonged and potentially indefinite period. It is notable that the power of retention extends beyond prejudice to the questioning matter specified in the warrant, and extends to all heads of 'security' within the definition of that term in section 4 of the ASIO Act.

271. The Law Council is concerned about the potential for proposed subsection 34CE(2) to be used to justify the indefinite retention of essential communications devices and other innocuous items that are capable of use by a person of security concern to engage in prejudicial activities, as well as lawful uses in the course of conducting their ordinary personal and business activities. For example, a person could use their smartphone to communicate via encrypted messaging platforms with persons of security concern to further a prejudicial activity; as well as using that device for the conduct of lawful personal and business-related communications. Or a person may have a laptop computer or a tablet on their person, which they need for business or educational purposes, which could be seized during a search of the person while apprehended and used by ASIO for intelligence-collection purposes.

272. For as long as the person is assessed as having an intent to engage in prejudicial activities (such as supporting a terrorist organisation) that person's use of innocuous items, such their smartphone or laptop computer, could be assessed as being prejudicial to security because the person may potentially use those items to pursue their prejudicial activities (for example, to contact and communicate with others to support the activities and continued existence of the terrorist organisation).

273. While the Law Council does not condone or seek to enable person to use such items for prejudicial purposes, it is concerned about the proportionality of the potentially indefinite duration of seizure where the relevant item is capable of prejudicial and non-prejudicial use. That is, proposed subsection 34CE(2) effectively confers upon ASIO a power to indefinitely retain an item under a questioning warrant on the basis of a speculation or belief that it could be used for purposes that are prejudicial to security (within the meaning of section 4 of the ASIO Act) at some point in the future if it were returned to the subject. This does not appear to be proportionate to the purpose for which the underlying questioning warrant was issued – namely, to enable the collection of intelligence about a particular questioning matter (being a matter relating to espionage, foreign interference or politically motivated violence) for a maximum of 24 hours (or 40 hours if an interpreter is required) over a period of up to 28 days.

274. In particular, the Law Council is concerned that the ability of ASIO to indefinitely retain an innocuous item (such as a smartphone or a computer), on the basis of a

suspicion or belief that it could be used for prejudicial purposes if returned to the subject at any point, has an equivalent effect to an order of a court for the forfeiture of an item seized during the exercise by the AFP of their investigative powers for law enforcement purposes.[219] Similarly, the ability of ASIO to retain a seized item for a prolonged period of time would have an equivalent effect to the judicial issuing of a control order preventing a person from accessing the item.[220] However, the indefinite or prolonged retention by ASIO would not be subject to any of the equivalent safeguards, particularly the making of a judicial order on an *inter partes* basis.

275. In contrast, the indefinite exercise by ASIO of the power of retention under proposed subsection 34CE(2) of the ASIO Act would be at the sole discretion of ASIO, on the basis of its opinion about the prejudicial impacts on security that may arise if the item was returned. There is no prescribed limit on the maximum duration of retention, nor any statutory criteria requiring an assessment of proportionality of the retention. Rather the power is enlivened by the existence of any degree of prejudice to security that may be occasioned if the item is retained. Nor is the power in subsection 34CE(2) subject to any requirements in relation to the applicable standard of proof or the application of the rules of evidence. Further, ASIO's opinion on the likely prejudicial impacts of return need not be provided in the form a security assessment under Part IV of the ASIO Act, which would confer rights of notification to the warrant subject, and rights to merits review by the Security Division of the AAT.

276. In view of the above considerations, the Law Council considers that the scope of the power to retain seized items on security-related grounds under proposed subsection 34CE(2) should be more tightly limited in relation to the seizure of items that could be put to both prejudicial and non-prejudicial purposes. This could include such items as a smartphone or laptop computer, or other tools of trade that a person may be carrying with them when they are apprehended.

277. Applications for the exercise of other statutory preventive or investigative powers are the appropriate means by which prolonged removal or forfeiture should be given effect, rather than under the low threshold and extremely broad and potentially indefinite executive discretion in proposed subsection 34CE(2) of the ASIO Act.

Recommendation 34 – basis for retaining seized items

- **Proposed paragraph 34CE(2)(a) should be amended to clarify that:**
  - **the provision does not empower ASIO to retain indefinitely or for a prolonged period of time a seized item (such as a phone or computer) that could be put to <u>both</u> prejudicial and non-prejudicial uses, on the basis that its return to the warrant subject at <u>any time</u> would be prejudicial to security;**
  - **any indefinite retention (effectively forfeiture) must be given effect through other powers, such as those under Division 4C of Part IAAA the *Crimes Act 1914* (Cth) (in relation to the forfeiture or return of things seized in in the exercise of law enforcement investigative powers); and**
  - **any prolonged retention for preventive purposes must be given effect through a control order issued under Division 104 of the *Criminal Code Act 1995* (Cth).**

[219] Crimes Act, Part 1AA, Subdivision B, Division 4C (returning things seized and documents produced under Part 1AA – for example, things seized under search warrants).
[220] Criminal Code Act 1995, Division 104.

Lack of documentation and procedural requirements for requesting return of seized items

278. Further, in contrast to requirements under the Crimes Act for overt seizures made under law enforcement search warrants for the purpose of investigating suspected offences,[221] the Bill contains no requirements for a person to be given notification of the seizure or a receipt for the seized item. Nor are there any procedures for a person to request the return of a seized item, and for the independent determination of such a request.[222]

279. The Law Council acknowledges that the powers of removal and retention under ASIO's search warrant provisions in section 25 of the ASIO Act do not contain equivalent provisions to those in the Crimes Act as outlined above. However, this reflects that ASIO's search warrant provisions are designed to support covert activities. In contrast, ASIO's questioning warrants are necessarily overt to the warrant subject. Accordingly, the Law Council considers that it is appropriate to align the powers of seizure in proposed subsection 34CC(5) and retention in proposed subsection 34CE(2) with the abovementioned procedural protections in the Crimes Act.

Recommendation 35 – procedural requirements regarding seized items

- **Proposed subsections 34CC(5) and 24CE(2) of the ASIO Act should be amended to include equivalent procedures to those in the *Crimes Act 1914* (Cth) for:**
  - **the giving of notifications and receipts for seized items; and**
  - **the establishment of procedures for the warrant subject (or others) to request the return of seized items, and the independent determination of those requests.**

Presence and role of lawyers for questioning warrant subjects

280. The Law Council does not support the proposed limitations on the role of lawyers for questioning subjects in proposed subsections 34FF(3) and (6) of the ASIO Act.

281. These provisions retain existing limitations in subsections 34ZQ(6) and (9) of the ASIO Act. These provisions prohibit a warrant subject's lawyer for speaking during questioning other than to request clarification of an ambiguous question, or to seek a break to address the prescribed authority or provide advice to their client. They also empower a prescribed authority to make a direction removing a warrant subject's lawyer from questioning if the prescribed authority considers that the lawyer is 'unduly disrupting' questioning.

282. The Law Council considers that these restrictions are extreme and go further than is reasonable and necessary to facilitate the efficient conduct of questioning and protect interests in security. Further, these restrictions inappropriately undermine the substance of a person's rights to effective legal assistance to understand and exercise their rights to challenge a warrant or aspects of its purported execution.

283. Further, the retention of these limitations in the re-designed questioning regime is incompatible with the view of the Committee in its 2017-18 review that a re-designed questioning warrant regime should include 'provisions consistent with those relating

[221] Crimes Act, s 3Q (receipts for things seized or moved); and Subdivision B of Division 4C of Part 1AA (procedures for the return of things seized).

[222] Cf Bill, Schedule 1, item 10, inserting proposed s 34D(8) (police must return a communication device that is confiscated at pre-questioning screening, if the person so requests after they have left the questioning place).

to legal representation in the ACC Act'[223] in which there are no equivalent restrictions.

284. In view of the proposal to confer power on ASIO to compulsorily question charged persons about the subject matter of their charges, the Law Council considers that it is particularly important for lawyers representing questioning warrant subjects to have a greater role in proceedings than is contemplated by the Bill and is currently provided for in the existing questioning regime. The Law Council also notes that the representation of a questioning warrant subject by a lawyer, who can be fully involved in the proceedings, could also assist in eliciting truthful and accurate responses from that person, and therefore accurate and credible intelligence.

285. The Law Council is particularly concerned by the following elements of the Bill, in terms of both their individual and cumulative impacts:[224]

Prohibitions on raising objections and cautioning clients during questioning

286. Proposed subsection 34FF(3) is an effective prohibition on a warrant subject's lawyer raising objections to irrelevant or improper questions, or cautioning their clients during questioning. For example, a lawyer may wish to object to a question on the basis it is outside the scope of the warrant, or is a leading question. A lawyer may also wish to caution their client that a particular question goes to the subject matter of a current or an imminent criminal charge against the client, before the client is compelled to answer that question, noting that proposed subsection 34GD(5) abrogates the privilege against self-incrimination.

287. The Law Council considers that effective legal representation requires a subject's lawyer to have a meaningful opportunity to participate in the process to ensure that questions are both lawful and fair.[225] The Law Council is also concerned that the restrictions imposed by proposed subsection 34FF(3) have the potential to impinge on a lawyer's professional obligation to act in the best interests of their client, especially when coupled with the power in proposed subsection 34FF(6) to remove a lawyer from questioning if the prescribed authority considers that the lawyer is causing an 'undue disruption'. This may result in the lawyer being faced with the choice between:

- upholding their professional responsibilities and contravening proposed subsection 34FF(3), and risking removal; or
- complying with the limitations in proposed subsection 34FF(3) by participating less fully in the questioning process, but being unable to discharge their professional obligation to act in the best interests of their client.[226]

Removal of lawyers for 'unduly disrupting' questioning

288. Proposed subsection 34FF(6) inappropriately confers a power on the prescribed authority to direct the removal of a lawyer for 'unduly disrupting' questioning, without

[223] PJCIS, 2018 Report, 82 at [3.162]. See also: ACC Act, s 25A(2) (representation at examination).

[224] These matters are additional to the concerns of the Law Council in relation to minor questioning warrants, in which lawyers are required to simultaneously perform the role of the minor's non-lawyer representative if a parent or guardian of the child are unable to be present at questioning. The Law Council has recommended the appointment of Independent Child Advocates to attend questioning under all minor questioning warrants.

[225] See further: Law Council of Australia, *Submission to the Independent National Security Legislation Monitor Inquiry into questioning and detention warrants, control orders and preventative detention orders*, (September 2012), 33-35.

[226] See further, professional conduct rules under the Legal Profession Uniform Law pertaining to the fundamental duties of lawyers to the court and the administration of justice, to act in the best interests of the client, and to avoid any compromise to their integrity and professional independence.

guidance on what constitutes 'undue disruption'.[227] There are no requirements for the prescribed authority to issue a prior warning to a person's lawyer, or to make such directions only as a last resort, having regard to the significant detrimental impact that a change of lawyer part-way through questioning could have on the subject.[228]

289. Further, breadth of the power to direct the removal of lawyers is particularly problematic in view of the fact that the role of lawyers for questioning warrant subjects is explicitly limited by proposed subsection 34FF(3) to seeking clarification of ambiguous questions and requesting breaks to give advice to their clients or address the prescribed authority.[229] This has the problematic result of making it possible for **anything** other than these interjections to be deemed to be a 'disruption' of questioning, and therefore potentially an 'undue' disruption that could warrant a direction for removal at the sole discretion of the prescribed authority.[230]

Findings of the former Parliamentary Joint Committee on ASIO, ASIS and ASD

290. Concerningly, the risk identified above appears to have materialised under the existing provisions of the regime. In 2005, the (then) IGIS gave evidence to the former Parliamentary Joint Committee on ASIO, ASIS and ASD (**PJCAAD**, which was the predecessor to the Committee) that, 'in practice, the prescribed authorities have interpreted section 34U [which corresponds to proposed s 34FF(3) in the Bill] fairly strictly, by not permitting any questions put to them by lawyers other than to clarify ambiguity'.[231] The (then) IGIS also gave evidence to the PJCAAD in 2005, that when warrant subjects sought to raise queries or concerns directly with the prescribed authority during questioning without the assistance of their lawyer, 'not surprisingly [they] can sometimes have difficulty in fully expressing their point of view'.[232]

291. The former PJCAAD also took classified evidence from lawyers representing questioning warrant subjects. The PJCAAD reported that 'the Committee has been told in evidence that lawyers and the subjects of the warrants have been excluded when a submission for an extension of time has been made and that a request for questioning to cease to allow for a complaint to be made to IGIS has been denied'.[233] The former PJCAAD recommended that 'individuals be entitled to make representations through their lawyer to the prescribed authority'.[234] The Law Council notes that this recommendation was never implemented fully, but rather only partially through provisions enabling the subject's lawyer to request an opportunity to address the prescribed authority during a break in questioning (which may be allowed or denied at the discretion of the prescribed authority).[235] The Bill proposes to retain

[227] Bill, Schedule 1, item 10, inserting proposed s 34FF(6).

[228] The Law Council also notes that the removal of a subject's lawyer in these circumstances could inappropriately influence an adult warrant subject's discretion to waive their right to contact another lawyer. That is, the warrant subject may form a view that having another lawyer would be futile, since they would be similarly liable to removal for doing no more than acting in the client's best interests. In the absence of guaranteed Commonwealth financial assistance, a warrant subject may be concerned that they are unable to afford a lawyer who would be legally restrained from actively protecting their client's interests during questioning.

[229] Ibid, inserting proposed s 34FF(3).

[230] See further: PJCHR, *Scrutiny Report 7 of 202*0 (June 2020), 59 at [2.88].

[231] Parliamentary Joint Committee on ASIO, ASIS and ASD, *Report on the Review of Division 3, Part III of the ASIO Act 1979 – Questioning and Detention Powers*, (November 2005), 50 at [3.22].

[232] Ibid, 50 at [3.21].

[233] Ibid, 50 at [3.22].

[234] Ibid, 51-52 at [3.28] and recommendation 5.

[235] ASIO Act, ss 35ZQ(7) and (8)

this provision in proposed subsections 34FF(2)-(5) and does not seek to implement the totality of the former PJCAAD's recommendation.

Approach taken in the Australian Crime Commission Act 2002 (Cth)

292. In contrast, the ACC Act takes a different approach to managing the conduct of ACIC's examinations. The ACC Act expressly provides that an examinee may be legally represented, and does not attempt to prescribe (and therefore limit) the role of lawyers for examinees in representing their clients at an examination. Rather, the ACC Act simply enacts a general offence in section 35 which applies to any person who obstructs or hinders an examiner in the conduct of an examination (including by disrupting an examination).[236] Further, the ACC Act includes a provision stating that examiners cannot give a direction to an examinee's legal representative which excludes them from an examination.[237]

The Committee's findings in its 2017-18 review

293. The Law Council notes that the Committee, in its 2017-18 review, considered that the existing provisions in the ASIO Act governing legal representation for questioning warrant subjects 'should be repealed and replaced with provisions consistent with those relating to legal representation in the ACC Act'.[238]

294. The Explanatory Memorandum seeks to justify the retention of the power to remove lawyers for 'unduly disrupting' questioning in proposed subsection 34FF(6) of the ASIO Act, contrary to the views of the Committee. It asserts that a disruption offence equivalent to that in s 35 of the ACC Act 'is not appropriate in the ASIO model' because ASIO's questioning warrants can be used 'to obtain critical and time sensitive national security information' in 'high risk situations'.[239]

295. However, the Law Council is concerned that the Explanatory Memorandum appears to contemplate that questioning warrants could **only** be issued in these circumstances, which is not supported by the breadth of the issuing criteria in proposed sections 34BA and 34BB. Nor does the Explanatory Memorandum provide any reasons as to why a generally applicable offence provision, such as that in section 35 of the ACC Act, would not be an adequate deterrent to a lawyer who is acting in accordance with their professional responsibilities in providing legal services. Similarly, the Explanatory Memorandum does not address the impact of the extreme limitations on the role of lawyers in proposed subsection 34FF(3) on the meaning of 'undue disruption' for the purpose of the power to direct a lawyer's removal from questioning in proposed subsection 34FF(6).

296. The Explanatory Memorandum does not identify the impact of the power to conduct post-charge questioning on the need for questioning warrant subjects to have full and effective legal representation, as is the case under the ACC Act for examinees. The Law Council considers that the ASIO Act should be amended to adopt the provisions of the ACC Act, and this will be particularly critical should the Committee be minded to support the inclusion of a post-charge questioning power in the ASIO Act that is modelled on the ACC Act.

[236] See also, ACC Act, s 34A(e) (disruption of an examination may also amount to a contempt of the ACC).
[237] ACC Act, s 25A(4)(a).
[238] PJCIS, 2018 Report, 82 at [3.162].
[239] Explanatory Memorandum, 90 at [478].

Recommendation 36 – removal of prescribed role of lawyers at questioning

- **Proposed subsection 34FF(3) of the ASIO Act (and related provisions) should be omitted from the Bill.**

Recommendation 37 – removal of discretionary power to remove lawyers

- **Proposed subsection 34FF(6) of the ASIO Act (and related provisions) should be omitted from the Bill and replaced with a generally applicable offence for disrupting questioning based on section 35 of the *Australian Crime Commission Act 2002* (Cth).**

Lack of transparency in the arrangements for 'appointed lawyers'

297. The Law Council is concerned that the Bill does not create transparent arrangements for establishing a pool of lawyers from which a prescribed authority may appoint a lawyer for a questioning warrant subject under the re-designed scheme (for example, if a person is subject to an immediate appearance requirement, or if a minor attends unrepresented, or a person's lawyer of choice is excluded or unable to attend within a reasonable time as determined by the prescribed authority).[240]

298. It will be important to ensure that the pool of lawyers is sufficiently broad, qualified, and diverse to meet the legitimate needs of warrant subjects. It would be desirable for lawyers to have expertise in criminal law, and specifically criminal defence work. There would also need to be appropriate mechanisms to prevent actual, perceived and potential conflicts of interest, including by reason of a lawyer's employment or their retention by the Commonwealth in other matters.

299. The Law Council is concerned that the Bill does not establish a scheme for the appointment of lawyers to a prospective pool or list, and the extrinsic materials do not provide any information about the intended approach.

300. In the interests of transparency and independence, the Law Council considers that the Bill should make explicit provision for these matters. This could be done by the conferral of a regulation-making power, with the ASIO Act prescribing the core parameters of that power, consistent with the approach to establishing a scheme of special advocates for certain control order proceedings under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).[241] The Law Council also considers that arrangements should be made for the provision of security awareness training for lawyers appointed to the pool of 'appointed lawyers' available to provide legal services to questioning warrant subjects.

