



Australian Government
Attorney-General's Department

July 2017

**Review of the operation, effectiveness and
implications of Division 3 of Part III of the
*Australian Security Intelligence Organisation Act 1979***

Attorney-General's Department response to the Parliamentary Joint
Committee on Intelligence and Security's post-hearing questions

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This document responds the questions on notice received from the Parliamentary Joint Committee on Intelligence and Security Secretariat on 27 June 2017.

1. At the public hearing, Dr McGarrity and Professor Williams AO stated that no comparable nation has given its domestic intelligence agencies a compulsory questioning power and that in those countries compulsory questioning generally is a law enforcement function.

a) Is this accurate?

Care must be taken when attempting to draw direct comparisons between individual aspects of the security frameworks of different countries, even where those countries appear to have many similarities. The Attorney-General's Department (the department) and ASIO consider that any comparison should take into account the whole security framework of respective countries, and the roles, relationships and powers afforded to agencies within that broader landscape

The department has reviewed the legislative frameworks of a number of international domestic intelligence agencies, including the UK's MI5, Canadian Security Intelligence Service (CSIS), USA's Federal Bureau of Investigation (FBI), New Zealand Security Intelligence Service (NSIS), the Israeli Security Agency (ISA) and India's Intelligence Bureau (IB). Based on this review, and to the best of the department's knowledge there are no other comparable international domestic intelligence agencies which have the power to conduct compulsory questioning for the purposes of gathering intelligence in relation to terrorism and espionage/foreign interference.

b) Which agencies can undertake compulsory questioning in relation to terrorism and espionage/foreign interference matters within comparable nations?

Canada

The Canadian Security Intelligence Service (CSIS) does not have the power to conduct compulsory questioning. However the *Anti-Terrorism Act 2001* provided Canadian law enforcement with the ability to conduct compulsory questioning. This power lapsed in 2007 and was reintroduced by the *Combating Terrorism Act 2013*. These reforms created an investigative hearing regime (IH regime) within the *Canadian Criminal Code 1985*.

Under section 83.28(2) of the Canadian Criminal Code a peace officer¹ may, for the purposes of an investigation of a terrorism offence, apply *ex parte* to a judge for an order for the gathering of information. The IH regime allows the state to compel testimony from a witness during the fact-finding stage of an investigation, and thus before any charges are laid. An application can only be made with the consent of the Attorney-General. The judge must be satisfied that there are reasonable grounds to believe that a terrorism offence has been/will be committed, that the person has information concerning the offence, or information that may reveal the whereabouts of a person suspected by the peace officer of having committed the offence, is likely to be obtained as a result of the order, and reasonable attempts have been made to obtain the information by other means. Any person subject to such an order is obliged to answer questions or produce things. No information or thing obtained directly or indirectly during questioning can be used against the person in any criminal proceedings against them.

United Kingdom

The Security Service does not have the power to conduct compulsory questioning for the purposes of gathering intelligence. Section 89 of the *Terrorism Act 2000* provides police with the ability to stop a person

¹ The term 'peace officer' is defined in section 2 of the Canadian Criminal Code, and includes a police officer, police constable, bailiff or constable. The term also includes a wider range of persons, including a mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer, justice of the peace, designated correctional services officers, customs officials, designated officers and non-commissioned officers of the armed forces, and certain pilots of aircraft while the aircraft is in flight.

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for so long as is necessary to question the person for the purpose of obtaining information which he or she knows or believes might be of material assistance in preventing the commission of a terrorist act by another person, or in securing the apprehension, prosecution or conviction of another person for an offence involving the commission, preparation or instigation of a terrorist act. The person commits an offence if he or she refuses to answer any question or fails to answer any question to the best of his or her ability. The person is not liable to imprisonment for this offence, but may receive a fine.

Section 53 and schedule 7 of the *Terrorism Act 2000*, provides police with the ability to stop, question and search a person at a port or border without a warrant or without any grounds for suspecting that a person has any involvement in terrorism – or any other criminal activity. A person is required to answer such questions. An examination can be extended for a maximum period of nine hours. A person may be detained under schedule 7 if required. A combination of examination or detention may not exceed nine hours. A person is liable for imprisonment for 6 months, or a fine of up to 5,000 pounds, or both, for failure to answer questions of giving false answers.