Recommendation 38 – legal framework for the pool of 'appointed lawyers'

- **Proposed Subdivision F of new Division 3 of Part III of the ASIO Act should be amended to establish framework for the establishment of a pool of lawyers to act as 'appointed lawyers' for questioning warrant subjects who attend unrepresented, or whose chosen legal representative is unable to be present (including because they have been refused or removed).**

[240] Ibid, inserting proposed ss 34FB(2)(a), 34FC(2)(a) and 34FC(3)(a).

[241] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), Part 3A, Division 3, Subdivision C (special advocates in control order proceedings). See also: *National Security Information (Criminal and Civil Proceedings) Regulation 2015*, Part 3A (special advocates)

- **This should be in the form of a regulation-making power, as follows:**
  - **The regulations must make provision for:**
    - **the eligibility requirements (minimum level of experience, expertise in criminal defence work, and eligibility to obtain and maintain a security clearance sponsored by the Commonwealth);**
    - **requirement to ensure diversity in the pool or panel of lawyers;**
    - **a transparent and open appointment process;**
    - **fixed terms of appointment with specific grounds of removal (misbehaviour, incapacity, bankruptcy, conflicts of interest, or non-compliance without reasonable excuse with duties to disclose interests);**
    - **procedures for disclosures of interests and duties to avoid conflicts of interest;**
    - **remuneration arrangements; and**
    - **consultation on the proposed regulation, and periodic review of the regulation once it is in force.**
  - **The regulations must be subject to disallowance and sunsetting under the *Legislation Act 2003* (Cth).**

Restrictions on a person's lawyer of choice

301. The Law Council does not support the power of the prescribed authority to prohibit a questioning warrant subject being represented by their lawyer of choice during questioning.[242] The Law Council's primary position is that a person compelled to answer questions pursuant to a warrant must be entitled to access a lawyer of choice, without limitation, at all stages of the questioning process. Such access is integral to the ability of a warrant subject to effectively exercise their right to challenge the legality of the warrant and its execution.[243]

302. There are no such limitations in the ACC Act for the engagement of lawyers representing persons summonsed to attend ACIC examinations, notwithstanding that those examinations can be conducted in relation to serious and organised crime and security offences (including terrorism) that may also raise sensitivities in relation to tip-off and tampering with relevant information. Rather, the risks are managed via the enactment of disclosure offences and contempt provisions applicable to all persons, including an examinee's lawyer,[244] and the usual application of lawyers' professional conduct rules and their overarching professional duties and responsibilities as officers of the court.[245]

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[242] Bill, Schedule 1, item 10, inserting proposed ss 34F(4)-(5) of the ASIO Act.

[243] See further: Law Council of Australia, *Submission to the Independent National Security Legislation Monitor Inquiry into questioning and detention warrants, control orders and preventative detention orders*, (September 2012), 33-35; and Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011), 3 (principle 4 – Everyone should have access to competent and independent legal advice).

[244] ACC Act, s 25A(2)(a) (an examinee is permitted to be represented by a lawyer at an examination) and s 35(1)(b) (offence of disrupting an examination). See also: s 34A(e) (disruption is a contempt of the ACC).

[245] The PJCHR also made this point, as part of its observation that 'it is not clear that there is a pressing and substantial need for this proposed limitation on a person's choice of lawyer': PJCHR, *Scrutiny Report 7 of 2020* (June 2020), 58 at [2.85].

303. The extrinsic materials to the Bill do not provide an adequate explanation of why it would not be possible for the ASIO Act to adopt an equivalent approach to that in the ACC Act, and why the Bill does not implement the Committee's design principle in its 2017-18 review that the provisions governing legal representation in a re-designed compulsory questioning regime should be modelled on those of the ACC Act, including its specific view that the existing provisions of the ASIO Act governing legal representation 'should be repealed' rather than replicated in amending legislation as the Bill proposes to do.[246]

304. Further, while the Bill maintains the existing provision that creates a discretionary financial assistance scheme administered by the Attorney-General (proposed s 34JE), financial assistance isn't guaranteed. The Law Council considers that legal aid should be available to a subject to cover all reasonable expenses incurred arising from their legal representation.

Recommendation 39 – right of subject to access the lawyer of their choice and legal assistance funding

- **proposed subsections 34F(4) and (5) of the ASIO Act should be omitted;**
- **Commonwealth legal assistance funding should be available for all reasonable legal expenses incurred; and**
- **new funding should not be offset against existing legal assistance funding, or the funding of the federal courts or oversight bodies.**

Prohibitions and limitations on the ability of lawyers to access critical information

305. There are also limitations on the ability of a warrant subject's lawyer to see the entirety of the questioning warrant and underlying documentation (such as the statement of facts and grounds supporting the request).

306. In particular, proposed section 34FE enables the Director-General of Security to delete material from a questioning warrant as the Director-General considers necessary to avoid prejudice to security, the defence of the Commonwealth, the conduct of the Commonwealth's international affairs or the privacy of individuals.[247]

307. This provision also states that there is no entitlement for the subject's lawyer to access documents other than the warrant or variations (or written records of warrants issued or variations made orally).[248] This may limit the ability of a lawyer to ascertain the scope of authority under the warrant (including any specific conditions or limitations), and therefore their capacity to advise the subject about whether a particular question or other action purportedly done under the warrant (such as the seizure of records or things) is lawfully authorised.[249]

308. Further, where a questioning warrant is issued in respect of a security matter that comprises 'politically motivated violence' in the form of 'acts that threaten or endanger any person or class of persons specified by the Minister… by notice in

[246] PJCIS, 2018 Report, 82 at [3.162]: 'The Committee's view is that the existing provisions in the ASIO Act should be repealed and replaced with provisions consistent with those relating to legal representation in the ACC Act'. See further: Explanatory Memorandum, 90 at [474] (the note to proposed s 34FF(3) merely summarises the effect of the provision without justification) and 11-12 (the commentary in the human rights statement of compatibility which argue that the Bill is compatible with the right to a fair trial does not make any reference to the extreme limitations on the role that a questioning warrant subject's lawyer may play by reason of proposed s 34FF).

[247] Bill, Schedule 1, item 10, inserting proposed s 34FE(4).

[248] Ibid, inserting proposed s 34FE(6)(b).

[249] See also: PJCHR, *Scrutiny Report 7 of 2020* (June 2020), 60 at [2.89].

writing given to the Director-General',[250] proposed section 34FE may operate to prevent a lawyer from viewing the relevant Ministerial notice, in order to independently consider whether the purported questioning matter specified in the warrant was legally capable of being authorised under the warrant.

309. The Law Council considers that any restrictions on the ability of a warrant subject's lawyer to access information should be subject to an overriding duty to ensure that the lawyer is given access to sufficient information so that they can perform their professional responsibilities to act in the best interests of the client, including in providing advice to the client on their legal position in relation to the issuing and execution of the warrant.

Recommendation 40 – duty to give sufficient information to subject's lawyer

- **Proposed section 34FE of the ASIO Act should be amended to provide that a lawyer for a questioning warrant subject is entitled to be given sufficient information to advise their client on the validity of the questioning warrant and acts done under the purported authority of the warrant.**

Limitations in oversight provisions

310. While the Law Council is supportive of the broad design of oversight arrangements for the re-designed questioning warrant regime, there are several technical issues in the provisions of the Bill that may frustrate the effective operation of oversight.

Technical errors in references to the functions of the IGIS and Ombudsman

311. Schedule 1 to the Bill contains various provisions that make references to the performance of functions or duties, or exercises of powers, by integrity agency officials under the IGIS Act and the *Ombudsman Act 1976* (Cth) (**Ombudsman Act**). This includes provisions concerning the making of complaints to the IGIS or Ombudsman; the making of permitted disclosures of questioning warrant information to the IGIS or Ombudsman, or by officials of these agencies; and 'an avoidance of doubt provision' to prevent the amendments to the ASIO Act from impliedly modifying the statutory functions of IGIS and Ombudsman officials under other Acts.[251]

312. While the Law Council welcomes the intent of these provisions, it is concerned that they repeat a (now commonly made) technical error in naming individual enactments under which IGIS and Ombudsman officials perform functions or duties and exercise powers This may inadvertently and arbitrarily limit the protections conferred by the re-designed questioning warrant regime to the performance of functions or duties or the exercise of powers under a narrow sub-set of the legislation under which the IGIS and Ombudsman have functions, powers and duties.

313. IGIS and Ombudsman officials perform functions and duties and exercise powers under a range of enactments. In particular, they perform investigative and other functions under the *Public Interest Disclosure Act 2013* (Cth) (**PID Act**) that are relevant to the actions of Commonwealth officials exercising authority under

[250] ASIO Act, s 4 (subparagraph (d)(ii) of the definition of 'politically motivated violence').

[251] Bill, Schedule 1, item 10, inserting proposed ss 34BH(2), 34CB(2), 34DC(1), 34GF(5)(a), 34H, and 34JA.

questioning warrants.[252] It is also possible that future Acts may be passed that confer further, relevant functions, duties and powers on these integrity agencies.

Recommendation 41 – references to functions of IGIS and Ombudsman

- **Proposed sections 34BH(2), 34CB(2), 34DC(1), 34GF(5)(a), 34H, and 34JA of the ASIO Act should be amended to remove the references to the functions, duties and powers of the IGIS and Ombudsman under named Acts. That is, these provisions should refer generally to the functions, duties and powers of these agencies and their officials, without limitation to individual statutory sources.**

Omission of Public Interest Disclosures from the 'permitted disclosures'

314. A further issue is that the 'permitted disclosures' in relation to questioning warrant information in proposed subsection 34GF(5) of the ASIO Act do not cover the making of public interest disclosures (**PIDs**) under the PID Act about the conduct of an ASIO or AFP official who is exercising authority under the questioning warrant, or who is assisting another official who is authorised to exercise authority under the warrant.

315. For example, an official of ASIO or the AFP may notice unlawful or inappropriate conduct by another official exercising authority under a warrant, or by an assistant. As the first mentioned officials are 'public officials' under the PID Act,[253] they may wish to pursue their concern via the making of PID.

316. The PID Act provides that a PID can be made to an 'authorised internal recipient'. This includes designated officers within ASIO or the AFP, as well as the IGIS (about the conduct of ASIO personnel) or the Ombudsman (about the conduct of AFP personnel).[254] If the Law Council's recommendation 41 was implemented, this would resolve the problem in relation to PIDs made to the IGIS or Ombudsman. However, there would remain a gap in relation to PIDs made to designated 'authorised internal recipients' within ASIO or the AFP.

317. While the PID Act contains immunity provisions, there is a potentially complex and uncertain legal exercise in determining whether the immunity in the PID Act or the prohibition in the ASIO Act should prevail. The existence of uncertainty or the absence of clear direction on the face of the ASIO Act may cause at least a practical disincentive to agency officials considering making PIDs about the conduct of other officials in executing a questioning warrant. The Law Council considers that the permitted disclosure provisions in proposed subsection 34GF(5) of the ASIO Act should make explicit that it is lawful and appropriate for public officials to make PIDs about disclosable conduct which concerns the execution of a questioning warrant.

Recommendation 42 – recognition of PIDs as 'permitted disclosures'

- **Proposed subsection 35GF(5) of the ASIO Act should be amended to provide that the making of a public interest disclosure to an authorised internal recipient under the *Public Interest Disclosure Act***

[252] PID Act, s 8 (IGIS and Ombudsman are included in the definition of an 'investigative agency' with powers to conduct PID investigations under Part 3 of the Act). See also ss 62-63 (educative and assistive functions of IGIS and Ombudsman in relation to the PID Act). ASIO officials and police members exercising authority under a questioning warrant are public officials for the purpose of the PID Act, whose conduct may be the subject of a PID: s 29 (disclosable conduct) and s 69 (public official).

[253] PID Act, ss 69 and 70 (definition of public official).

[254] PID Act, s 34, table items 1 and 2 (definition of authorised internal recipient).

2013 **(Cth) is a 'permitted disclosure' for the purpose of the disclosure offences in proposed subsections 34GF(1) and 34GF(2).**

Subjection of IGIS officials to police powers of seizure at places of questioning

318. Under proposed section 34D of the ASIO Act, IGIS officials who are attending questioning would be subject to police powers of seizure in relation to their personal communications devices, as a condition of their entering the place of questioning to perform their oversight functions. In contrast, ASIO officials and police are expressly excluded from powers of seizure in relation to their communications devices at places of questioning, even if they are not exercising authority under a warrant.[255]

319. The Law Council considers it would be preferable for IGIS officials to be removed from the seizure provisions, and for their ability to take communications devices into places of questioning to be governed by their obligations under the Commonwealth Protective Security Policy Framework. This would be compatible with the independence of the IGIS, and the statutory rights of IGIS officials to enter places of questioning, to observe the conduct of questioning, and raise any concerns.

320. For example, it may be necessary for an IGIS official attending questioning to contact the Inspector-General to discuss how a complaint made to the IGIS official should be handled, including any representations to be made to the prescribed authority. Subjecting IGIS officials to a power of seizure in relation to their communications devices could inappropriately interfere with the performance of this important 'real time' oversight function. This risk should be removed from the Bill.

Recommendation 43 – exemption of IGIS officials from seizure powers

- **Proposed paragraph 34D(11)(a) of the ASIO Act should be amended to provide that IGIS officials are, like ASIO officials and police officers, exempt from the powers of seizure in relation to their communications devices as part of pre-questioning screening.**

Absence of legal basis for IGIS officials to observe mandatory assistance orders

321. While IGIS officials have an explicit power to attend questioning and apprehension,[256] there is no clear legal basis for an IGIS official to observe the execution by ASIO of a mandatory assistance notice under section 34AAA of the ASIO Act against a person who is in attendance under a questioning warrant. For example, if ASIO seizes the phone of a questioning warrant subject (or has obtained a warrant with a condition requiring the warrant subject to produce their phone, tablet or computer when they attend for questioning) they may obtain a mandatory assistance order to require the person to provide their passcode or fingerprint to unlock the device.

322. The Law Council notes that the Office of the IGIS raised this issue in October 2018, in its submission to the Committee on the legislation enacting section 34AAA of the ASIO Act, the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018.[257] This problem was not remedied by amendments to the latter Bill in 2018, and is now perpetuated by the present Bill.

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[255] Bill, Schedule 1, item 10, inserting proposed ss 34D(5) and (11).

[256] Ibid, inserting proposed s 34JC. See also, items 25 and 26 (consequentially amending the IGIS Act).

[257] IGIS, *Submission to the Parliamentary Joint Committee on Intelligence and Security Inquiry into the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 201*8, (October 2018), 65.

Recommendation 44 – statutory basis for IGIS officials to attend s 34AAA orders

- **The Bill should be amended to confer on IGIS officials an express right to attend the execution of a mandatory assistance order under section 34AAA of the ASIO Act (which is proposed to be renumbered section 34AAD by the Bill). This should include circumstances in which ASIO is executing a mandatory assistance order against a questioning warrant subject at the place of questioning, in relation to an item that has been seized from, or compulsorily produced by, the warrant subject.**

Exclusion of State and Territory police oversight bodies as 'complaints agencies'

323. The Bill confers a regulation-making power to exclude **any or all** State and Territory police oversight bodies from the definition of a 'complaints agency' to which a questioning warrant subject may disclose warrant-related information for the purpose of lodging a complaint about their treatment by State or Territory police members exercising authority under a questioning warrant.[258] The Bill retains this provision in the existing questioning warrant regime.[259] Presently, no State or Territory oversight bodies appear to have been excluded by regulation.

324. There are no statutory conditions or criteria for excluding a State or Territory police oversight body from the definition of a 'complaints agency', which may lead to arbitrary exclusions, and consequent limitations in the effectiveness of oversight in relation to State and Territory police who may exercise significant powers (such as apprehension, including the use of force, and search and seizure). It creates a risk that a person who is aggrieved by the conduct of a State or Territory police officer exercising authority under the warrant may not have the ability to make a complaint to an appropriate oversight body, and may commit a disclosure offence for doing so.

325. In the absence of any explanation for the inclusion of this power, and the absence of any limitations on the grounds of its exercise, the Law Council is concerned that it is an inappropriate delegation of legislative power and supports its removal. If State and Territory police are to be involved in the execution of questioning warrants, they should be subject to the usual oversight mechanisms that govern their conduct.

Recommendation 45 – removal of power to exclude complaints agencies

- **The definition of a 'complaints agency' in proposed section 34A of the ASIO Act should be amended to remove the regulation-making power to exclude any or all State and Territory police oversight bodies.**

Inappropriate delegations of legislative power

326. The Law Council is concerned that the Bill confers overly broad powers on the Executive to make regulations and legislative instruments in relation matters that are critical to the operation of the questioning regime.

[258] Bill, Schedule 1, item 10, inserting proposed s 34A (definition of 'complaints agency'). See also: proposed ss 34GF(5)(a)(v) and (f)(vii) (permitted disclosures to, and by, officials of a complaints agency).
[259] ASIO Act, s 34A (definition of 'complaints agency').

Administrative expansion of the definition of 'politically motivated violence'

327. The Bill proposes to expand the relevant questioning matters for both adult and minor questioning warrants to cover 'politically motivated violence' within the meaning of that term in section 4 of the ASIO Act.

328. The Law Council notes that subparagraph (d)(ii) of the definition of 'politically motivated violence' in section 4 of the ASIO Act covers 'acts that threaten or endanger any person or class of persons specified by the Minister … by notice in writing given to the Director-General'.[260] The inclusion of this aspect of the definition of politically motivated violence within the prescribed questioning matters may have several adverse and potentially unintended consequences, which are outlined below.

Administrative variation of the scope of questioning matters

329. The inclusion of matters of politically motivated violence within the meaning of subparagraph (d)(ii) of that definition of that term means that the scope of the compulsory questioning power in relation to politically motivated violence may be varied administratively, without any Parliamentary visibility or control.

Inability of warrant subjects and their lawyers to access necessary information

330. The limitations in the Bill on the ability of lawyers and warrant subjects to access information relating to warrants that is separate to the warrant instrument itself may make it impossible for a warrant subject and their lawyer ascertain whether questioning is lawfully authorised by the relevant warrant.[261]

331. For example, the warrant subject's lawyer would have no right to see the accompanying statement of facts and grounds on which the application and issuing decision were based. If the questioning warrant was issued in relation to politically motivated violence against certain persons, the lawyer would also have no right to see the Minister's notice under subparagraph (d)(ii) of the definition of politically motivated violence prescribing the relevant persons.

Recommendation 46 – coverage of subparagraph (d)(ii) of the definition of 'politically motivated violence' in the compulsory questioning regime

- **The definitions of 'adult questioning matter' and 'minor questioning matter' in section 34A of the ASIO Act should be amended to provide that 'politically motivated violence' for the purpose of compulsory questioning does not include matters within subparagraph (d)(ii) of the definition of 'politically motivated violence' in section 4 of the ASIO Act. (That is, acts that threaten or endanger persons who are listed in a written notice given by the Minister for Home Affairs to the Director-General of Security.)**

Prohibitions, limitations and conditions on lawyers' access to information

332. A further area of overbreadth in the delegation of legislative power is the proposed conferral of a regulation-making power to prohibit or regulate the access of a warrant subject's lawyer to security classified information that is relevant to their client's questioning warrant, where the lawyer is acting for the warrant subject connection

[260] ASIO Act, s 4 (subparagraph (d)(ii) of the definition of politically motivated violence).

[261] Bill, Schedule 1, item 10, inserting proposed s 34FE(6)(b). See also: proposed s 34FH.

with proceedings for a remedy relating to the issuing of the warrant, or the warrant subject's treatment under the warrant.[262]

333. Problematically, the Bill does not prescribe any limitations on the nature of the prohibitions or conditions that may be applied to a lawyer's access to such information, or the grounds for doing so. For example, the Bill contains no provisions that would limit the regulation-making power to imposing prohibitions, conditions or limitations on access that are necessary for, and proportionate to, the purpose of protecting sensitive information from disclosure that would cause harm to the legitimate national security interests of the Commonwealth.[263]

334. Further, the Bill proposes to keep in force the present regulations[264] made under the existing regulation-making power in the ASIO Act[265] to limit access to security classified information by warrant subjects' lawyers.[266] The extremely broad terms of the current regulations highlight the risks arising from the overbreadth in the terms of the primary legislation conferring the delegation of legislative power.

335. In particular, the current regulations are broad enough to enable the Secretary of the Department of Home Affairs to impose conditions or limitations that would effectively frustrate a warrant subject's ability to exercise their right to a legal remedy by doing one or more of the following:

- requiring the person's lawyer to hold **any level** of security clearance the Secretary considers appropriate, without requiring any connection with the level of security clearance required under the Commonwealth Protective Security Policy Framework to access information of the relevant classification. (For example, the Regulations could authorise the Secretary to impose a condition requiring a warrant subject's lawyer to hold a 'top secret positive vetting' clearance to access a document relevant to the warrant that is only classified as 'secret');[267]
- imposing **any conditions** on a warrant subject lawyer's access to, or dealings with, the relevant documents that the Secretary deems appropriate, which can include, but are not limited to, conditions relating to the use, handling, storage or disclosure of the information. There is also no requirement for any conditions pertaining to the lawyer's dealings with the information to be imposed for the purpose of protecting classified or sensitive information.

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[262] Bill, Schedule 1, item 10, inserting proposed s 34FH.

[263] An example of incorporating the requirements of the PSPF into law is found in section 90.5 of the *Criminal Code Act 1995* (Cth). This provision defines 'security classification' for the purpose of foreign interference and official secrecy offences by reference to Commonwealth policy as in force from time-to-time, provided that the classifications assigned in the policy are based on prescribed degrees of harm to the national interest that would be sustained due to unauthorised disclosure, and that a record or piece of information is classified in accordance with that policy. The provision also confers a regulation-making power to specify other classification markers that may be introduced in future under amendments to the PSPF, but that power is subject to a condition that the Governor-General must be satisfied that the regulations are not inconsistent with the applicable Commonwealth policy framework. The Law Council submits that this approach would apply an appropriate limitation on regulations made for the purpose of proposed s 34FH of the ASIO Act that prohibit or regulate access by a lawyer to security-related information, so that the requirements of the regulations must be consistent with, and go no further than, the requirements of the PSPF.

[264] *Australian Security Intelligence Organisation Regulation 2016*, cl 8.

[265] ASIO Act, section 34ZT.

[266] Bill, Schedule 1, item 16(2) (savings provision).

[267] Australian Security Intelligence Organisation Regulation 2016, cl 8(2)(a): access may be given to the lawyer if they have been given a security clearance in relation to the information '**at the level considered appropriate** by the Secretary of the Department'.

This could potentially allow the Secretary to set conditions that have no rational connection with the lawyer's dealings with the information; or[268]

- denying a warrant subject's lawyer access to relevant information on for **any or no reason**, even if the Secretary is satisfied that the disclosure to the lawyer would not be prejudicial to security, and the lawyer holds the necessary level of security clearance, has given the necessary undertakings in relation to their dealings with the information, and has installed the necessary physical security infrastructure at their premises. [269]

336. The evident overbreadth in the existing regulations is compounded by the fact that decisions made under the ASIO Act (or its regulations) are not subject to statutory judicial review.[270] In view of the absence of appropriate limitations on the regulation making power, and the consequent overbreadth of the current Regulations, the Law Council considers that the existing regulations should not continue in force under the new questioning regime. The regulation making power should also be amended to narrow its scope, so that new regulations made for the purpose of the re-designed questioning regime will not suffer from the overbreadth of the current Regulations.

Recommendation 47 – removal of savings provisions for s 34ZT regulations

- **The Bill should be amended to omit the savings provision in subitem 16(2) of Schedule 1, so that current regulations made under existing section 34ZT of the ASIO Act will not apply to the re-designed questioning regime as regulations made for the purpose of proposed section 34FH. Rather, new regulations should be made under the latter section for the purpose of prohibiting or regulating access by a warrant subject's lawyer to information about a questioning warrant.**

Recommendation 48 – regulation-making power regarding access to information

- **Proposed section 34FH of the ASIO Act should be amended to apply further conditions on the regulation-making power to prohibit or regulate access to information by a warrant subject's lawyer. The section should provide that the regulations may only impose prohibitions or other conditions or requirements that are:**
  - **necessary for, and proportionate to, the purpose of protecting information, access to which is controlled or limited on national security grounds; and**
  - **compliant with Commonwealth protective security policy as in force from time-to-time (for example, the Commonwealth Protective Security Policy Framework). That policy must be freely available to the public or made available to an individual lawyer who makes a request for access to information.**

[268] *Australian Security Intelligence Organisation Regulation 2016*, cl 8(3): access may be given to the lawyer 'subject to **any conditions** that the Secretary of the Department considers appropriate, **including [but not limited to]** conditions relating to the use, handling, storage or disclosure of the information'.

[269] *Australian Security Intelligence Organisation Regulation 2016*, cl 8(2) and (4). Subclause 8(2) provides that the Secretary of the Department **may, but is not required,** to give the lawyer access to the information if they hold a security clearance at the level considered appropriate by the Secretary, and if the Secretary is satisfied that giving the lawyer access to the information would not be prejudicial to the interests of security. Further, subclause 8(4) provides that nothing in clause 8 entitles a lawyer who has been given a security clearance to be given access to the relevant information.

[270] ADJR Act, Schedule 1.

Retention and destruction obligations for questioning material

337. While the Law Council is supportive of the obligation on the Director-General of Security to cause the destruction of any information obtained under a questioning warrant if satisfied it is no longer relevant to security,[271] there is no obligation on the Director-General to periodically cause the proactive review of information in ASIO's holdings to assess its relevance, or continued relevance, to security.

338. The Law Council considers it important that the Bill includes an obligation for proactive, periodic review of information obtained under a questioning warrant, to ensure that sensitive personal information about the warrant subject (and any other person) is not retained for longer than is necessary. Such an obligation would be particularly important to exclude the possibility that information obtained under a questioning warrant could be retained indefinitely, unless and until ASIO decided to conduct a review of its relevance that could enliven the deletion obligations.

339. Given that questioning warrants may conceivably generate significantly smaller volumes of data than ASIO's technical intelligence collection activities, such as accessing telecommunications data, the Law Council considers it unlikely that a periodic review obligation would impose an unduly onerous burden on ASIO, as was recently suggested in the context of proposals for periodic review and deletion requirements for electronic communications information in ASIO's holdings.[272]

Recommendation 49 – periodic review of questioning material held by ASIO

- **Proposed section 34HC of the ASIO Act should be amended to require the Director-General of Security to cause the periodic review of questioning warrant material in ASIO's holdings to assess whether it is, or remains, relevant to security; and therefore determine whether the destruction obligation applies or whether the material may be retained.**

Offences in relation to questioning warrants

Parity of maximum penalties

340. Proposed section 34GE of the ASIO Act will retain the offence in the existing questioning regime for officials exercising authority under a questioning warrant who knowingly contravene a safeguard provision, including the present maximum penalty of two years' imprisonment.

341. In contrast, the maximum penalties for the offences in proposed section 34GD for questioning warrant subjects who fail to appear or give information in accordance with a questioning warrant, or who give false or misleading information, or who tamper with relevant records or things, will remain as five years' imprisonment.

342. The Law Council continues to support the views and recommendations of the first INSLM, Bret Walker SC, who considered that each offence involved an equal degree of culpability and, accordingly, their maximum penalties should be aligned. The first INSLM supported alignment of the maximum penalty at two years' imprisonment.[273]

[271] Ibid, inserting proposed s 34HC.

[272] Explanatory Memorandum, Telecommunications Legislation Amendment (International Production Orders) Bill 2020, [62] and [456].

[273] Bret Walker SC, Independent National Security Legislation Monitor, *Annual Report 2012*, (December 2012), 80-82 and recommendations IV/4 and IV/5.

343. The Law Council notes that maximum penalties for various Commonwealth disclosure offences have increased significantly since the first INSLM recommended a consistent, two-year maximum penalty in December 2012. Consideration could therefore be given to a maximum penalty of five years' imprisonment for both offences.

344. Notwithstanding the particular quantum selected, the Law Council considers that the Parliament should not send a signal to officials exercising authority under a questioning warrant that their intentional or knowing contravention of statutory safeguards is, in any way, less culpable than the conduct of a warrant subject who contravene their obligations under the warrant. This would be the effect of retaining a lower maximum penalty for the offence of contravening safeguards in proposed section 34GE than the offences in proposed section 34GD for warrant subjects who fail to comply with their obligations.

Recommendation 50 – parity of maximum penalties in proposed ss 34GE & 34GD

- **Proposed section 34GE of the ASIO Act should be amended to provide that the maximum penalty for the offence of contravening safeguards by persons exercising authority under a warrant is five years' imprisonment (not two years' imprisonment).**

Offences applying to warrant subjects

345. Proposed subsection 34GD(3) of the ASIO Act creates an offence of failing to give any information or producing any record or thing in response to a request from ASIO in accordance with a questioning warrant. The offence is subject to an exception in proposed subsection 34GD(4) if the subject does not have the information or does not have possession or control of the record requested.

346. However, it is the defendant (the warrant subject) who bears the evidential burden in relation to the exception. This is a reversal of the usual burden upon the prosecution to discharge the legal and evidential burdens. The Explanatory Memorandum seeks to justify the reversal of the evidential burden in the following terms:

> *In accordance with subsection 13.3(3) of the Criminal Code, it is the defendant who must adduce evidence that suggests a reasonable possibility that he or she does not have the information requested. The evidential burden has been placed on the defendant because the matter is peculiarly within the defendant's knowledge and would be too difficult for the prosecution to prove.*[274]

Allocation of the evidential burden

347. The Law Council does not agree with the suggestion in the Explanatory Memorandum that the relevant matter is peculiarly within the defendant's knowledge and would be too difficult for the prosecution to prove.

Availability of evidence to the prosecution

348. The suggestions advanced in the Explanatory Memorandum appear to overlook the likelihood that the prosecution would have ready access to evidence, in the form of the intelligence informing ASIO's belief that the person had knowledge of the information sought, or had possession or control of the record or thing required to be produced. Given that such intelligence would have motivated ASIO to request

[274] Explanatory Memorandum, 99 at [537].

disclosure or production in its warrant request made to the Attorney-General, the statement of facts and grounds accompanying the warrant request would likely set out the factual basis for ASIO's belief that the person possessed the information, record or thing.

349. The prosecution would also have access to evidence in the form of the intelligence or other facts underlying ASIO's belief that the person dishonestly responded to a question that the information was not within their knowledge, or gave a dishonest response that the records or things they were required to produce under the warrant were not within their possession or control.

Difficulty for, and prejudice to, the defendant

350. Conversely it may be extremely difficult, and potentially impossible, for a defendant to discharge the evidential burden – that is, to adduce or point to evidence suggesting a reasonable possibility that the information was not within their knowledge, or that the record or thing was not within their possession or control. In practice, these matters would require the defendant to essentially 'prove a negative' in relation to their own state of mind.[275] It is easily conceivable that such evidence may not exist, as a defendant may only be able to make a bare statement about their subjective state of mind.

Re-framing the exception as an element of the offence

351. The Law Council considers that if ASIO asks a warrant subject a question or requests the production of a record or a thing under a questioning warrant, then ASIO should have intelligence-based reasons for believing that the information is in the person's knowledge or the record or thing is in the person's possession or control.

352. Accordingly, and in view of the potential for significant prejudice to the warrant subject, the evidential onus should not be on the defendant in relation to the fact that the information was not in their knowledge, or the record or thing was not in their possession or control. The exception in proposed subsection 34GD(4) should be re-framed as an element of the offence in proposed subsection 34GD(3).

353. The Law Council notes that the offence in the ACC Act of failing to answer a question does not impose an evidential burden on the defendant.[276] Similarly, the offence in the ACC Act of giving false or misleading information in relation to a material particular applies to persons who knowingly gave false or misleading information, and there is no imposition of an evidential burden on the defendant to establish that they lacked knowledge.[277]

Recommendation 51 – exception to the disclosure offence in s 34GD(4)

- **Proposed section 34GD of the ASIO Act should be amended to re-frame the matter in the exception in proposed subsection 34GD(4) as an element of the offence in proposed subsection 34GD(3). The prosecution should be required to prove that:**
  - **there were reasonable grounds on which ASIO believed the warrant subject had the relevant information in their knowledge,**

[275] The Senate Standing Committee for the Scrutiny of Bills also made this observation: Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2020* (June 2020), 9 at [1.36]-[1.37].

[276] ACC Act, s 30(2).

[277] Ibid, s 33.

or had possession or control of the relevant record or thing at the material time; and

- **the warrant subject intentionally failed to comply with the requirement in the warrant for disclosure or production.**

Reporting on questioning warrants

Reporting to the Attorney-General on individual questioning warrants

354. The Law Council welcomes the retention of the requirement in proposed section 34HA of the ASIO Act for the Director-General to provide a report to the Attorney-General on each questioning warrant within three months of the warrant's expiry.

The need for breach reporting on questioning warrants

355. The Law Council is concerned that there is no requirement for ASIO's individual warrant reports to inform the Attorney-General of any breaches of applicable legal requirements, such as any instances in which ASIO exceeded the limits of its authority under a warrant; contravened a safeguard in relation to the humane treatment of warrant subjects; contravened a direction of the prescribed authority; or contravened a requirement in the Statement of Procedures for Questioning or the ASIO Guidelines.[278]

356. The Law Council considers that mandatory reporting to the Attorney-General on these compliance issues is necessary to ensure appropriate Ministerial accountability in relation to the execution of individual warrants. Such reporting is also necessary to inform the future decision-making of the Attorney-General about the issuing of questioning warrants – including decisions about imposing particular conditions or limitations to help prevent the repetition of any previous compliance issues.

357. The inclusion of a breach reporting requirement in individual warrant reports may also assist the IGIS in focusing their oversight of questioning warrants – including in identifying and addressing the causes of reported breaches, and assessing whether individual breaches across multiple warrants are symptomatic of systemic issues.

Recommendation 52 – breach reporting on questioning warrants

- **Proposed section 34HA of the ASIO Act should be amended to require the Director-General's warrant reports to the Attorney-General to give details of its compliance with the limits of authority under the warrant and the requirements of Part 3 of Division 3 of the ASIO Act.**

Annual reporting requirements on questioning warrants

358. The Law Council welcomes the retention in the Bill of public annual reporting requirements on ASIO's use of questioning warrants. These reports must include: statistical information on warrant requests and warrants issued (including a breakdown of oral and written requests); the number of times persons were apprehended; the number of hours each person appeared for questioning and the total number of hours of all appearances; and the number of times each prescribed authority had persons appear for questioning before them.[279]

[278] Bill, Schedule 1, item 10, inserting proposed s 34HA(1) (matters that must be included in questioning warrant reports).

[279] Ibid, item 11, inserting new s 94(1) of the ASIO Act.

The need for public reporting on additional matters

359. The Law Council considers that these reports should provide further information to enable the effective scrutiny of an expanded questioning regime. In particular, the Law Council considers that ASIO's public annual reports should also be required to include specific information about the operation of the new or expanded measures conferred under the re-designed questioning regime, as recommended below.

360. The Law Council further recommends that, if the restrictions on the appointment and involvement of lawyers for warrant subjects are to be retained, ASIO's unclassified annual reports should provide statistical information about the exercise of these powers (as detailed in the recommendation below). Information about the frequency of use of these provisions will assist in scrutinising their continued appropriateness.

Recommendation 53 – requirements for public annual reports

- **New subsection 94(1) of the ASIO Act (item 11 of Schedule 1) should be amended to require ASIO's unclassified annual reports on questioning warrants to provide information about the following, additional matters:**
  - **a breakdown of the number of adult and minor questioning warrants issued (as recommended above);**
  - **the number of questioning warrants issued with immediate appearance requirements;**
  - **whether an IGIS official attended for questioning under each warrant (including a breakdown of the attendance or otherwise of IGIS officials at questioning under warrants with an immediate appearance requirement);**
  - **the number of times police exercised their powers of search and seizure in connection with apprehension;**
  - **the qualification of each prescribed authority, as part of the requirement to identify the number of times each prescribed authority had persons appear before them for questioning (namely, a retired judge, or a Presidential or Deputy Presidential AAT member, or a lawyer of 10 years' standing if the Law Council's preferred option in recommendation 27 is not adopted);**
  - **the number of times a lawyer for a warrant subject was directed to be removed from questioning (if this power is retained, contrary to the recommendations of the Law Council); and**
  - **the number of times a prescribed authority issued a direction prohibiting a warrant subject from contacting their first lawyer of choice (if this power is retained, contrary to the recommendation of the Law Council).**

Administrative guidance

Statement of Procedures for Questioning

361. The Law Council welcomes the retention of the requirement for a Statement of Procedures for Questioning to be in force as a pre-condition to exercise by the Attorney-General of the power to issue an adult or a minor questioning warrant.[280]

362. The Law Council also welcomes the requirement for the Statement of Procedures to be the subject of consultation with the IGIS and AFP Commissioner, and approval by the Attorney-General before they are issued (noting the particular responsibilities of the Attorney-General as First Law Officer and responsible Minister for integrity policy and human rights).[281] The Law Council further welcomes the status of the Statement of Procedures as a legislative instrument,[282] which will facilitate its accessibility and help ensure certainty about its currency.