United States of America

In the USA, the FBI has both security intelligence and law enforcement functions, and is responsible inter alia for counter-terrorism, counter-espionage and cyber security investigations.

The FBI does not possess compulsory questioning powers. However, pursuant to rule 17(g) of the Federal Rules of Criminal Procedure, grand juries in the USA have the ability to compel a person to give evidence under oath. Section 203 of the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001* (USA PATRIOT Act) amended those rules to permit the disclosure of grand jury (and wiretap) information regarding foreign intelligence (including foreign interference) to Federal law enforcement, intelligence, protective, immigration, national defence, or national security officials in order to assist the official receiving that information in the performance of his official duties. This means that the FBI, and other US law enforcement and intelligence agencies, may obtain information that has been obtained from a person who has been compelled to answer questions before a grand jury.

c) *What is unique about Australia, our system and the threat that we are experiencing that has resulted in our intelligence agency requesting quite unique powers compared to intelligence agencies across the world?*

The nature of the current security environment has been outlined in ASIO's classified submission to the Committee of 28 April 2017. ASIO does not suggest that the security threats Australia faces, whether in regard to terrorism, foreign interference and espionage, or other issues are unique to Australia. Certainly, amongst our 5-Eyes partners, we experience similar sources of threat which risk the lives and livelihoods of our citizens.

Having said this, care must be taken when attempting to draw direct comparisons between individual aspects of the security frameworks of different countries, even where those countries appear to have many similarities. The department and ASIO consider that any comparison should take into account the whole security framework of respective countries, and the roles, relationships and powers afforded to agencies within that broader landscape.

In the context of the availability of compulsory questioning powers, the following are important considerations:

- compulsory questioning powers exist within a broader suite of powers afforded to individual agencies—different jurisdictions may grant agencies greater powers in one field, while limiting powers in other fields;
- the nature of the agencies may differ—even for agencies commonly regarded as counterparts, their functions and remit can differ substantially; and

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- individual agencies exist within the broader Executive structure of each jurisdiction—the powers afforded to different agencies, and their ability to cooperate and share information with one another for the performance of the other agencies' functions, may differ.

For example, while the UK Security Service performs similar functions to ASIO, there are a number of marked differences in its statutory powers. The range of electronic surveillance powers afforded to the Security Service under the *Investigatory Powers Act 2016* (UK) are, as the department understands it, broader than those afforded to ASIO under the *Telecommunications (Interception and Access) Act 1979* and *Australian Security Intelligence Organisation Act 1979* and have different statutory thresholds.² We understand that the difference in thresholds would facilitate the Security Service deploying those powers at an earlier stage in its investigations.

Additionally, the compulsory questioning powers afforded to UK police under the *Terrorism Act 2000* (UK) (outlined in 1(b) above) have no counterpart in Australia. Part IC of the *Crimes Act 1914* permits the AFP to question a person who has been arrested for a terrorism offence, but does not require that person to answer any such questions (s 23S, *Crimes Act 1914*).

Although the ACIC should not be directly compared with police forces such as the AFP or UK police, as the Committee is aware, it possesses compulsory questioning powers. However, these powers:

- are restricted to ACIC Board-approved Special Investigations or Special Operations concerning 'federally relevant criminal activity' in circumstances where ordinary policing or intelligence methods would be ineffective; and
- may only be exercised for the purposes of the performance of ACIC's functions – the powers may not be exercised solely for the purposes of assisting ASIO or other agencies in the performance of their functions.

In the USA, the FBI performs a dual role, acting as hybrid law enforcement and security intelligence agency. As the Committee would be aware, the FBI operates within a fundamentally different Constitutional framework to Australian agencies. Accordingly, while grand jury processes (outlined in 1(b) above) are different in form to questioning warrants under the ASIO Act, they are a form of covert, compulsory questioning by the Executive for investigative purposes and, in particular, are available for international terrorism and counter-espionage purposes.

Due to the different approaches taken in other jurisdictions, the department and ASIO consider the ongoing availability to ASIO of compulsory questioning powers is better viewed in the Australian context with comparisons to other Commonwealth and State agencies. In the domestic context, compulsory questioning powers are far from unique, not just in the intelligence and law enforcement space but also in regulatory matters.