363. However, the Law Council is concerned about the following matters:

- the absence of minimum requirements for the contents of the Statement of Procedures;
- the absence of mechanisms to ensure the currency and ongoing appropriateness of the Statement of Procedures, via a mandatory periodic review provision;
- the absence of mechanisms to ensure that adequate stakeholder consultation is undertaken on the initial Statement of Procedures and any subsequent amendments, including as part of periodic reviews; and
- the exemption of the Statement of Procedures from Parliamentary disallowance.

Statutory requirements for the contents of the Statement of Procedures

364. The Law Council supports the requirement that a Statement of Procedures for Questioning must be in force as a condition to the issuing of a questioning warrant under proposed sections 34BA and 34BB. However, the Law Council is concerned that there are no statutory requirements for the minimum matters that these statements must address. The Law Council supports amendments to proposed section 34AF to include a prescription of minimum requirements (detailed below).

365. This requirement will provide a stronger safeguard than the exercise of an unguided executive discretion in the making and approval of the Statement of Procedures. It will provide clear benchmarks for the assessment of the Statement of Procedures, and will offer a stronger assurance that the Statement of Procedures will, at all times, provide comprehensive protections for warrant subjects.

Problems in placing sole reliance on the beneficial exercise of executive discretion

366. Presently, the absence of a statutory requirement for the Statement of Procedures to address certain core or minimum matters makes the inclusion of adequate rights protection measures dependent on the beneficial exercise of executive discretion. This is problematic, given that the commentary Explanatory Memorandum indicates that the Government has placed significant reliance on the anticipated contents of

[280] Ibid, item 10, inserting proposed ss 34AF, 34BA(1)(e) and 34BA(1)(f) of the ASIO Act.
[281] Ibid, inserting proposed s 34AF(2)-(5) of the ASIO Act.
[282] Ibid, inserting proposed s 32AF(6) of the ASIO Act.

the Statement of Procedures as a key basis for arguing that the re-designed questioning regime is compatible with Australia's core human rights obligations.

367. For example, in relation to the prohibition on cruel, inhuman or degrading treatment or punishment,[283] and the right to humane treatment in detention,[284] the Explanatory Memorandum states:

> *The Statement of Procedures issued under [proposed] section 34AF and made in consultation with the Inspector-General of Intelligence and Security (IGIS) and the Australian Federal Police Commissioner, sets out a number of requirements in relation to the humane treatment of people subject to questioning warrants. These include requirements to ensure the health and welfare of people while in custody (including while being transported), to ensure that the manner of questioning is humane and courteous, and that people are offered appropriate breaks in questioning (30 minutes after every four hours of continuing questioning).*[285]

368. In the absence of a statutory requirement for the Statement of Procedures, as in force from time-to-time, to always address these matters, the statement in the Explanatory Memorandum represents an expression of mere anticipation about the way in which an unguided executive discretion might be exercised from time-to-time in making the relevant instrument. Placing reliance on the potential exercise of discretion is not an acceptable substitute for the creation of a genuine safeguard, in the form of a legal obligation.

369. More problematically, the above statement in the Explanatory Memorandum appears to assume that the contents of the present Statement of Procedures (made under existing section 34C of the ASIO Act)[286] provide some form of guarantee that those matters will be addressed in all future statements made under proposed section 34AF. However, the savings provisions in the Bill do not preserve the existing Statement of Procedures, which will sunset with the existing provisions of Division 3 of Part III.[287] In the result, if the Bill is passed, then a new Statement of Procedures will need to be made under proposed section 34AF, and the latter provision does not prescribe any legal requirements for its contents.

370. The Law Council is of view that, if there is a policy intention for a new Statement of Procedures – and all future iterations of that instrument – to include at least the matters addressed in the present instrument, this must be guaranteed by a statutory prescription of the minimum contents of the Statement of Procedures.

Core matters that must be addressed in the Statement of Procedures

371. The Law Council considers that the ASIO Act should require the Statement of Procedures, as in force from time-to-time, to address the following matters:

- procedures for questioning children and persons with disabilities;

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[283] Article 7, *International Covenant on Civil and Political Rights,* [1980] ATS 23 (done at New York, 16 December 1966) (**ICCPR**); Articles 2 and 16 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, [1989] ATS 21 (done at New York, 10 December 1984) (**CAT**).

[284] Article 10, ICCPR.

[285] Explanatory Memorandum, 7 at [19].

[286] *Statement of Procedures – warrants issued under Division 3 of Part III, Australian Security Intelligence Organisation Act 1979*, 16 October 2016.

[287] Bill, Schedule 1, items 14-16 (these savings provisions deal only with pre-existing warrants and requests, the appointment of prescribed authority and certain regulations for the purpose of permitted disclosures and lawyers' access to information).

- if the Law Council's recommendation 11 for an Independent Children's Advocate is implemented, arrangements for their appointment, attendance and performance of functions in relation to a minor questioning warrant;
- notifying warrant subjects of the warrant, and explaining its effect to them and their rights and obligations under the warrant;
- apprehension (including the use of force and the exercise of powers of search and seizure);
- transportation to the place of questioning (including the provision of facilities for the person to contact the IGIS or the Ombudsman to make a complaint);
- the conduct of pre-questioning screening, search and seizure;
- the minimum requirements for the questioning premises (including compliance with accessibility standards, proximity to the person's usual place of residence, the availability of natural light and appropriate temperature control);
- the minimum requirements for facilities at the place of questioning for a warrant subject to contact a lawyer and obtain legal advice (without the monitoring of confidential lawyer-client communications), contact other permitted persons, and make complaints to the IGIS or Ombudsman;
- the manner and conduct of questioning (including requirements about the manner of addressing the questioning warrant subject, and scheduled breaks);
- measures to ensure the health and welfare of persons being questioned (including access to bathroom and personal hygiene facilities; the provision of drinking water and appropriate sustenance for a person's dietary, nutritional and religious or cultural needs; physical and mental health care; and appropriate places for the warrant subject to rest and, if applicable, undertake religious practice or study for their course of education during breaks);
- arrangements for access to information by questioning warrant subjects' lawyers (before, during and after questioning) including the warrant; and
- guidance to the prescribed authority on:
  - explaining the warrant subject's rights and obligations at their first appearance for questioning; and
  - managing interjections or objections by a subject's lawyer or non-lawyer representative, including requirements to exercise powers of removal as a last resort after providing warnings.

Recommendation 54 – mandatory contents of the Statement of Procedures

- **Proposed section 34AF of the ASIO Act should be amended to provide that the Statement of Procedures, as in force from time-to-time, must include procedures on the core requirements listed at [371] of the Law Council of Australia's submission**.

Periodic review mechanisms for the Statement of Procedures

The importance of periodic review

372. The Law Council is concerned that there are inadequate arrangements to ensure that the Statement of Procedures is subject to periodic review, to ensure that it remains fit-for-purpose.

373. Periodic review is important because of the central role of the Statement of Procedures in protecting the human rights of the questioning warrant subject, and ensuring the legality and propriety of the entirety of the process of executing a questioning warrant before there is a need for remedial action (for example, upon the IGIS or the Ombudsman making adverse findings post-execution). Contrary to the suggestion in the Explanatory Memorandum to the Bill that the statement is merely 'an internal management tool of government',[288] the Law Council considers that it provides substantive rights protections and promotes consistent compliance with the safeguards and other requirements under the primary legislation.

374. Consequently, periodic review of the Statement of Procedures is essential. For example, it will ensure that procedures are updated in line with relevant developments in human rights jurisprudence, and the accumulation of practical experience in its operation. The latter may include findings of the IGIS and Ombudsman in relation to the execution of questioning warrants. It could also include feedback from other persons, such as legal professional bodies whose members are engaged in the provision of legal services to warrant subjects.

Inadequacy of periodic review arrangements in the Bill

375. The Bill does not establish arrangements for the periodic review of the Statement of Procedures during its period of effect (namely, the proposed 10-year sunset period for the revised questioning warrant regime in proposed section 34JF of the ASIO Act).

376. Further, if the re-designed questioning scheme were to be renewed beyond its first sunset period, it is unlikely that a review of the Statement of Procedures would occur as a result of the standard provisions for the sunsetting (cessation and automatic repeal) of legislative instruments under Part 4 of Chapter 3 of the *Legislation Act 2003* (Cth) (**Legislation Act**).

377. The Legislation Act establishes a general rule that legislative instruments sunset after 10 years of operation.[289] This scheme is intended to ensure that instruments are kept up to date, and are only in force for so long as they are needed. Sunsetting creates an incentive for rule-makers to review the currency and necessity of their instruments.[290] However, it is possible for the Attorney-General to make a legislative instrument under section 54 of the Legislation Act exempting an instrument from sunsetting.

378. The Explanatory Memorandum indicates that the Government intends to exempt the new Statement of Procedures from sunsetting under the Legislation Act.[291] This would be consistent with the approach taken to the current Statement of Procedures made under existing section 34C of the ASIO Act, which has been exempted from sunsetting.[292]

379. The Explanatory Memorandum states that it would be 'duplicative' to make the Statement of Procedures subject to sunsetting under the Legislation Act due to the existence of the sunset period for the re-designed questioning regime in proposed section 34JF of the ASIO Act.[293]

[288] Explanatory Memorandum, 39 at [120].

[289] *Legislation Act 2003* (Cth) (**Legislation Act**), s 50.

[290] Ibid, s 49.

[291] Explanatory Memorandum, 39 at [121].

[292] *Legislation (Exemptions and Other Matters) Regulation 2015*, s 12, item 10.

[293] Explanatory Memorandum, 39 at [121].

380. However, this suggestion does not accurately reflect the experience with the current Statement of Procedures. The combination of exempting the current Statement of Procedures from sunsetting and the multiple renewal of ASIO's existing questioning and detention regime for further periods of time has meant that the current Statement of Procedures has continued in force since it was made in 2006, and has not been updated or re-made since that time. To the Law Council's knowledge, no reviews of its contents have been announced publicly.

381. The Law Council considers that it is undesirable for this critical instrument to go unreviewed for a protracted and indefinite period of time (that is, for as long as the questioning regime continues to be renewed). This would be particularly problematic in the context of the proposed expansion of ASIO's questioning powers under the re-designed scheme.

A statutory periodic review mechanism

382. The Law Council considers that the Statement of Procedures should be subject to a statutory periodic review requirement under proposed section 34AF of ASIO Act. This should require the Attorney-General or the Minister for Home Affairs to cause a review of the Statement of Procedures every three years (being once every Parliamentary term).

Recommendation 55 – periodic review requirement for Statement of Procedures

- **Proposed section 34AF of the ASIO Act should be amended to require the Minister for Home Affairs to cause the periodic review of the Statement of Procedures every three years (that is, once every Parliamentary term).**

Stakeholder consultation requirements for the Statement of Procedures

383. The Law Council welcomes the retention in proposed section 34AF of the requirements to consult with the IGIS and AFP Commissioner on the Statement of Procedures before it is made, and the requirement for ASIO to brief the Committee.[294] However, the Law Council considers that further consultation should be mandated with the Ombudsman, the Australian Human Rights Commission and civil society, including the Law Council, as the representative body of the national legal profession.

384. Consultation with the Ombudsman is important given the involvement of the AFP in the execution of questioning warrants, particularly the exercise of powers of apprehension. Consultation with the Australian Human Rights Commission and civil society, including the legal profession, is necessary in view of the critical importance of the Statement of Procedures to the human rights compatibility of the re-designed questioning scheme, as acknowledged in the Statement of Compatibility with Human Rights in the Explanatory Memorandum.[295]

[294] Bill, Schedule 1, item 10, inserting proposed ss 34AF(2)-(5) and (7).

[295] See, for example: Explanatory Memorandum, 7 at [19] (which relies on the contents of the present Statement of Procedures to support an argument that the compulsory questioning framework is compatible with the rights to freedom from cruel, inhuman or degrading treatment or punishment, and to humane treatment in detention). See further: Explanatory Memorandum, 39 at [120] (which indicates that the Statement of Procedures is intended 'to **ensure** the basic standards applicable when a person is apprehended and/or questioned under a warrant', emphasis added).

The need for a specific statutory consultation requirement

385. The Law Council acknowledges that section 17 of the Legislation Act requires rule-makers to undertake such consultation on a proposed legislative instrument as the rule-makers consider appropriate and reasonably practicable. This includes consultations with persons who have expertise in the relevant field, and persons who are likely to be affected by the instrument.

386. However, the Law Council considers that the ASIO Act should provide specific guidance about consultations on the Statement of Procedures. This reflects: the extraordinary nature of the compulsory questioning power as well as the proposed expansion of its scope by the Bill; the significant impact on rights and liberties of questioning subjects, including the potential for broader impacts on their rights to a fair trial or hearing; and the impacts on lawyers representing questioning warrant subjects.

387. It would be desirable and appropriate for the Parliament to provide clear statutory guidance, in the ASIO Act, about relevant stakeholders and its expectations in relation to consultation, rather than leaving these matters purely to executive discretion in relation to the application of section 17 of the Legislation Act.

Recommendation 56 – consultation requirements for Statement of Procedures

- **Proposed section 34AF of the ASIO Act should be amended to expand the consultation requirements on the Statement of Procedures before they are made a legislative instrument.**
- **This should include a requirement to consult with the Law Council of Australia, as the national representative body for the legal profession, other representatives of civil society, and the Australian Human Rights Commission.**

Parliamentary disallowance of the Statement of Procedures

388. As noted above, proposed subsection 34AF(5) of the ASIO Act provides that the Statement of Procedures is a non-disallowable legislative instrument. This is consistent with the non-disallowable nature of the current Statement of Procedures under existing subsection 34C(5) of the ASIO Act.

389. The Explanatory Memorandum argues that the Statement of Procedures should not be subject to Parliamentary disallowance because it is 'an internal management tool of government to ensure the basic standards applicable when a person is apprehended and/or questioned under a warrant'.[296] It also states that an exemption from disallowance is considered to be appropriate because the Statement of Procedures 'provides for specific security needs in relation to persons who are subject to these warrants'.[297]

390. The Law Council is concerned that these general statements do not provide a coherent explanation of why Parliamentary control, in the form of disallowance, would not be appropriate. Rather, as explained below, the Law Council considers that the reasoning provided in the Explanatory Memorandum supports the contrary position – namely, that Parliamentary disallowance is appropriate.[298]

[296] Explanatory Memorandum, 39 at [120].

[297] Ibid.

[298] See also: Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2020*, (June 2020), 7-8 at [1.28]-[1.31].

Importance of Parliamentary control

391. As the Explanatory Memorandum has identified, the Statement of Procedures is critical to ensuring that all of the 'basic standards' (that is, the safeguards under the re-designed questioning regime) are implemented in practice. More generally, it is also a critical instrument in ensuring that warrants are executed lawfully, with propriety and in a manner that is compatible with Australia's human rights obligations. These are benchmarks against which the IGIS (in the case of ASIO) and the Ombudsman (in the case of the AFP) will conduct their oversight.

392. The restrictions on the disclosure of specific information about the execution of individual questioning warrants[299] will mean that the Parliament as a whole will have very limited opportunity to scrutinise individual warrants or to know of individual compliance issues. Making the Statement of Procedures subject to disallowance would provide the Parliament with control of the minimum procedural requirements for compliance with applicable legal standards, and key benchmarks for oversight. A requirement that these matters must be found acceptable to the Parliament is likely to give both the Parliament and the public greater assurance about the lawful and proper operation of the compulsory questioning regime.

393. In addition, since the existence of a Statement of Procedures is a pre-condition to the issuing of a questioning warrant,[300] the Law Council considers it appropriate that warrants are not able to be issued unless and until the Parliament is assured that appropriate procedural safeguards and other requirements are in place. The Law Council considers that this is an appropriate condition for the Parliament to impose, in return for its enactment of legislation conferring an extraordinary power on ASIO to conduct compulsory questioning for intelligence collection purposes – especially in view of the extension of that power to a broader range of persons and security matters.

Application of the parliamentary human rights scrutiny framework

394. Importantly, making the Statement of Procedures a disallowable legislative instrument would also require the preparation of a Statement of Compatibility with Human Rights to facilitate scrutiny by the Parliamentary Joint Committee on Human Rights and the Parliament and public more broadly. The statutory requirement to prepare a Statement of Compatibility with Human Rights does not apply to non-disallowable legislative instruments.[301]

395. Accordingly, the Law Council considers that making the Statement of Procedures a disallowable legislative instrument would give the Parliament a degree of scrutiny and control over its contents that is commensurate with its significance.

Recommendation 57 – Parliamentary disallowance of Statement of Procedures

- **Proposed subsection 34AF(5) of the ASIO Act should be amended to provide that the Statement of Procedures is subject to Parliamentary disallowance under section 42 of the *Legislation Act* (2003) (Cth).**

[299] Bill, Schedule 1, item 10, inserting proposed s 34GF of the ASIO Act.

[300] Ibid, ss 34BA(1)(e) and 34BB(1)(f) of the ASIO Act.

[301] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s 9(1).

Minister's Guidelines to ASIO ('ASIO Guidelines')

The need for specific guidance on compulsory questioning powers

396. The ASIO Guidelines made under section 8A of the ASIO Act currently provide no explicit guidance on the exercise by ASIO of its coercive questioning powers. There is no specific guidance on the practical approach to assessing matters of proportionality, privacy impacts and the relative degrees of intrusion of compulsory questioning and other collection methods.

397. The Law Council is particularly concerned that the current contents of the ASIO Guidelines about investigations of politically motivated violence appear to have been drafted in specific contemplation of ASIO's covert investigations using its special powers warrants (such as search and computer access) or surveillance that does not require authorisation under a warrant (such as physical surveillance or the use of human sources). This content does not address the exercise of compulsory questioning powers in relation to threats of politically motivated violence, notwithstanding that questioning powers are presently available in relation to one component of politically motivated violence as defined under the ASIO Act (namely, terrorism offences).

398. The Law Council notes that existing provisions of the ASIO Guidelines in relation to covert investigations of politically motivated violence may raise problems in the context of an expanded compulsory questioning regime that covers all of the matters within the definition of politically motivated violence. In particular, the ASIO Guidelines specifically address decision-making about the commencement and conduct of investigations into threats against persons prescribed in paragraph (d) of the definition of politically motivated violence (namely, threats of violence made against internationally protected persons such as foreign dignitaries, and other persons who are prescribed by the Minister in a written notice given to the Director-General). The ASIO Guidelines state that investigations into threats made against such persons:

- 'may require a higher degree of intrusion into the privacy of persons suspected of involvement than would normally be appropriate when based only on information of low reliability';[302] and
- are an exception to the general rule that ASIO is not to investigate demonstrations or other protest activity unless there is a risk of pre-meditated violence or tactics resulting in violence, or a link with conduct coming within another head of security.[303]

399. The Law Council is concerned that these provisions of the ASIO Guidelines may lead to the making of requests for questioning warrants on the basis of information of 'lower reliability' as compared to other questioning matter; or may lead to requests for questioning warrants against participants in protests and demonstrations in which there is not a risk of pre-mediated violence or tactics resulting in violence, or connection with other heads of security.

400. In other words, there is a risk that these provisions of the ASIO Guidelines may have some influence on the interpretations applied by ASIO and the Attorney-General to the broad statutory issuing thresholds for questioning warrants. (Namely, the issuing of the warrant would **substantially assist** ASIO in the collection of intelligence that is important in relation to an incident of politically motivated violence, comprising a

[302] *Minister's Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its function of obtaining, correlating, evaluating and communicating intelligence relevant to security (including politically motivated violence* (**ASIO Guidelines**), 10 at [15.2].
[303] Ibid, 11 at [16.4].

threat within paragraph (d) of the definition of politically motivated violence; and that it is **reasonable** for the warrant to be issued, having regard to the availability of other methods of collecting the intelligence that are likely to be as effective.)

401. The concepts of 'substantial assistance' and 'reasonableness' are broad and could feasibly be influenced by the provisions in the ASIO Guidelines referred to above in relation to taking action on information of low reliability, or investigating civil demonstrations or protests. If so, this could lead to a greater willingness to seek and issue questioning warrants in relation to politically motivated violence within the meaning of paragraph (d) than would be the case for other questioning matters.

402. The Law Council considers it essential that the ASIO Guidelines are revised to incorporate, and provide specific guidance on, the re-designed questioning regime. These revisions should be completed before the re-designed questioning regime commences.

The need for a statutory periodic review requirement of the ASIO Guidelines

403. More generally, the Law Council is concerned by the persistent failure of the ASIO Guidelines to be updated to reflect significant expansions of ASIO's powers.

404. The ASIO Guidelines have not been updated for over 10 years, despite multiple recommendations from this Committee, over at least a six-year period. Those recommendations have been prompted by numerous significant legislative expansions to ASIO's powers; a sustained increase in its operational tempo; the evolution and intensification of security threats (particularly terrorism and foreign interference); and major technological developments.

405. The Law Council considers that this prolonged inaction has become so serious that it is no longer appropriate to place continued reliance on executive assurances to undertake discretionary reviews on a regular basis and to make timely updates.

406. The ASIO Guidelines should instead be subject to greater Parliamentary control and accountability, through the insertion of a legal requirement in section 8A of the ASIO Act, which should provide that the Minister for Home Affairs must cause the periodic review of the ASIO Guidelines every three years (once every Parliamentary term).

The need for consultation with the legal profession and civil society

407. The Law Council also considers that proposed revisions to the ASIO Guidelines should be subject to expanded consultation requirements before they are issued, in recognition of the significant expansions in ASIO's powers and their consequent potential to impact larger numbers of Australians. The Law Council considers that these circumstances make it important for civil society to have a meaningful opportunity to comment on proposed revisions to the Guidelines as part of the three-yearly reviews recommended by the Law Council, and any other ad hoc reviews or updates undertaken between these periodic reviews.

408. Importantly, the ASIO Guidelines provide administratively binding guidance to ASIO on the assessment of proportionality and the relative degrees of intrusion into personal privacy arising from different intelligence collection methods. The contents of the ASIO Guidelines also provides a benchmark for oversight by the IGIS, in terms of both the legality and propriety of ASIO's actions. It is therefore highly desirable that the standards prescribed in the ASIO Guidelines are informed by the views of civil society, including the legal profession.

409. To ensure that such consultations are duly and consistently undertaken, the Law Council considers that there should be a statutory consultation obligation, rather than an executive undertaking alone. In this regard, the Law Council records its concern

about the advice it received from the Department of Home Affairs in May 2020 that the Law Council would not be consulted in the current review of the ASIO Guidelines, following the Law Council's expression of interest to the Department in an opportunity for consultation.

Recommendation 58 – revision of ASIO Guidelines

- **The ASIO Guidelines should be updated to provide specific guidance on the re-designed compulsory questioning regime. If the Bill is passed, the revised Guidelines should be issued before the amendments commence.**
- **Before the revised Guidelines are finalised and issued, they should be the subject of consultation with civil society representatives, including the Law Council of Australia.**

Recommendation 59 – statutory periodic review of ASIO Guidelines

- **Section 8A of the ASIO Act should be amended to require the Minister for Home Affairs to:**
  - **cause a review of the ASIO Guidelines to be carried out every three years; and**
  - **undertake expanded consultations on proposed amendments to the ASIO Guidelines before they are issued. This should include a requirement to consult with representatives of civil society, including the Law Council of Australia.**

Inter-agency protocol on multiple coercive powers

410. The Law Council remains of the view expressed in its submission to the Committee in 2017 that the Government should implement the recommendation of the second INSLM for a protocol between ASIO, the ACIC and the AFP on the use of multiple powers should be adopted, to avoid the potential for oppression as a result of a person's exposure to multiple coercive powers in relation to the same or similar subject-matter.[304]

411. The Law Council also remains of the view that this protocol should be additional to the inclusion of statutory issuing criteria for questioning warrants that require the Attorney-General to consider whether the subject of a proposed questioning warrant has been subject to the exercise of coercive powers other than ASIO questioning warrants. (This includes examinations by the ACIC under the ACC Act, and investigative questioning by the AFP under Part 1C of the Crimes Act, as well as the exercise of preventive restraints on liberty, including control orders and preventative detention orders under Divisions 104 and 105 of the Criminal Code.)[305]

412. The Law Council is concerned that the extrinsic materials to the Bill do not indicate whether there is an intention for the regime to be supplemented with a protocol. The Law Council considers that an administrative protocol is essential to ensure that sufficient information is available, including in time critical circumstances, about the prior (or current) exercise of multiple coercive powers against a single target, by different security agencies.

[304] Law Council of Australia, *Submission to the PJCIS Review of ASIO's Questioning and Detention Powers*, (April 2017), 13.
[305] Ibid.

Recommendation 60 – protocol on multiple powers

- **The Government should implement the recommendation of the second INSLM for an inter-agency protocol on the use of multiple coercive powers, to avoid the potential for oppression of individuals.**

Period of operation and review arrangements for the new scheme

Period of effect of the re-designed questioning scheme

413. The Law Council is concerned that the proposed 10-year period of operation for the revised questioning warrant regime,[306] and the absence of provisions requiring 'pre-sunsetting' reviews of its overall operation by the Committee and the INSLM, does not adequately reflect the extraordinary nature of ASIO's questioning powers and the ensuing need to keep them under continuous review.

414. The Law Council considers that a more limited period of operation of no more than five years, and statutory requirements for pre-sunsetting reviews, are particularly important in view of the proposals to significantly expand the scope of questioning, lower the minimum age of questioning, and confer powers of apprehension, search and seizure.

415. The Law Council notes that the first renewal of ASIO's compulsory questioning powers was limited to three years.[307] Given that the Bill proposes the substantial re-design and expansion of the questioning warrant regime, the Law Council considers that a shorter sunset period, more closely aligned with the original period of extension, would be preferable. Further, the Law Council's recommended statutory pre-sunsetting reviews would be consistent with established practice in relation to the previous sunsetting and renewal of ASIO's compulsory questioning powers.[308]

Recommendation 61 – sunset period for the re-designed questioning scheme

- **Proposed section 34JF of the ASIO Act should be amended to provide that the re-designed questioning warrant regime should have a period of effect of no more than five years (not 10 years).**

Statutory 'pre-sunsetting reviews' of the re-designed questioning scheme

416. The Law Council notes that the various statutory 'pre-sunsetting reviews' conducted by this Committee, its predecessor (the PJCAAD) and the second INSLM have proven valuable in providing transparent, comprehensive and participatory review mechanisms for ASIO's extraordinary questioning and detention powers.

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[306] Bill, Schedule 1, item 10, inserting proposed s 34JF of the ASIO Act (sunset date of 7 September 2030).

[307] *Australian Security Intelligence Organisation Amendment (Terrorism) Act 2003* (Cth), Schedule 1, item 24, inserting s 34Y of the ASIO Act.

[308] See also: Parliamentary Joint Committee on ASIO, ASIS and ASD, *Report on the Review of Division 3, Part III of the ASIO Act 1979 – Questioning and Detention Powers*, (November 2005), 107-108, and recommendation 19. (The Committee's predecessor did not support a 10-year sunset period, but rather only an approximately five-year period, in recognition of the extraordinary nature of the powers and the need to ensure they were subject to thorough review, by that Committee, after a mid-range period of time, and not 10 years as was proposed by the Government). In its 2017-18 Review, the Committee considered that a re-designed questioning regime should be subject to 'an appropriate sunset clause' without nominating a particular period of operation: PJCIS, *2018 Report*, 86 at [3.189]. The Law Council considers that a period of between three years and no more than five years would provide sufficient time to monitor the use (or non-use) of the re-designed scheme as a whole and assess its continuing necessity, effectiveness and proportionality, and make adjustments as needed.

417. The creation of statutory review requirements provides an important guarantee that these powers will be kept under independent and parliamentary review, rather than placing sole reliance on executive discretion to refer matters for review from time-to-time. The ability of such reviews to undertake a comprehensive examination of the scheme over its entire period of operation also complements the annual reports of the INSLM, which focus on the powers exercised by relevant security agencies in the particular reporting year.[309]

418. Previous pre-sunsetting reviews have led to refinements of the regime since its original enactment in 2002, and have enabled the periodic re-assessment of its continued necessity and proportionality. Such reports can greatly assist in Parliamentary decision-making about any renewal of the regime for a further period. Indeed, the Committee's 2017-18 Review and the 2016 review by the second INSLM have prompted the proposals in the present Bill for the re-design of the scheme.

419. The Law Council considers that the recent statutory approach of requiring there to be dual INSLM and Committee reviews of the compulsory questioning regime[310] has been particularly effective. Cumulatively, they have provided participatory fora for different views and proposals to be tested and progressively refined on policy and legislative design issues, and have made recommendations to pro-actively shape the design of amending legislation before its development and introduction.

420. Further, these pre-sunsetting reviews have provided stakeholders, including the Law Council, a greater opportunity to provide input into the design of the new questioning regime than is normally afforded in relation to proposed national security legislation before Bills are introduced to Parliament.

421. The Law Council therefore supports the continuation of these review arrangements in all future sunsetting periods for ASIO's compulsory questioning regime.

Recommendation 62 – PJCIS and INSLM statutory pre-sunsetting reviews

- **The *Independent National Security Legislation Monitor Act 2010* (Cth) and the *Intelligence Services Act 2001* (Cth) should be amended to require the INSLM and the Committee to conduct 'pre-sunsetting reviews' of the re-designed questioning warrant regime in Division 3 of Part III of the ASIO Act. These statutory reviews should be completed approximately 12 months before the sunset date.**

Delegation of legislative power to extend the duration of the current regime

422. Schedule 16 to the *Coronavirus Economic Response Package Omnibus Act 2020* (Cth) (**Omnibus Act**) was passed in March 2020 as part of the Parliament's emergency response to the COVID-19 pandemic.

423. Clause 1 of Schedule 16 to the Omnibus Act delegates legislative power to Ministers administering Acts or legislative instruments that will sunset on, or before, 15 October 2020. These Ministers are empowered to extend the operation of the relevant Act or instrument for a further six months from its sunset date. The power is

[309] *Independent National Security Legislation Monitor Act 2010* (Cth) (**INSLM Act**), s 9.

[310] See: the version of s 6(1B)(a) of the INSLM Act as in force in in 2017 (now repealed and substituted by the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth)) which was the statutory basis for the second INSLM's 2016 review of ASIO's questioning and detention powers; and the version of s 29(1)(bb) of the ISA as in force at July 2018 (now repealed and substituted by the *Counter-Terrorism Legislation Amendment (No 1) Act 2018* (Cth)) which was the statutory basis for the Committee's 2017-18 review of ASIO's questioning and detention powers.

exercisable via the making of a legislative instrument, which is subject to Parliamentary disallowance.

424. This provision has empowered the Minister for Home Affairs to make an instrument extending the operation of the current questioning and detention regime for up to six months from 7 September 2020[311] (to 7 March 2021) if the passage of the present Bill is delayed for any reason (whether or not the pandemic is the cause of the delay).

425. The Law Council understands the need for a degree of flexibility in relation to sunset dates falling during the COVID-19 pandemic, given the uncertainty that existed in March 2020 about the Parliamentary sitting schedule for the remainder of 2020, and the associated impact of a reduced sitting schedule on the Parliament's workload. However, the Law Council is concerned to ensure that the delegated legislative power to extend sunset dates is not exercised to prolong the existence of questioning-and-detention warrants in existing Subdivision C of Division 3 of Part III of the ASIO Act.

Sunsetting of questioning-and-detention warrants

426. It is a matter of concern to the Law Council that, despite recommendations of the Committee (in 2018) and the second INSLM (in 2016) for the questioning-and-detention regime to sunset without renewal, these provisions have been extended twice as part of extensions to the sunset period to accommodate delays in the development and introduction of the re-designed questioning scheme in the present Bill.[312]

427. These extensions were additional to a previous two-year extension of the sunset period in 2014, notwithstanding recommendations of the first INSLM that questioning-and-detention warrants should be repealed, as they were neither necessary to manage the risk of terrorism confronting Australia, nor proportionate to that threat.[313]

428. The Law Council considers that, if any legislative instrument is made to extend the sunset period for the existing provisions of Division 3 of Part III of the ASIO Act, that extension should be limited to the questioning warrant regime alone.[314] That is, the period of effect for the questioning-and-detention warrant regime in Subdivision C of Division 3 of Part III of the ASIO Act should not be extended by legislative instrument. It should sunset on 7 September 2020. The Law Council would support the Parliamentary disallowance of a legislative instrument which purported to extend the period of effect for questioning-and-detention warrants.

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[311] ASIO Act, s 34ZZ.

[312] *Counter-Terrorism Legislation Amendment Act (No. 1) 2018* (Cth), Schedule 1, item 18 (first 12-month extension from 7 September 2018 to 7 September 2019); and *Australian Security Intelligence Organisation Amendment (Sunsetting of Special Powers Relating to Terrorism Offences) Act 2019* (Cth), Schedule 1, item 1 (second 12-month extension from 7 September 2019 to 7 September 2020).

[313] *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth), Schedule 1, item 33 (extension from 22 July 2016 to 7 September 2018). See further: Bret Walker SC, Independent National Security Legislation Monitor, *Annual Report 2012*, (December 2012), recommendation V/1.

[314] The Law Council considers that the text of Clause 1 of Schedule 16 to the Omnibus Act permits the extension of a sunset date in relation to **part of** the relevant legislation subject to sunsetting. This is because the definition of 'sunsetting legislation' in Subclause 1(1) expressly covers 'an Act … or a provision of an Act'. The Law Council considers that the interpretive rule in section 23(b) of the *Acts Interpretation Act 1901* (Cth) would apply to the word 'provision' in Subclause 1(1) of Schedule 16 to the Omnibus Act, so that the reference in the singular form ('a **provision** of an Act' is taken to include the plural form ('**provisions** of an Act'). The Law Council therefore considers that the delegation of legislative power in the Omnibus Act would support the making of a legislative instrument extending the sunset date for all provisions of Division 3 of Part III of the ASIO Act **except for** Subdivision C (questioning-and-detention warrants).

Recommendation 63 – non-extension of questioning-and-detention warrants

- **If there is a need to exercise the delegated legislative power in Schedule 16 to the *Coronavirus Economic Response Package Omnibus Act 2020* (Cth) to extend the operation of the compulsory questioning regime beyond 7 September 2020:**
  - **The exercise of that power should be limited to questioning warrants under Subdivision B of Division 3 of Part III of the ASIO Act.**
  - **The regime of questioning-and-detention warrants under Subdivision C should sunset on 7 September 2020.**
  - **The Government should make a public commitment not to extend questioning-and-detention warrants for any period of time.**
  - **The Committee may wish to consider recommending the Parliamentary disallowance of any legislative instrument purporting to extend the period of effect for questioning-and-detention warrants for any length of time.**

Schedule 2—Warrantless use of tracking devices by ASIO

The proposed internal authorisation framework

429. Schedule 2 to the Bill contains additional measures, which are unrelated to ASIO's re-designed questioning powers in Schedule 1. Schedule 2 proposes to insert a new Subdivision DA in Division 2 of Part III of the ASIO Act. This is an internal authorisation framework for ASIO to conduct certain warrantless surveillance of persons of security interest – namely, by tracking their movements in circumstances that do not involve gaining entry to private premises or the interior of a vehicle.[315] This could include, for example, placing a tracking device in a person's bag while they are in a public place, or on the exterior of their vehicle while parked in a public place.

430. An internal authorisation may be granted to any ASIO employee[316] or ASIO affiliate,[317] if the authorising officer is satisfied that the installation or use of a tracking device in the above circumstances would substantially assist in the collection of intelligence in respect of the relevant security matter in respect of which the authorisation is given.[318] Authorising officers are the Director-General of Security and any Senior Executive Service (**SES**) level ASIO employee or affiliate.[319]

431. An internal authorisation can be given to enable any ASIO employee or any ASIO affiliate, such as a human source or a secondee from another agency, to track a particular person (for example, in any object used or worn by that person). An internal authorisation may alternatively be given to enable the installation and use of a tracking device in a specified object or class of object (for example, the exterior of all vehicles thought to be used by a person of security concern).[320] Internal authorisations have a maximum duration of 90 days.[321]

432. These measures are said to be necessary to: improve ASIO's operational agility in a fast-paced and time-critical operational environment; protect the safety of its officers by alleviating the need to conduct physical surveillance in urgent and dangerous circumstances; and align ASIO's powers with those of law enforcement agencies under section 39 of the *Surveillance Devices Act 2004* (Cth) (**SDA**) – especially in the case of joint operations between ASIO and law enforcement agencies such as the AFP and ACIC.[322]

433. Section 39 of the SDA establishes an internal authorisation framework for Commonwealth law enforcement officers to use tracking devices to investigate certain offences and to undertake other specified enforcement-related activities

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[315] Bill, Schedule 2, item 8, inserting proposed s 26K of the ASIO Act (certain acts not authorised).