The most obvious example of another Australian intelligence agency with compulsory questioning powers is the Australian Criminal Intelligence Commission (ACIC) (albeit in the criminal intelligence space). ACIC is charged with among other things collecting, correlating, analysing and disseminating criminal information and intelligence, and undertaking, when authorised by the ACIC Board, intelligence operations (see paragraphs 7A(a) and (b) of the *Australian Crime Commission Act 2002*). ACIC can utilise its compulsory questioning powers in regard to any intelligence operation that has been determined by the Board to be a 'special operation'.

² For example, the Secretary of State may issue a targeted interception warrant to the Security Service where it is 'necessary in the interests of national security'. Comparatively, the Attorney-General may issue a service-based interception warrant to ASIO where he or she is satisfied that:

- the service is being or is likely to be used by a person engaged in, or reasonably suspected by the Director-General of Security of being engaged in, or of being likely to engage in, activities prejudicial to security; and
- the interception of communications made to or from the service will, or is likely to, assist ASIO in carrying out its function of obtaining intelligence relating to security.

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ACIC special operations currently cover the following broad range of serious and organised crime issues:

- high risk and emerging drug threats;
- national security impacts from serious and organised crime;
- outlaw motorcycle gangs;
- emerging organised crime threats; and
- criminal exploitation of Australia's migration system.

Sections 29A and 29B of the Australian Crime Commission Act contain provision for compulsory questioning by ACIC to occur in secret. While in some circumstances, the examiner will have a discretion not to require secrecy, the department and ASIO understand that secrecy obligations are regularly imposed. As with questioning warrants under the ASIO Act, these secrecy obligations contain criminal offences that apply to disclosure by a person of the existence of a summons requiring them to attend compulsory questioning.

Arguably, the ability to conduct compulsory questioning best suits with agencies charged with gathering intelligence (whether security or criminal intelligence), as opposed to purely law enforcement agencies, due to the necessary constraints placed on the use of information obtained against the person in criminal proceedings. The outcomes an intelligence agency seeks from its investigations will not always be directed at achieving a successful criminal prosecution, but often have a broader focus on building a stronger understanding of the security or crime environment. Therefore, the existence of direct use immunities in regard to compulsory questioning is unlikely to be a major impediment to intelligence agencies pursuing their functions.

The department and ASIO also reiterate that the value to ASIO's investigations of past use of questioning warrants should not be forgotten. As stated in ASIO's submission of 28 April 2017, questioning warrants enabled ASIO to collect valuable and previously unknown information on key individuals, tactical information related to investigative targets, and information on which more confident intelligence assessments could be made concerning an individual's intent, extremist views and motivations. This information would not have been able to be obtained through other collection methods.

The then-Independent National Security Legislation Monitor (INSLM), Mr Bret Walker QC, examined closely the files for all questioning warrants previously executed in his 2012 Annual Report and relevantly advised:³

The efficacy of the QW provisions and their worth as an intelligence collection tool has been established through review of the files and discussions with relevant agencies. Questioning under QWs has played a role in informing intelligence assessments and progressing terrorism investigations.

The department or ASIO can provide to the Committee a copy of Appendix CB of Mr Walker's classified Annual Report which explains in detail his opinion on the specific benefits to ASIO's investigations of the previously executed questioning warrants. ASIO can also provide further verbal briefing to the Committee (in a classified setting) on the specific benefits of those warrants to ASIO investigations.

³ INSLM Declassified Annual Report 20 December 2012, p70.

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2. ***ASIO has stated that it needs the ability to detain the subject of a warrant to prevent them from absconding, destroying material or alerting others.***
 - a) ***What powers are available to ASIO and law enforcement to prevent those three concerns from eventuating? If the powers are not available, then what (or where) are the exact gaps?***

The purpose of a questioning and detention warrant (QDW) is to be able to carry out compulsory questioning of a person while ensuring none of the following outcomes occur following the service of the warrant:

- the subject of the warrant does not attend questioning;
- the subject alerts others as to the existence of the investigation; or
- the subject destroys, damages or alters records or other things relevant to the collection of intelligence.