[316] That is, a person who is employed under the ASIO Act: ASIO Act, ss 4, 84 and 90.

[317] That is, a person who is performing functions or services for ASIO accordance with a contract, agreement, or other arrangement, including secondees and consultants. As noted below in this submission, the concept of an 'ASIO affiliate' is extremely broad and could cover, for example: human sources, contracted service providers to ASIO such as cleaners; and secondees and consultants who are performing services for ASIO that are unrelated to its intelligence collection functions (for example, analytical, governance and policy work).

[318] Ibid, inserting proposed s 26G.

[319] Ibid, item 1, inserting the definition of 'authorised officer' in s 22 of the ASIO Act.

[320] Ibid, item 8, inserting proposed s 26J ASIO Act (what an internal authorisation authorises).

[321] Ibid, inserting proposed ss 26G(4)(c) and 26H(3)(b) of the ASIO Act.

[322] Explanatory Memorandum, 3 at [4], 5-6 at [13] and 15 at [54] . See also, the Hon Peter Dutton MP, Minister for Home Affairs, *Second Reading Speech, Australian Security Intelligence Organisation Amendment Bill 2020*, House of Representatives Hansard, 13 May 2020, 11.

(such as conducting integrity operations, monitoring compliance with control orders and executing child recovery orders in made in family law matters).[323]

Description of warrantless tracking powers as 'non-intrusive'

434. The proposed warrantless tracking powers are described in the extrinsic materials to the Bill as 'non-intrusive'.[324] This assessment appears to be based on certain limitations in the scope of internal authorisations under the proposed framework.

435. These include prohibitions on using listening or optical surveillance capabilities in addition to tracking a person's movement,[325] prohibitions on the remote installation of tracking software on a device in order to use it to track a person's movements;[326] and prohibitions on ASIO gaining entry to private premises without the occupier's consent for the purpose of installing, maintaining or recovering a tracking device.[327]

436. The assessment of the proposed warrantless tracking powers as 'non-intrusive' also appears to reveal an implicit assumption that the act of covertly tracking a person's location and movements is not, itself, intrusive upon a person's privacy. The Law Council is concerned that such an assumption may indicate a significant disjunct between the proposal's assessment of the degree of intrusion on individual privacy and the views of the wider community in such circumstances.[328] The Law Council emphasises that the degree of intrusion that may be involved in the installation of a tracking device is not an appropriate measure of the degree of intrusion into a person's privacy as a result of the operation of that device and the subsequent use of intelligence obtained about the person's location and movements.

437. The Law Council is further concerned that such an assumption does not appear to take account of the potential significant cumulative privacy impact that the use of tracking devices with other forms of surveillance may have. For example:

- the use of a tracking device under an internal authorisation, combined with internally authorised access to a person's metadata;
- in the case of a tracking device that has multiple surveillance capabilities and has been internally authorised to track a person's location and movements – the warrant-based use of other forms of surveillance using that device, such as remotely engaging its optical or audio surveillance capabilities; or
- the use of intelligence obtained from an internally authorised tracking device to obtain warrant-based authorisation for the exercise of further, more intrusive covert surveillance powers in relation to a person.

438. The suggested characterisation of ASIO's covert tracking powers as 'non-intrusive' makes it particularly important that careful consideration is given to the scrutiny of the operational case given in support of the powers, and the individual provisions establishing the scheme, to avoid unintended consequences that may lead to a broader and more intrusive application than may have been contemplated.

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[323] SDA, ss 39(1), (3), (3A) and (3B).

[324] The Hon Peter Dutton MP, Minister for Home Affairs, *Second Reading Speech, Australian Security Intelligence Organisation Amendment Bill 2020*, House of Representatives Hansard, 13 May 2020, 11.

[325] Bill, Schedule 2, item 8, inserting proposed s 26K(c) of the ASIO Act.

[326] Ibid, inserting proposed s 26K(b).

[327] Ibid, proposed ss 26K(a) and (d). See also: Explanatory Memorandum, 17 at [63].

[328] See also: PJCHR, Scrutiny Report 7 of 2020 (June 2020), 66 at [2.107]. (The PJCHR observed that 'the activities that can be authorised internally still involve substantial interference with an individual's privacy. In fact, it is not apparent that some activities which may be internally authorised (eg, planting a tracking device on the outside of a car) limit a person's right to privacy any less [than] an activity which must be authorised by the Attorney-General (eg planting a tracking device inside a person's car). Both activities have the same implications with respect to the tracking of a person's movements, and therefore on the right to privacy'.)

Law Council position on an internal authorisation framework

439. The proposed internal authorisation framework represents a significant devolution of responsibility for the authorisation of ASIO's use of intrusive, covert surveillance.

440. Such authorisations are presently required to be given by the Attorney-General under warrant requested by the Director-General of Security.[329] In contrast, the Bill proposes to empower all SES-level officials in the Organisation to give internal authorisations that are exercisable by any ASIO employee or affiliate, upon the request of any ASIO employee or affiliate.[330]

441. The Law Council considers that a proposal for such a significant diminution in the present Ministerial level of authorisation requires careful scrutiny, to ensure the new framework is necessary, contains appropriate limitations and safeguards to ensure its operation is proportionate to an identified operational need, and does not extend any further than is necessary to address that need.

442. As outlined below, the Law Council has reservations about the necessity and appropriateness of implementing an internal authorisation framework under the ASIO Act. The Law Council considers that Schedule 2 should not be passed unless these issues are addressed through cogent, evidence-based explanations. Further, if the Committee is minded to support the enactment of an internal authorisation framework, the Law Council has identified several instances of overbreadth in its individual provisions. The Law Council supports various amendments to ensure that the proposed framework is appropriately limited and proportionate to the operational risks and security threats sought to be addressed.

Outline of key concerns

443. While the Law Council acknowledges that the proposed framework contains some useful safeguards,[331] several matters remain outstanding, namely:

- the operational necessity of an internal authorisation framework;
- the appropriateness of aligning ASIO's authorisation framework for the use of an intrusive intelligence-collection power with that of the AFP;
- the overbreadth of several provisions of the proposed scheme;
- limitations in ministerial visibility and accountability;
- the absence of an unclassified annual reporting requirement on ASIO's use of the internal authorisation framework (comprising aggregated statistics); and
- the urgent need for updates to, and periodic reviews of, ASIO's Guidelines to reflect this major devolution of authority (among other pressing matters).

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[329] ASIO Act, s 26.

[330] Bill, Schedule 2, item 1, inserting a definition of 'authorising officer' in s 22 of the ASIO Act and new s 26M (exercise of authority under internal authorisation).

[331] These aspects of the Bill include: record-keeping and reporting requirements (including a limited form of breach reporting to the Attorney-General); and an extension of existing requirements in ASIO's special powers warrants to notify the IGIS and Attorney-General in relation to the use of force against persons and things. See: Bill, Schedule 2, item 17, insertion of new s 34AAB in the ASIO Act, especially s 34AAB(2)(f) (the Director-General must give reports to the Attorney-General on each internal authorisation, and those reports must give details of compliance with any conditions or restrictions to which the authorisation was subject). See also item 8, inserting proposed s 26R into the ASIO Act (recovery warrants issued by the Attorney-General). These warrants are subject to the reporting and notification requirements in Division 2 of Part III of the ASIO Act, including the obligation in s 31A to notify the Attorney-General and IGIS of the use of force against a person or thing under a warrant, as soon as practicable.

Operational necessity

Availability of existing emergency authorisation powers

444. The Law Council notes that other powers are presently available under the ASIO Act, which would appear to apply to the circumstances of urgency outlined in the Explanatory Memorandum to the Bill,[332] and the submission of ASIO to the Committee, in support of establishing the internal authorisation framework.[333]

445. For example, the Director-General of Security can issue emergency surveillance device warrants which are effective for up to 48 hours.[334] It is also unclear why the ability to obtain and use IPWs would not provide the requisite agility to target those engaging in prejudicial activities, even if they are not identifiable to ASIO by their full name.[335] The Law Council notes that the IPW regime was enacted in 2014, on the recommendation of the Committee in 2012, to provide greater efficiency in the authorisation of multiple collection powers against a single person of security concern, by streamlining the approval process.[336]

446. In its submission to the Committee on the present Bill, ASIO has cited two examples of real cases said to justify the need for it to be able to deploy tracking capabilities quickly (in some cases immediately). The Law Council considers that these scenarios raise significant questions about why existing powers are considered to be inadequate; and how the proposed internal authorisation framework would meet the stated need for ASIO to have 'the power to immediately deploy tracking devices' in the circumstances of extreme urgency described in the case studies.[337]

ASIO case study 5 – plot to plant an explosive device on an outbound aircraft

447. ASIO indicated that an internal authorisation framework for tracking devices would have assisted in the surveillance of Australian persons involved in a plot to place an improvised explosive device on an outbound flight in July 2017.[338] ASIO appears to suggest that it would not have been feasible for it to pursue an emergency warrant under section 29 of the ASIO Act (which enables the Director-General of Security to issue an emergency warrant for up to 48 hours, where a warrant request has been placed before the Attorney-General but has not yet been determined). There is no explanation of the reasons it would not have been feasible, in this scenario, to make an urgent warrant request to the Attorney-General; and for the Director-General to issue an emergency warrant pending the Attorney-General's decision.

448. There is also no explanation of why it would not have been possible to obtain IPWs against the multiple individuals suspected of being involved in the relevant terrorism plot, with those IPWs giving conditional approval to the use of surveillance devices (including tracking devices) in relation to these persons (who need not be known to

[332] Explanatory Memorandum, 5-6 at [13].

[333] ASIO, *Submission to the PJCIS Review of the ASIO Amendment Bill 2020* (May 2020), 8-9.

[334] ASIO Act, s 29.

[335] Ibid, Subdivision G of Division 2 of Part III.

[336] PJCIS, *Report on Potential Reforms to National Security Legislation*, (September 2014), 112 at [4.122] and 114-115 at [4.133]-[4.136] (the Committee endorsed the proposal to establish a regime of 'named person warrants' which was enacted by the *National Security Legislation Amendment Act (No 1) 2014* (Cth).

[337] ASIO, *Submission to the PJCIS Review of the ASIO Amendment Bill 2020* (May 2020), 9 at [33].

[338] Ibid, 8-9.

ASIO by name in order to be the subject of a warrant). The Director-General could then have authorised the use of the surveillance power as required.[339]

449. Further, the case study appears to indicate that there was a need for the immediate, or near immediate, authorisation of the use of a tracking device. Given the reasonably detailed issuing criteria and other requirements for internal authorisations proposed in the Bill,[340] the Law Council considers it doubtful that the proposed framework could have provided the level of agility sought in this scenario – at least not without diminishing the degree of rigour in applying the issuing test.

ASIO case study 6 – purchase of weapon by terrorism suspects

450. ASIO suggested that an internal authorisation framework would have provided it with the necessary agility to deploy tracking devices on two minors who were suspected of being peripherally involved in a group planning an act of terrorism in Australia, when it was identified during physical surveillance of those persons that they were in the process of purchasing a knife.[341]

451. It appears from the summary of facts that the identified need for the use of a tracking device was unforeseen and arose immediately. The need was identified for the purpose of retaining visibility of the minor's location until the police arrived; and to do so in a way that minimised the risks to the safety of ASIO officers who were performing physical surveillance of the armed persons.[342]

452. However, the case study does not explain how the detailed requirements for requesting and issuing an internal authorisation for the use of a tracking device could have been fulfilled in this scenario, when the need appeared to arise immediately and for a very constrained period until police arrived on the scene.[343] The case study also does not explain why it would not have been possible for ASIO to manage the risk to officer safety by obtaining IPWs in relation to the two individuals at an earlier stage in the investigation of the particular terrorist group assessed to be planning a terrorist attack in Australia, when the individuals were identified as being involved. Furthermore, the case study does not explain how ASIO officers would have been able to attach tracking devices to the minors without compromising their safety.

453. The Law Council also notes that both of the relevant case studies in ASIO's unclassified submission to the Committee are confined to circumstances of emergency or urgency, which were said to require the use of 'immediate' surveillance for a limited period of time. It is difficult to reconcile these circumstances with the proposal in the Bill to give internal authorisations of a 90-day maximum, which would far exceed the duration of the identified emergencies.[344] There is insufficient information on the public record to conclude that the proposed internal authorisation framework is operationally necessary because the mechanisms presently available under the ASIO Act have been exhausted or clearly demonstrated to be unsuitable.

454. The proposed internal authorisation framework would have been effective in providing the instantaneous, or near-instantaneous, approvals required in the emergency circumstances identified in the above cases studies.

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[339] ASIO Act, Subdivision G, Division 2, Part III (IPW regime), especially, s 27C (issuing of warrants by Attorney-General giving conditional approval to multiple special powers) and s 27F (authority under an IPW to use surveillance devices, where the warrant has given conditional approval to the use of these powers).

[340] Bill, Schedule 2, item 10, inserting proposed ss 26G, 26H and 26J of the ASIO Act.

[341] ASIO, *Submission to the PJCIS Review of the ASIO Amendment Bill 2020* (May 2020), 9 at [33].

[342] Ibid, 8-9.

[343] Bill, Schedule 2, item 10, inserting proposed ss 26G, 26H and 26J of the ASIO Act.

[344] Bill, Schedule 2, item 10, inserting proposed section 26G(4)(c) of the ASIO Act.

455. The Law Council queries whether – in circumstances where the above circumstances of extreme urgency are demonstrated – consideration has been given to making targeted amendments to the existing emergency warrant provisions in section 29 of the ASIO Act, to improve their flexibility in these cases.

456. Further, the queries whether consideration could be given to making provision for ASIO officers working on a joint operation to be authorised to exercise powers under section 39 of the SDA. This would be preferable to creating an entirely new framework under the ASIO Act that involves the devolution of Ministerial-level authority to agency-level, and would have a significantly broader application than the equivalent law enforcement framework under the SDA (as explained below).

Recommendation 64 – further information about operational need

- **The Government should provide further information about the operational need for the proposed internal authorisation framework, in particular:**
  - **why the stated need for urgency in obtaining approval to use tracking devices could not be met from the existing emergency warrant provisions in the ASIO Act; or from making use of Identified Person Warrants concerning persons who are believed to be engaging in prejudicial activities, which give conditional approval to use tracking devices;**
  - **how, if at all, the proposed internal authorisation framework would have been likely to have made a difference in the scenarios outlined in Case Studies 5 and 6 of ASIO's submission.**

Unclear basis for the anticipated efficiency gains

457. The Law Council is also concerned by the potential for the internal authorisation framework to result in a diminution in the degree and rigour of scrutiny that is currently given to surveillance warrant requests, which are determined by the Attorney-General. In particular, the Law Council notes the remarks in the extrinsic materials to the Bill that it is not feasible in some urgent circumstances 'to go through the current lengthy authorisation process to use a tracking device'.[345]

458. However, these remarks are difficult to reconcile with the fact that the proposed internal authorisation framework in the Bill contains substantially similar issuing criteria to the requirements for issuing surveillance device warrants, with the material difference being the identity of the relevant issuing authority.[346] The major difference is that the warrant provisions require the issuing authority to be satisfied that the person is engaged, or is reasonably suspected of being engaged or likely to be engaged in activities that are prejudicial to security.[347] The internal authorisation framework does not explicitly require the authorising officer to be satisfied that the target of the intended surveillance activity is engaged in prejudicial activities, but merely that the collection of the relevant intelligence is likely to substantially assist in

[345] The Hon Peter Dutton MP, Minister for Home Affairs, *Second Reading Speech, Australian Security Intelligence Organisation Amendment Bill 2020*, House of Representatives Hansard, 13 May 2020, 11.

[346] The proposed internal authorisation framework is also not limited to targets who are believed to have engaged in activities that are prejudicial to security. Cf ASIO Act, s 26 (surveillance device warrants) and ss 27C and 27F (surveillance under an IPW).

[347] ASIO Act, s 26(3).

the collection of intelligence in respect of the security matter (which is the second part of the issuing test for surveillance device warrants).

459. However, the case studies provided by ASIO in support of the internal authorisation framework are limited to circumstances in which the relevant persons are engaged in prejudicial activities, and this circumstance is identified as a cause of the urgency. Accordingly, it would still require assessment by the authorising officer in considering the degree of assistance that tracking a person engaged in prejudicial activities would provide ASIO in collecting intelligence about those activities.

460. Consequently, the similarity of the issuing criteria – and the focus of the operational case on tracking persons who are engaged in prejudicial activities – makes it difficult to ascertain precisely how the proposed internal authorisation framework is intended to improve efficiency and agility in time-critical circumstances, especially where a need for the 'immediate' use of tracking devices has been identified.[348]

Recommendation 65 – clear explanation of basis for desired efficiency gains

- **The Government should provide an explanation of how the proposed internal authorisation framework for tracking devices will result in the desired efficiency gains (including meeting the need identified in ASIO's submission for the immediate use of tracking devices) without reducing the rigour with which an application is assessed.**

Appropriateness of an internal authorisation framework

Misalignment of authorisation requirements for 'onshore' and 'offshore' activities

461. The Law Council notes that the enactment of the proposed internal authorisation framework will create a significant misalignment of the level of authorisation applying to ASIO, with the considerably higher level of authorisation applying to other Australian intelligence agencies under the ISA to conduct the same surveillance activities of an Australian person, if that person is in a foreign country.

462. Under section 8 of the ISA, ASIS, ASD and AGO are required to obtain a Ministerial authorisation to undertake an activity to produce intelligence on an Australian person who is outside Australia, which could include using a tracking device.[349] Ministerial authorisation must be obtained whether or not the intelligence collection activity would constitute an offence or a civil wrong under Australian law.[350] If the activity would contravene an Australian law, then section 14 of the ISA applies to confer statutory immunity on the officials of the relevant agency, provided that they were acting in the course of, and as part, of the proper performance by their agency of its statutory functions.

463. Further, section 9 of the ISA provides that the relevant Minister responsible for ASIS (the Minister for Foreign Affairs), ASD or AGO (the Minister for Defence) must obtain the agreement of the Attorney-General to the giving of a Ministerial authorisation, if the Australian person being targeted is, or is likely to be, engaging in activities that are, or are likely to be a threat to security.[351] Accordingly, at least two Ministers may be involved in giving the requisite approvals to ASIS, ASD and AGO to undertake

[348] ASIO, *Submission to the PJCIS Review of the ASIO Amendment Bill 2020*, (May 2020), 9 at [33].
[349] ISA, s 8(1)(a)(i).
[350] Ibid, s 8(1).
[351] Ibid, s 9(1AA).

equivalent activities to those which ASIO would be able to authorise internally if undertaken in Australia, if the Bill was passed.