Following is a table that outlines possible ASIO and law enforcement powers that could be considered in conjunction with a questioning warrant (QW) to seek to try to prevent one of the three outcomes QDWs seek to avoid occurring. However, it is ASIO's view that none of these current options are well tailored to the specific circumstances that a QDW is intended to address. Their use as a substitute would either be ineffective in preventing one or more of those three outcomes, or result in compulsory questioning being detrimentally affected or unavailable altogether.

The overriding purpose of a QDW is *the ability to compulsorily question a person in time critical circumstances* where it is important that others are not alerted to the investigation and security-relevant material not destroyed. In particular, while arrest may be available for some persons considered as suitable to be subject to a QDW, arrest and QDWs are not interchangeable powers. They are designed to achieve different purposes:

- arrest generally occurs for the purpose of ensuring a person stops committing a criminal offence and/or ensuring that person is available to face criminal justice processes;
- a QDW is an information gathering power, which includes a detention capability to ensure certain things do not occur that may jeopardise time critical investigations.

In the circumstances where a QDW may be necessary, and the person to be questioned is a suspect in regard to an offence, an assessment will have been made that compulsory questioning of that person is preferable to arrest and interviewing them under caution. This assessment would involve weighing up the benefits of the two courses, including consideration that any information obtained under compulsory questioning will not be able to be directly used against that suspect in criminal proceedings.

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Alternative power	What the power authorises	Whether effective at addressing unwanted outcomes	Key gaps
<p>ASIO QW: Obtained under s34E ASIO Act requiring immediate attendance for questioning under the warrant.</p>	<ul style="list-style-type: none"> Under s34K(7) ASIO Act, a police officer can take a person into custody <i>if they fail to appear</i> for questioning as required under a warrant. Under ss 34U & 34V ASIO Act, a police officer can use force to take person into custody and bring before prescribed authority, and enter premises to take person into custody. 	<p>Notwithstanding the requirement for immediate attendance, there will still be a time delay between service of warrant and when it can be said the person has failed to appear which triggers the ability to take the person into custody under s34K(7). This time delay will potentially give a person the opportunity to abscond, alert others or destroy material.</p>	<p>Time delay between service of warrant and trigger for police to detain for non-compliance.</p>
<p>ASIO search warrant: Obtained under s25 ASIO Act enabling search of premises, and persons at or near premises.</p>	<ul style="list-style-type: none"> Search for records or other things that will substantially assist the collection of intelligence in respect of a matter that is important in relation to security. Removing and retaining relevant records or things found in search. Minister can specifically authorise ordinary or frisk search of persons at or near search premises under s25(4A). 	<p>A search warrant can only go to preventing destruction, damaging or altering of records or things sought under a QW. However, would only be effective if the things sought were believed to be at the search premises. An occupant of the premises subject to a search warrant cannot be prevented from contacting others or leaving the premises, and this could lead to others being alerted to the investigation. The fact of the search will also not ensure the person's attendance at questioning. Further, the person may not necessarily be at the premises specified for a search at the time ASIO wants to serve the questioning warrant and conduct the search.</p>	<p>Reliant on things sought being at the search premises at time of search.</p> <p>Will not prevent subject alerting others or ensure their attendance at questioning.</p>

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Alternative power	What the power authorises	Whether effective at addressing unwanted outcomes	Key gaps
<p>Police arrest without warrant (ss 3W & 3WA <i>Crimes Act 1914</i> (Cth))</p>	<ul style="list-style-type: none"> Arrest on basis that reasonable suspicion/belief that person has committed or is committing an offence, plus consideration of other factors (see ss 3W(1)(b) & 3WA(1)(b) <i>Crimes Act 1914</i> (Cth)) 	<p>The arrest power is triggered by the commission of an offence. In some cases the person sought to be questioned will not necessarily be a suspect in any offence at that time. If the QW requires immediate attendance, and the person appears to not be taking steps to immediately attend there is the possibility arrest could occur in this instance. However, in either case arrest would likely be counter-productive to what is sought to be achieved by compulsory questioning, as the person would have to be taken to police premises, possibly interviewed under caution, decisions made as to charges and bail. If interviewed, the person would not be obliged to answer any questions put to them by police. Further, there is no guarantee they would be prevented from contacting others at any stage from the time the questioning warrant was served.</p>	<p>Not available in all circumstances where a QDW may be required.</p> <p>Ability to conduct compulsory questioning subordinated to arrest, charge, and bail processes.</p> <p>May not prevent subject alerting others.</p>
<p>NSW police investigative detention (Part 2AA <i>Terrorism (Police Powers) Act 2002</i> (NSW))</p>	<ul style="list-style-type: none"> Arrest of terrorism suspect for investigative detention purposes. Enables detention for up to 4 days following arrest, or if 	<p>Investigative detention is only available for terrorism suspects. While in many cases where a QDW was to be used this definition could be met, it may</p>	<p>Currently only available in NSW.</p> <p>Not available in all circumstances</p>

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Alternative power	What the power authorises	Whether effective at addressing unwanted outcomes	Key gaps
	<p>a detention warrant is obtained up to 14 days.</p> <ul style="list-style-type: none"> Contact with family members and others can be monitored, and can be prohibited in some cases by a judge. 	<p>not always be the case. Further, investigative detention does not include a compulsory questioning power. As with ordinary arrest, any questioning of the terrorism suspect would be under caution meaning they would not be obliged to answer.</p> <p>So while, the risk of the three outcomes QDWs are designed to prevent may be able to be better met compared to ordinary arrest, the primary purpose of the QDW would be lost – the ability to compel answers to questions.</p>	<p>where a QDW may be required.</p> <p>Ability to conduct compulsory questioning subordinated to investigative detention processes.</p> <p>Only available for terrorism investigations.</p>
<p>Police preventative detention order (PDO) (Commonwealth or State/Territory law – for example Division 105 <i>Criminal Code</i> (Cth))</p>	<ul style="list-style-type: none"> Enables detention of a person who is suspected of involvement in a terrorist act that is capable of being carried out, and could occur, in the next 14 days, or where detention is necessary to preserve evidence of a recent terrorist act. Detention can extend for up to 48 hours under the <i>Criminal Code</i> (Cth), and up to 14 days for States. Very limited contact with others is allowed during PDO, and can be monitored. Questioning of person under a PDO is prohibited except 	<p>The threshold for obtaining a PDO means that only persons suspected of direct involvement in a prospective or past terrorist act are likely to be able to be detained. While in many cases where a QDW was to be used this threshold could be met, it may not always be the case. While a person subject to a PDO can be released from the PDO for questioning by ASIO under a QW, a PDO does not itself allow the person to be questioned.</p>	<p>Not available in all circumstances where a QDW may be required.</p> <p>No direct ability to question the subject.</p> <p>Only available for terrorism investigations.</p>

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Alternative power	What the power authorises	Whether effective at addressing unwanted outcomes	Key gaps
	<p>to check on safety and well-being.</p> <ul style="list-style-type: none"> Person subject to a PDO can be released from PDO for purposes of being questioned by ASIO under a QW/QDW (see s105.25 <i>Criminal Code</i> (Cth)). 		
<p>Police search warrant (s 3E <i>Crimes Act 1914</i> (Cth))</p>	<ul style="list-style-type: none"> Search and seizure of evidential material found. Can obtain a warrant to search a specific premises or a specific person (ASIO search warrant confined to specific premises, and persons at or near the premises). 	<p>The requirement that there be suspicion of evidential material at the relevant premises or on a person may not always be able to be met in intelligence cases, so a police search warrant will not always be available. If a police search warrant (under s3E <i>Crimes Act</i>) can be obtained, it potentially offers a little more flexibility in that a warrant can be obtained over a specific person so they can be stopped in the street and searched. However, as with an ASIO search warrant, a police search warrant can only go to preventing destruction, damaging or altering of records or things sought under a QW. An occupant of premises subject to a search warrant cannot be prevented from contacting others or leaving the premises, and this could lead to others being alerted to the investigation. The fact of the search will</p>	<p>Not available in all circumstances where a QDW may be required.</p> <p>Will not prevent subject alerting others or ensure their attendance at questioning.</p>

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Alternative power	What the power authorises	Whether effective at addressing unwanted outcomes	Key gaps
		also not ensure the person's attendance at questioning.	

b) If gaps exist, what are the various solutions, methods and options available (including via legislative amendment) to prevent someone from absconding, destroying material, or notifying others?