464. For this reason, the Law Council is concerned that the objective of the Bill to align ASIO's surveillance powers with those of domestic law enforcement agencies would create an arbitrary difference in the levels of authorisation needed for the collection of intelligence, which is based solely on the identity of the particular Australian intelligence agency that is undertaking the collection exercise and the geographical location of the relevant target inside or outside Australia.

465. Since ASIO is not a law enforcement agency – a point emphasised strongly by the Hope Royal Commission on ASIO[352] – the Law Council considers that the primary focus of proposals for alignment or consistency should be on the powers, thresholds and standards applicable to Australian intelligence agencies.

466. Accordingly, the Law Council urges the Committee to consider the appropriateness of enacting a new internal authorisation framework for ASIO that will create a significant misalignment in the level of authorisation applicable to agencies governed by the ISA, in relation to the same intelligence collection method concerning an Australia person.

Recommendation 66 – explanation of misalignment of authorisation levels between different Australian intelligence agencies for the same activities

- **The Government should provide an explanation of why it is considered appropriate to create a significant misalignment in:**
  - **the proposed internal authorisation levels required for ASIO under the ASIO Act; and**
  - **the existing Ministerial authorisation levels required for ASIS, ASD and AGO under the *Intelligence Services Act 2001* (Cth)**

  in relation to the use of a tracking device on an Australian person, which does not involve entry to private premises or interference with the interior of a vehicle.

Significantly greater breadth of ASIO powers compared to AFP powers

467. The Law Council notes that the stated policy objective to effectively harmonise ASIO's warrantless powers to use tracking devices with those of the AFP[353] does not appear to give acknowledgement or weight to the result that ASIO's internal authorisations would then enable the use of tracking devices in considerably broader circumstances than the internal authorisations presently available to the AFP.

468. The Law Council has identified several elements of ASIO's statutory functions and operational context that make it conceivable that a single internal authorisation given under ASIO's proposed framework may be capable of authorising far more extensive surveillance than an internal authorisation given to an AFP member under section 39 of the SDA. These elements are outlined below. They cover the persons against whom a tracking device may be used; the security matters in respect of which an authorisation may be given; and the persons authorised to use a tracking device.

469. The Law Council submits that the presence of these elements makes it important for the wider effects of the proposed scheme to be acknowledged and given careful

[352] The Hon Justice Robert Hope, Royal Commission into Intelligence and Security, *Fourth Report: Australian Security Intelligence Organisation*, 1976, 210-21.

[353] The Hon Peter Dutton MP, Minister for Home Affairs, *Second Reading Speech, Australian Security Intelligence Organisation Amendment Bill 2020*, House of Representatives Hansard, 13 May 2020, 11.

consideration in determining whether the proposed internal authorisation framework is appropriate. The Law Council emphasises that the proposed internal authorisation framework is not merely a benign and uncontroversial exercise in standardising or aligning the respective surveillance powers of two agencies performing like functions. Rather, the very different functions of ASIO and the AFP will result in ASIO being able to internally authorise far broader surveillance powers, which will also result in a significant misalignment with the authorisation levels required for other Australian intelligence agencies to undertake the same collection activities.

470. Should the Committee nonetheless be inclined to support the enactment of Schedule 2, the Law Council makes several recommendations that may assist in limiting overbreadth in aspects of the proposed internal authorisation framework.

471. However, the Law Council cautions that not all areas of overbreadth can be cured with amendments to individual provisions. As noted above, there is a threshold question about the appropriateness of enacting an internal authorisation framework for ASIO that will necessarily have a wider application than the equivalent framework available to law enforcement agencies because of inherent differences of functions.

'Particular persons' who may be tracked

472. An internal authorisation for the use by ASIO of a tracking device may permit the surveillance of a 'particular person', or more broadly, 'an object or class of objects'.[354]

473. Even if an authorisation is limited to the surveillance of a 'particular person', it may be possible that a 'particular person' could include an identified legal person (that is, a named body corporate or body politic) and not merely an individual (that is, a natural person).[355] If this interpretation was applied, it could mean that a single internal authorisation could permit ASIO to use tracking devices against a large number of individuals, such as all officers of a body corporate or officials of a body politic.

474. The Law Council is concerned that such an interpretation would create an inappropriately broad power of surveillance, when considered in the context of the broad security matters in respect of which internal authorisations could be issued to collect intelligence via the use of a tracking device (as discussed below).

475. If there is an intention for ASIO to be permitted to rely on a single internal authorisation to use tracking devices against large numbers of individual officers of bodies corporate or officials of bodies politic, then the Law Council considers that responsibility for giving such authorisations should remain with the Attorney-General.

476. For completeness, the Law Council notes that the corresponding law enforcement provision in section 39 of the SDA does not specify targets of the surveillance (such as a particular person or an object) but rather prescribes the purpose for which surveillance is authorised. (For example, the investigation of a relevant offence, or the location of a child under a recovery order, or the surveillance of a person who is the subject of a control order.) In contrast to the 'security matters' in respect of which

[354] Bill, Schedule 2, item 8, inserting proposed ss 26G(2) and 26H(2) in the ASIO Act (which provide that authorisations can be sought and given in relation to a particular person, or an object or class of objects).

[355] AIA, s 2C defines the component term 'person' as including bodies corporate and bodies politic as well as individuals. Whether this rule of interpretation applies involves a complex and context-specific assessment of the particular provision. The Law Council considers that there is ambiguity as to whether the use of the qualifying word 'particular' in relation to the 'person' referred to in proposed ss 26G(2) and 26H(2) of the ASIO Act evinces a necessary intendment to disapply the interpretive rule in section 2C of the AIA. The existence of such ambiguity creates a risk that ASIO may choose to adopt an interpretation that a 'particular person' includes a body corporate or a body politic. In view of the remote possibility of ASIO's covert, internal authorisation-based activities being the subject of judicial review, it is important that there is a high degree of clarity and certainty on the face of the provisions of the ASIO Act.

ASIO may use tracking devices, these more constrained and specific purposes are also likely to limit the persons in relation to whom a tracking device can be used under an authorisation (for example, suspects in an investigation, a controlee, or the child who is subject to recovery order or persons associated with the child).

Recommendation 67 – meaning of 'particular persons'

- **Proposed paragraph 26G(2)(a) of the ASIO Act (item 8 of Schedule 2) should be amended to expressly limit the 'particular person' who can be tracked under an internal authorisation to a single individual (that is, a natural person) and not a body corporate or a body politic.**

'Security matters' in respect of which internal authorisations may be given

477. ASIO's surveillance powers are directed to the collection of intelligence on specified 'security matters'[356] with the component term 'security' taking its meaning from section 4 of the ASIO Act.[357]

478. A 'security matter' for ASIO is considerably broader than the investigation by a law enforcement agency of an offence committed by a particular person or persons (or the other specified enforcement-related matters in section 39 of the SDA, including integrity operations, the recovery of children under court orders, and monitoring compliance with a control order). For example, a 'security matter' could conceivably extend to a natural person, a group of natural persons; an event, activity or occurrence; or the actions, capabilities and intentions of a body politic (as represented by the officials of its government) or a body corporate (as represented by its officers).

479. A security intelligence investigation is directed to a broader purpose than enforcing an offence against an individual, or the other specific law enforcement-related matters under section 39 of the SDA. It can cover the collection of intelligence to build a comprehensive picture of a particular security threat, such as associated personnel; the objectives, modus operandi, organisational structure and affiliations of key individuals, entities or networks; and their revenue sources, capabilities and future intentions and plans.

480. While section 39 of the SDA authorises law enforcement agencies to use tracking devices to investigate a wide range of federal offences (or State offences with a federal aspect) the concept of a 'security matter' for the purposes of ASIO's security intelligence collection functions is considerably broader. As noted above, a security matter is not limited to conduct constituting an offence. The purpose of a security investigation is to build a detailed picture of security threats, rather than to disrupt criminal conduct through the collection of sufficient evidence to enable a suspect to be charged and prosecuted.

481. While the Law Council makes no specific recommendations for amendment to the Bill in relation to this matter (which is core to ASIO's security intelligence collection functions under section 17 of the ASIO Act) it is a key reason that the ASIO's proposed internal authorisation framework will have a significantly broader application than that of law enforcement agencies under section 39 of the SDA. Accordingly, the Law Council urges the Committee to consider this matter when

[356] Bill, Schedule 2, item 2, inserting proposed s 26H(2)(a) (namely, a matter that is important to security).

[357] Section 4 of the ASIO Act defines 'security' as the protection of Australia and Australians from espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia's defence system, acts of foreign interference, the protection of Australia's territorial and border integrity from serious threats, and the carrying out of Australia's responsibilities to any foreign country in relation to these matters.

assessing whether it is appropriate to align the levels of authorisation for ASIO with those presently governing the AFP in relation to the use of tracking devices.

Persons who may exercise authority under an internal authorisation

482. Once an ASIO employee or affiliate has obtained an internal authorisation, **any other** ASIO employee or affiliate may exercise authority under that authorisation.[358] In contrast, an authorisation given under the SDA is specific to the individual police officer who made the application (notwithstanding that an individual applicant may be authorised to use multiple tracking devices).[359]

483. The scope of the proposed authorisation for ASIO is exceptionally broad, covering all employees irrespective of whether they perform operational functions, and irrespective of their level of seniority or expertise. The concept of an 'ASIO affiliate' further extends the breadth of the proposed statutory authorisation to all persons performing functions or services for ASIO, in accordance with a contract, agreement or other arrangement.[360] This would include, for example: contracted cleaners; human sources; secondees from other agencies who are working on non-operational matters and have no direct experience in the collection of intelligence (for example, intelligence analysts, linguists or policy professionals); and contractors and consultants to ASIO, irrespective of the nature of the services they have been engaged to provide for ASIO.

484. The Law Council is concerned that the Bill purports to directly authorise all ASIO employees and affiliates to exercise authority under an internal authorisation, without any further statutory limitation. The existence of any further limitations or safeguards on the persons who may exercise authority would be wholly reliant on the Director-General of Security to make internal administrative directions or policy. The Law Council considers that it is inappropriate to leave such important matters purely to administrative discretion as exercised from time-to-time. This is not proportionate to the intrusive and broad nature of the relevant surveillance powers.

485. Rather, the Law Council recommends the inclusion of a specific statutory requirement in the Bill, which is analogous to the requirements in section 24 of the ASIO Act for the authorisation of persons to exercise authority under ASIO's special powers warrants. This would require the Director-General of Security (or other senior officers appointed by the Director-General) to specifically approve the ASIO employees or affiliates (whether individually or by classes) who may exercise authority under internal authorisations.

Recommendation 68 – appointment of persons who may exercise authority

- **Proposed section 26M of the ASIO Act (item 8 of Schedule 2) should be amended to mirror the requirements under section 24 of the ASIO Act for persons authorised to exercise authority under ASIO's special powers warrants. Namely:**
  - **an ASIO employee or an ASIO affiliate must be specifically authorised (either individually or as part of a class of persons) to exercise authority under an internal authorisation; and**

[358] Bill, Schedule 2, item 8, insertion of proposed s 26J in the ASIO Act (which provides 'the Organisation' is authorised to do the relevant acts or things); and s 26M (which provides that the authority conferred by an internal authorisation may be exercised by any ASIO employee or ASIO affiliate).

[359] SDA, s 39(9) (the law enforcement officer wishing to use the device must apply for the authorisation).

[360] ASIO Act, s 4 (definition of ASIO affiliate, which in effect, covers the wide range of non-employment relationships a person may have with ASIO, for the purpose of that person performing functions or providing services for ASIO.)

- **persons able to approve ASIO employees or ASIO affiliates (individually or by class) to exercise authority under an internal authorisation should be:**
  - **the Director-General of Security;**
  - **a Deputy Director-General of Security; or**
  - **a 'senior position holder' (within the meaning of that term in section 4 of the ASIO Act) who is appointed by the Director-General of Security.**

Other areas of overbreadth

Appointment of 'authorising officers'

486. The Bill proposes to appoint all SES-level ASIO employees and ASIO affiliates as the 'authorising officers' who may grant a request for an internal authorisation for the installation, maintenance and use of a tracking device, which does not involve entry to private premises or interference with the interior of a vehicle.[361]

487. There is no requirement for the appointment of such persons to be specifically approved by the Director-General of Security (or other nominated senior position-holders in the organisation). There are also no requirements for the relevant SES officers to hold any relevant experience or expertise in relation to the conduct of intelligence operations and administrative decision-making in this context.

488. The absence of a qualification-based appointment mechanism from among ASIO's SES officers creates a risk that SES-level staff in non-operational areas in the organisation could be authorised to give internal approvals, despite having limited or no relevant operational experience or visibility. For example, the effect of the Bill would be that SES-level officers performing internal corporate roles such as finance, human resources, media, government relations, procurement and contract management, and policy development would be declared to be 'authorising officers' under the ASIO Act for the purpose of the new tracking device framework.

489. This is an exceptionally broad form of statutory authorisation, having regard to the intrusive nature and breadth of the intelligence collection powers able to be authorised. The Law Council is concerned that a commensurately rigorous operational case has not been advanced for the omission of **any** qualifying criteria by reference to an SES officer's substantive expertise and experience.

490. The Law Council considers that the power of appointment should be subject to a further requirement that the Director-General of Security must personally appoint an authorising officer, either individually or as a member of a class of persons. The minimum qualifying criterion should be that the person is an ASIO employee or ASIO affiliate holding an SES position. In the case of a class-based authorisation, the relevant class should be open to the Director-General's discretion but must be a sub-set of all SES-level ASIO employees and ASIO affiliates. (For example, SES-level staff on a particular operation, or working within specific organisational units.)

Recommendation 69 – appointment of authorising officers

- **Paragraph (b) of the definition of an 'authorising officer' (item 1 of Schedule 2) should be amended to provide that an 'authorising officer' is an SES-level ASIO employee or ASIO affiliate who is**

[361] Bill, Schedule 2, item 1, insertion of definition of 'authorising officer' in s 22 of the ASIO Act.

appointed by the Director-General of Security (individually, or by class, provided that the class is a sub-set of all SES-level ASIO employees or ASIO affiliates).

- **The Director-General's power of appointment should be subject to a requirement that the Director-General is satisfied, on reasonable grounds, that each individual or class of SES officers has sufficient operational expertise, visibility and authority to perform the functions of the 'authorising officer'.**

Duration of internal authorisations

491. As noted above, the extrinsic materials to the Bill emphasise a desire to improve ASIO's operational agility in relation to the use of tracking devices in time-critical circumstances. There is a desire to avoid risks to the safety of ASIO personnel in carrying out physical surveillance, which may arise if an authorisation to use a tracking device cannot be obtained on an immediate, or close to immediate, basis.[362]

492. However, the Law Council questions the necessity of an internal authorisation framework to enable the exercise of surveillance powers for up to 90 days,[363] rather than a more limited period of time to enable the immediate use of a tracking device in unforeseen circumstances, until Ministerial-level authorisation can be obtained if it is necessary to maintain such surveillance over a longer period.

493. In the absence of a compelling explanation for this lengthy proposed maximum duration of an internally authorised, intrusive intelligence collection power, the Law Council considers that the maximum duration should be aligned with emergency warrants under section 29 of the ASIO Act (a maximum duration of 48 hours). This would also be consistent with the emergency authorisation framework in the ISA. Under that framework, emergency agency head authorisations have a maximum duration of 48 hours, with the intention that a Ministerial authorisation should be sought if it is necessary to conduct further intelligence-production activities outside the 48-hour emergency period.[364]

494. In assessing any explanation that may be advanced for a 90-day maximum period of effect, the Law Council cautions against the wholesale adoption of the maximum duration applying to authorisations under the SDA simply because that duration is available to the AFP.[365] Rather, a specific justification is needed for ASIO to be conferred with authorisations of this duration, in view of the fundamental differences in intelligence collection and criminal law enforcement-related functions, which result in ASIO's framework having a broader application.

Recommendation 70 – maximum period of effect of internal authorisations

- **Proposed paragraph 26G(4)(c) of the ASIO Act (item 8 of Schedule 2) should be amended to provide that the maximum duration of an internal authorisation is 48 hours.**

[362] See, for example: Explanatory Memorandum, 3 at [4] and 5-6 at [13]; and ASIO, *Submission to the PJCIS Review of the ASIO Amendment Bill 2020*, (May 2020), 8-9.

[363] Bill, Schedule 2, item 8, inserting proposed s 26G(4)(c) in the ASIO Act.

[364] ISA, s 9B(4)(c).

[365] SDA, s 39(7).

Cancellation of internal authorisations

Absence of a mandatory cancellation power for authorising officers

495. The Bill proposes that 'authorising officers' must take such steps that are necessary to ensure that action taken under the internal authorisation is discontinued, if they become satisfied that the grounds of authorisation have ceased to exist.[366]

Legal uncertainty about the status of a 'suspended' authorisation

496. The Law Council is concerned that an authorising officer is not under a positive legal obligation to **cancel** an internal authorisation in these circumstances. This could lead to an internal authorisation technically remaining in force for its period of effect (up to 90 days) with no action being taken in reliance on it. While an authorising officer has a discretionary power to revoke the authorisation, they are not required to exercise it in these circumstances.[367]

497. If an authorising officer declines to revoke an authorisation, and merely takes steps to ensure action is discontinued, there may be uncertainty about the legal status of that authorisation. Since such an authorisation would still be in existence for the remainder of its period of effect (up to 90 days), there may be a legal possibility that it could effectively be 'revived' administratively during its period of effect. That is, an authorising officer could revoke their direction for ASIO officers to discontinue action under the authorisation, on the basis that the issuing grounds are, once again, satisfied as a result of changing circumstances (such as the latest activities of the target, or if new intelligence becomes available).

498. The Law Council considers that the legal possibility should not be open for authorising officers to intermittently 'turn on' and 'turn off' an authorisation during its period of effect. Rather, there should be an obligation on an authorising officer to cancel an authorisation if they believe that the issuing grounds have ceased to exist, with the result that it would be necessary for the officers conducting an investigation to obtain a new internal authorisation if the factual circumstances subsequently changed.

499. This approach would provide clarity and certainty to all ASIO employees and ASIO affiliates about the status of the internal authorisation – namely, that there is no legal basis on which they may commence or continue surveillance in reliance on that authorisation. The Law Council considers that legal clarity and certainty is particularly important given the breadth of the persons proposed to be authorised to exercise authority under an internal authorisation (namely, all ASIO employees and affiliates).

Protection for ASIO employees or ASIO affiliates who rely on a cancelled authorisation

500. The Law Council acknowledges the possibility that a mandatory cancellation requirement might not have been included in the Bill due to a desire to protect those ASIO employees and ASIO affiliates who are not informed of a cancellation decision in time to prevent them from exercising further powers. If this is the case, the Law Council considers that the preferable approach would be the inclusion of a provision equivalent to that in existing section 35M of the ASIO Act.

501. Section 35M protects SIO participants who rely on an SIO authority being unaware that it was varied or cancelled. These persons have no legal liability in relation to acts done in purported reliance on the SIO authority. This is provided that their

[366] Ibid, proposed section 26P.

[367] Bill, Schedule 2, item 8, inserting proposed s 26H(3) (authorising officer may revoke an authorisation).

actions would have been within the scope of the authority but for the variation or cancellation, and they were not reckless about the existence of the variation or cancellation.

Recommendation 71 – mandatory power of cancellation

- **Proposed section 26P of the ASIO Act (item 8 of Schedule 2) should be amended to impose a mandatory power of cancellation on authorising officers, or the Director-General of Security alone, to cancel an internal authorisation if the authorising officer or Director-General (as applicable) is satisfied that the grounds on which an internal authorisation was granted have ceased to exist.**
- **Consideration should be given to the inclusion of a similar provision to section 35M of the ASIO Act, to protect those ASIO employees and ASIO affiliates who act in reliance on a cancelled internal authorisation, and were unaware of the cancellation and were not reckless about the existence of the cancellation.**

Absence of a discretionary power of cancellation for the Attorney-General

Circumstances in which a discretionary cancellation power is appropriate

502. The Law Council is concerned that the Attorney-General does not have a power of cancellation in addition to authorising officers, which could be exercised if the Attorney-General believes that the issuing criteria are not or are no longer met; or that it would be more appropriate for ASIO to obtain a warrant for the relevant activity.

503. A discretionary cancellation power would be appropriate if the Attorney-General became aware (potentially via ASIO's reports on its internal authorisations[368] or other briefings provided by ASIO, or reports of the IGIS) of an approach to adopted by ASIO to the interpretation of the relevant provisions of new Subdivision DA of Division 2 of Part III of the ASIO Act, which the Attorney-General considered was not legally open.

The position under the Intelligence Services Act

504. In contrast to the proposed provisions in the Bill, the Law Council notes that the ISA enables the responsible Ministers for ASIS, ASD and AGO to cancel emergency authorisations given by agency heads at any time while they are in effect (and these Ministers are required to consider whether to exercise their powers of cancellation).

505. This is a strong reflection of the primacy that the ISA places on the concept of Ministerial authorisation and accountability for the actions of intelligence agencies, with devolutions of the level of authorisation reserved only for exceptional circumstances in which no relevant Minister is readily available or contactable to consider a request for an authorisation.[369] This is the position under the ISA **irrespective** of whether relevant intrusive intelligence collection activity proposed to be undertaken by ASIS, ASD or AGO would have otherwise constituted an offence under Australian law.[370] The ISA clearly reflects that it is ultimately the Minister for each ISA agency who is responsible and accountable for the conferral of intrusive intelligence collection powers.

[368] Bill, Schedule 2, item 17, inserting proposed s34AAB (reports to Attorney-General on authorisations).
[369] ISA, s 9B(8).
[370] ISA, ss 8, 9, 9A-9C and 14.

The case for treating ASIO consistently with ASIS, ASD and AGO

506. It is unclear why the ASIO Act should not follow the ISA in giving primacy to Ministerial responsibility and accountability for the authorisation of intrusive intelligence collection powers, which may have the potential to otherwise constitute an assault. The Law Council does not consider it appropriate to depart from that principle because a particular intrusive intelligence collection activity is not an offence under Australian law in the absence of lawful authority under a warrant. The ISA does not do so in relation to the Ministerial authorisation requirements applying to ASIS, ASD or AGO for the production of intelligence on an Australian person outside Australia.

507. The Law Council submits that ASIO should not be treated differently to the intelligence agencies governed by the ISA, with respect to the primacy of Ministerial-level authorisation for its collection activities. Such differential treatment of ASIO would create an arbitrary distinction in the authorisation levels applicable to ASIO and the ISA agencies, based solely on the physical location of the relevant intelligence collection activity, whether the Australian person in relation to whom intelligence is sought to be collected is physically located 'onshore' or 'offshore'.

508. Accordingly, the Law Council considers that the Attorney-General should be invested with a discretionary power to cancel an internal authorisation given under the proposed framework. This should be additional to the conferral of a mandatory power of cancellation on ASIO's authorising officers.

Recommendation 72 – cancellation of internal authorisations

- **Proposed section 26P of the ASIO Act (item 8 of Schedule 2) should be amended to confer a discretionary power on the Attorney-General to cancel an internal authorisation, in addition to an authorising officer, if the Attorney-General is satisfied that:**
  - **there are reasonable grounds on which to believe that the authorisation criteria are not met, or are no longer met; or**
  - **it would be more appropriate for ASIO to obtain authority for the activity under a special powers warrant.**

Relationship of the internal authorisation framework with other laws

509. The Law Council is concerned that the Bill does not include consequential amendments to explicitly address how the proposed authorisation framework will interact with other authorisation-based regimes, and in particular:
   - ASIO's SIO scheme in Division 4 of Part III of the ASIO Act; and
   - the cooperative regime in Division 3 of Part 2 of the ISA, which enables ASIS to produce intelligence on an Australian person who is outside Australia, without ASIS being required to obtain a Ministerial authorisation if it is undertaking the relevant activity for the purpose of cooperating with ASIO (generally following receipt of a request from ASIO to collect intelligence).

510. Presently, the above regimes contain provisions that expressly exclude conduct for which ASIO would require authorisation under a separate warrant (for example, a special powers warrant authorising the use of a surveillance device).[371] This ensures that the separate, pre-existing authorisation requirements are preserved, and cannot

[371] ASIO Act, s 35L (special intelligence operations); ISA, ss 13B(1) and 13D (ASIS-ASIO cooperation).

be subsumed by an SIO authorisation, or a request for ASIS to collect security intelligence overseas for ASIO.

511. However, the Bill does not contain any consequential amendments to extend the exclusion provisions in ASIO's SIO regime or the ASIS-ASIO cooperation regime in the ISA to refer to the new internal authorisation framework for tracking devices. This creates a risk that the SIO and ASIS-ASIO cooperation regimes could be used to bypass the separate requirements of the proposed internal authorisation framework.

512. As the extrinsic materials to the Bill do not acknowledge or justify these results, they may be unintended or unforeseen consequences. In any event, the Law Council considers that it should not be possible for SIO authorities to effectively bypass the separate requirements of internal authorisation. Nor should ASIS be relieved of the existing requirement to obtain a Ministerial authorisation when it is using tracking devices in public places or on the exterior of vehicles in a foreign country, as part of ASIS providing assistance to ASIO by tracking the location and movements of an Australian person while they are outside Australia.

Recommendation 73 – relationship with special intelligence operations

- **Section 35L of the ASIO Act should be amended to provide that any use of a tracking device that would otherwise require an internal authorisation under proposed Subdivision DA of Division 2 of Part III cannot be authorised as part of a special intelligence operation.**

Recommendation 74 – relationship with ASIO-ASIS cooperation regime

- **Section 13D of the *Intelligence Services Act 2001* (Cth) should be amended to provide that ASIS is not permitted to undertake an act without obtaining a Ministerial authorisation for the purpose of cooperating with ASIO, if ASIO would be required to obtain an authorisation under Subdivision DA of Division 2 of Part III of the ASIO Act to carry out the same activity in Australia.**

Recovery warrants for tracking devices

513. Proposed section 26R creates a new category of 'recovery warrant' that empowers the Attorney-General to issue a warrant for the recovery of a tracking device in **any circumstances** in which the installation, use and maintenance of the tracking device was **not** authorised under a surveillance device warrant, or foreign intelligence surveillance device warrant, or an IPW. While this would enable the recovery of tracking devices that were installed in reliance on an internal authorisation, it would also have a broader and potentially unintended application, as explained below.

Potential overbreadth of proposed section 26R

514. An unacknowledged and potentially unintended consequence of the breadth of proposed section 26R is that these recovery warrants may be available in respect of unauthorised and potentially unlawful surveillance activities undertaken by ASIO.

515. This could arise, for example, if ASIO failed to obtain **any** authorisation under a warrant or internal authorisation to use a tracking device in circumstances in which it was required to do so. It may also arise if ASIO exceeded the limits of its authority under a warrant or authorisation. In either of these scenarios, the actions of ASIO in installing, maintaining and using a tracking device would meet the requirements of

proposed paragraph 26R(1)(b) that these actions were not authorised under the warrants or authorisations listed in that provision (namely, because they lacked any form of legal authorisation). The Law Council is doubtful that the Bill should, as a matter of policy, create a mechanism by which ASIO may be given lawful authority to enter private premises or interfere with the interior of a vehicle to recover a tracking device that it has installed, used or maintained without the requisite legal authority.

516. The possible application of proposed section 26R is particularly concerning in circumstances in which ASIO acted unlawfully by failing to obtain a surveillance device warrant where one was required to use a tracking device, or exceeded the limits of authority under such a warrant. This is especially so in view of the fact that the proposed recovery warrants would be in force for up to 90 days; would authorise the use of force against persons and things where this is considered necessary and reasonable to do any of the things authorised in the warrant; and could authorise ASIO to enter private premises at any time of the day or night.[372]

Rationale for limiting the scope of recovery warrants

517. The Explanatory Memorandum to the Bill offers no acknowledgement of, or justification for, the potential for section 26R to apply in the circumstances outlined above, but rather appears to focus on the recovery of tracking devices used under an internal authorisation.[373] On one hand, the Law Council acknowledges that there may be highly exceptional circumstances in which the discovery of a tracking device by a person of security concern is likely to cause harm to national security (or ASIO's operational security) that is so grave as to merit a warrant-based power to authorise recovery – notwithstanding the unlawful or unauthorised character of the installation, use or maintenance of the device.

518. However, proposed section 26R is not limited to exceptional circumstances involving real risks of grave harm to national or operational security. It would merely require the Attorney-General to be satisfied that the non-recovery of the tracking device would cause **any degree** of prejudice to security.[374] In cases in which non-recovery would not present a significant risk of serious prejudice to security, the Law Council considers that there is a credible argument that the forced abandonment of a tracking device should properly be regarded as the 'cost' of ASIO undertaking unauthorised or unlawful activity in relation to the installation, maintenance or use of that tracking device (as applicable).

519. In the absence of any information to support this extremely broad scope, the Law Council considers that section 26R should be limited expressly to circumstances in which the installation, maintenance and use of the relevant tracking device for intelligence collection purposes was **not** unauthorised or unlawful.

520. Alternatively, if the Committee is persuaded that there is a credible, evidence-based case supporting the availability of recovery warrants in relation to unlawful or unauthorised tracking devices, the Law Council considers that such warrants should only be available if the Attorney-General is satisfied there are **exceptional circumstances** present, in which there would be a **significant** risk of **serious** prejudice to security if the device was not recovered. This would ensure that any possibility for the issuing of recovery warrants to effectively remediate unauthorised or unlawful activities would be highly exceptional and could not become normalised.

521. Further, if the Committee is persuaded that recovery warrants should be available to recover tracking devices whose installation, use or maintenance was unauthorised or

[372] Bill, Schedule 2, item 8, inserting proposed subsection 26R(4) of the ASIO Act.

[373] Explanatory Memorandum, 128-130 at [700]-[706].

[374] Ibid, inserting proposed subsections 26R(2) and (3) of the ASIO Act.

unlawful, the Law Council considers that provision should be made for a statutory right of compensation to persons whose property is damaged in the course of recovery. This should not be left to the general discretion of ASIO (including on the advisory recommendations of the IGIS) but rather should be guaranteed as of right. This would be an appropriate recognition of the unauthorised or unlawful nature of the original installation, use or maintenance that prompted the need for recovery.

Recommendation 75 – scope of recovery warrants

- **Proposed section 26R (item 8 of Schedule 2) should be amended to make explicit that recovery warrants cannot be issued if ASIO acted without lawful authority to install, maintain or use the tracking device for the purpose of collecting intelligence.**

  In particular, proposed section 26R should provide that the Attorney-General may only issue a recovery warrant if the original installation, maintenance and use of the tracking device (as applicable) was:

  - **authorised under a warrant, an internal authorisation or a foreign intelligence authorisation (as applicable); or**
  - **was covered by one of the permitted circumstances in which ASIO may operate a tracking device without a warrant or internal authorisation (as applicable).**

- **Alternatively, if the Committee is persuaded that there is a credible, evidence-based case supporting the availability of recovery warrants in relation to unlawful or unauthorised tracking devices, recovery warrants should only be available if:**
  - **the Attorney-General is satisfied there are exceptional circumstances present that resulted in the unintentional unlawful or unauthorised use of a tracking device; and**
  - **there would be a significant risk of serious prejudice to security, or to the life or safety of a person, if the device was not recovered.**

Ministerial visibility and accountability via breach reporting

522. Under proposed section 34AAB, ASIO must report to the Attorney-General on each internal authorisation within three months of it ceasing to have effect. Each report is required to 'give details of the compliance with the restrictions or conditions (if any) to which the warrant was subject' under proposed subsection 26G(8).[375]

Limitations in the proposed breach reporting provision

523. While the Law Council supports breach reporting, the requirements in proposed paragraph 34AAB(2)(f) of the ASIO Act are inappropriately narrow.

524. The requirements are limited to providing details of breaches by ASIO personnel of any specific, discretionary conditions and limitations that are an authorising officer may apply to an individual internal authorisation under proposed subsection 26G(8). There is no requirement for ASIO to report to the Attorney-General on any breaches of the statutory limits of its authority. For example, there is no requirement for

[375] Bill, Schedule 2, item 17, inserting proposed s 34AAB(2)(f) of the ASIO Act.

reports to the Attorney-General to identify whether any acts were done in excess of the limits of the activities authorised under proposed section 26J; or whether any of ASIO's actions breached the express exclusions listed in proposed section 26K.

525. This means that ASIO's reports to the Attorney-General on each internal authorisation will potentially only notify the Attorney-General of a limited sub-set of potential breaches of ASIO's legal obligations. The Law Council is concerned that this could result in the Attorney-General being given an inaccurate impression of ASIO's compliance. A limited breach reporting requirement may also limit the utility of these reports to the IGIS in conducting oversight of ASIO's internal authorisations.

526. Accordingly, the Law Council considers that internal authorisations should be subject to a comprehensive breach reporting requirement to the Attorney-General.

Recommendation 76 – comprehensive breach reporting requirements

- **Proposed paragraph 34AAB(2)(f) of the ASIO Act (item 17 of Schedule 2) should be amended to require ASIO to provide details of its compliance with:**
  - **all of the statutory requirements of the proposed internal authorisation framework, and not merely any specific conditions or restrictions imposed by an authorising officer under proposed subsection 26G(8); and**
  - **all applicable requirements of the ASIO Guidelines, which are administratively binding on ASIO.**

Unclassified annual reporting of aggregated statistics

527. The Bill proposes to amend section 94 of the ASIO Act to insert a new classified annual reporting requirement on the use of the proposed internal authorisation framework. Classified annual reports must include the total number of requests made and authorisations given for the relevant financial year.[376]

528. The Explanatory Memorandum describes the reporting requirement 'an additional safeguard to the amendments as it requires ASIO to be transparent about authorisations under the framework'.[377] It does not acknowledge that the relevant reporting requirement applies only to ASIO's classified annual reports. Nor does it explain how withholding aggregated statistical information from the Parliament and the public is consistent with the stated outcome of transparency.

529. Consistent with the Law Council's position on public reporting requirements for statistical information about ASIO's use of intrusive powers, the Law Council considers that any basis for a claim to secrecy requires a cogent and evidence-based justification, which should be tested carefully by the Committee and the wider Parliament.

530. As the Explanatory Memorandum does not provide any reasons for the proposed classified annual reporting requirement, the Law Council considers that it should be replaced with an unclassified annual reporting requirement.

[376] Bill, Schedule 2, item 21, inserting proposed s 94(2BD) in the ASIO Act (classified annual reports). The reports are classified because all of the contents in a report except for the statements specified in subsection 94(1) (questioning and detention warrants) are subject to deletion from the version of the report to be tabled in Parliament: ASIO Act, ss 94(5) and (6).

[377] Explanatory Memorandum, 133 at [726].

Recommendation 77 – unclassified annual reporting of aggregated statistics

- **Proposed subsection 94(2BD) of the ASIO Act (item 17 of Schedule 2) should be amended to require ASIO's unclassified annual reports to include aggregated statistical information about internal authorisations.**

Revision of the ASIO Guidelines

531. If Schedule 2 to the Bill is passed, the ASIO Guidelines would require updating to reflect the new internal authorisation framework. The Law Council considers that necessary updates to the ASIO Guidelines in relation to the tracking device authorisation framework should include specific guidance on the circumstances in which an internal authorisation should be sought by an ASIO employee or an ASIO affiliate; and specific decision-making guidance to authorising officers.

532. In view of the statement in the Minister's second reading speech to the Bill that the tracking powers able to be authorised under the proposed internal framework are 'non-intrusive',[378] it will be especially important for clear guidance to be provided about the application of proportionality and emergency requirements. This includes specific guidance about assessing the relative degrees of privacy intrusion associated with different intelligence collection methods.[379] The Law Council also considers that the suggested characterisation of these tracking powers as 'non-intrusive' reflects a significant disjunct between the views of the executive and civil society. This highlights the importance of broad consultation on revised guidelines.

Recommendation 78 – updates to the ASIO Guidelines on internal authorisations

- **The Government should update the ASIO Guidelines to include specific guidance about the internal authorisation framework. This should include guidance about assessing matters of proportionality, circumstances of emergency, and the relative degrees of privacy intrusion associated with different intelligence collection methods.**
- **The Government should consult with civil society stakeholders, including the Law Council of Australia, on these revisions.**

[378] The Hon Peter Dutton MP, Minister for Home Affairs, *Second Reading Speech, Australian Security Intelligence Organisation Amendment Bill 2020*, House of Representatives Hansard, 13 May 2020, 11.

[379] The PJCHR has also commented on the absence of specific guidance in the ASIO Guidelines in relation to the use of tracking devices: PJCHR, *Scrutiny Report 7 of 2020* (June 2020), 66-67 at [2.108].