The department and ASIO are considering alternative models that may provide mechanisms to ensure the same ends are achieved as a QDW, in a more targeted fashion. The critical issue is removing any period of time between the service of the questioning warrant and the appearance of the subject at questioning during which others could be alerted to the investigation or material of security relevance could be destroyed (including electronic records accessible from a mobile phone). In 2017 where mobile phones are prevalent and likely to be immediately at-hand for any person, the time period that would enable these things to occur is literally a matter of seconds or minutes. As such, any model that achieves the same purposes as a QDW must necessarily allow the police officer serving the warrant to immediately search the subject and if necessary use force in escorting them to the location where questioning will occur.

As the department stated in evidence on 16 June 2017, powers that engage a person's rights and interests to a significant degree should generally be exercised under warrant (subject to countervailing considerations, such as urgency or practicability). Accordingly, the department and ASIO consider that the proposed mechanisms should continue to operate under warrant, maintaining the existing questioning warrant safeguards and time limits.

Possible model

Attorney-General may authorise additional powers under a QW

At present, subsection 34E(2) of the Act provides that a QW may require a person to attend immediately for questioning after being notified of the warrant.

The department and ASIO consider that it would be possible to establish a more graduated framework by supplementing the QW framework, to enable the Attorney-General to, in specific circumstances (outlined below), authorise a police officer to exercise one or more additional powers:

- conduct an ordinary search (as defined in the ASIO Act) of the subject of the warrant;
- seize:
 - devices or things capable of enabling communication with another person;
 - seizeable items (as defined in the ASIO Act); and
 - items relevant to the collection of intelligence that are important in relation to the security matter;
- require the subject of the warrant to immediately accompany the officers to the location of the questioning, with the ability to use force as necessary and reasonable to ensure this occurs (consistent with current s 34V of the ASIO Act);
- where necessary, enter premises using such force as is necessary and reasonable (consistent with current s 34U of the ASIO Act) to ensure the person does immediately accompany officers to the location of questioning.

The Attorney-General would have the option to specifically authorise the above actions under the warrant only in circumstances where he or she is satisfied that there are reasonable grounds for believing that, if those powers are not available the person may:

- not attend questioning as required under the warrant;

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- alert a person involved in the security-relevant activity that there is an investigation into that activity; and/or
- destroy, damage or alter a record or thing, or cause another person to destroy, damage or alter a record or thing, that has been requested or may be requested to be produced in accordance with the warrant.

The existing limitations and safeguards on QWs would continue to apply, including the time limits for questioning.

Police ability to take subject into custody

In his 2012 Annual Report, Mr Walker recommended that the police officer serving the warrant should be empowered to take the subject of the warrant into custody where officer believes on reasonable grounds from anything said or done by the person that there is a serious possibility that the person intends not to comply with the warrant.⁴ Non-compliance would include:

- not attending questioning as required under the warrant;
- alerting a person involved in the security-relevant activity that there is an investigation into that activity; and/or
- destroying, damaging or altering a record or thing, or causing another person to destroy, damage or alter a record or thing, that has been requested or may be requested to be produced in accordance with the warrant.

The department and ASIO consider that there would be merit in considering such a power in conjunction with the warrant-based model, outlined above. The development of such a power would require further consultation with the AFP. Such a power would account for circumstances in which the Attorney-General is not satisfied, at the time of issuing the warrant, that there are reasonable grounds to believe that one of the abovementioned risks exists, but where the risk becomes apparent following the service of the warrant.

Such a power would likely need to include:

- the ability to enter premises to take the person into custody (consistent with s 34U of the ASIO Act);
- the ability to carry out an ordinary search and seizure of the same types of items as described above; and
- a requirement for the police officer to immediately bring the person to the location where questioning is to occur.

Power for examiner or prescribed authority to direct that subject be taken into custody

These proposed powers under the warrant (both those specifically authorised by the Attorney-General and the general power available to police serving the warrant) would only go to what could occur prior to the person appearing for compulsory questioning.

Once a person was before the examiner/prescribed authority, the department and ASIO consider that it would be appropriate for the examiner/prescribed authority to retain the power to determine whether the person should be taken into custody (taking into account the same considerations as above) until the conclusion of questioning.

⁴ *INSLM Declassified Annual Report 20 December 2012*, Recommendation V/2 p107.

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3. ASIO and AGD have recommended the ASIO Act be amended to allow ASIO to conduct compulsory questioning in respect of all heads of security. What are the gaps or deficiencies in ASIO's existing powers that require a questioning power for espionage and acts of foreign interference?

ASIO's questioning warrant powers are currently only available for use where they would substantially assist the collection of intelligence that is important in relation to a terrorism offence. This makes the questioning warrant power the only warranted activity not available to ASIO for the collection of intelligence under all heads of security. Having ready access to all mechanisms for collecting intelligence would equip ASIO with valuable tools for investigating and resolving espionage and foreign interference investigations.

Legislating inclusion of other heads of security, including espionage and foreign interference, in ASIO's current compulsory questioning powers would allow the development of a streamlined process for carrying out compulsory questioning independent of external partners and their resourcing and legislated constraints. A compulsory questioning regime would provide protection for the interviewee (through secrecy and direct use immunity provisions) and a means for ASIO to efficiently and effectively explore security intelligence issues with persons who would otherwise refuse to cooperate with ASIO on a voluntary basis.

The availability of ASIO's compulsory questioning powers for espionage and foreign interference matters would provide a key tool in quickly and efficiently resolving complex, and in many cases extremely sensitive, CEI investigations, and the reallocation of limited resources to other high priority investigations.

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4. *In its written submission, the Australian Lawyers Alliance questioned the constitutional validity of Division 3 of Part III and suggested that the provisions do not comply with Australia's international human rights obligations. What is the Department's response to these concerns?*

Constitutional validity

Consistent with longstanding practice, it would not be appropriate for department officials to provide legal or constitutional advice to the Committee.

The department obtained legal advice from the Australian Government Solicitor as to the constitutional validity of proposed questioning and detention warrant regime in and would anticipate seeking advice on the constitutional validity of any proposed new framework, in the ordinary course of drafting any amendments.

Australia's international human rights obligations

The department considers that ASIO's questioning, and questioning and detention powers are compatible with Australia's international human rights obligations and are both necessary and proportionate. While it would not be appropriate to provide legal advice to the Committee, the department has reviewed the areas of concern raised by the Australian Lawyer's Alliance and has provided the general information below to assist the Committee. This information focuses on the existing regime in Division 3 of Part III of the ASIO Act. If a new framework were to be developed the department would do so consistently with Australia's international human rights obligations.

Right to be free from arbitrary detention

Article 9 of the International Covenant on Civil and Political Rights (ICCPR) provides that no-one shall be subjected to arbitrary arrest or detention or deprived of their liberty except on such grounds and in accordance with such procedure as are established by law. Cases of deprivation of liberty provided for by law must not be manifestly disproportionate, unjust or unpredictable and the manner in which an arrest is made must not be discriminatory, and must be appropriate in view of the circumstances of the case.

The department's view is that, judged against the requirements of Article 9, the power to detain a person under ASIO's questioning and detention warrant provisions is justified to ensure that ASIO can collect intelligence that is important in relation to a terrorism offence, in circumstances in which:

- other intelligence collection methods would be ineffective; and
- unless the person is detained, the person is likely abscond, tip-off persons involved in the offence, or destroy evidence or intelligence material.

The Attorney-General may only consent to the issue of a questioning and detention warrant if satisfied there are reasonable grounds for believing or being satisfied of the relevant statutory criteria. An issuing authority (being a judge of a federal court) may then issue a warrant if satisfied there are reasonable grounds for believing that questioning the person who is the subject of a warrant will substantially assist in the collection of intelligence that is important in relation to a terrorism offence.

Division 3 does not authorise ASIO to take into custody and detain people under questioning and detention warrants. Rather, such authority is conferred upon a police officer. If a person is taken into custody by a police officer in accordance with the warrant, that officer must make arrangements for the person to be brought immediately before a prescribed authority for questioning. The prescribed authority is required to inform the person of the relevant rights, including to contact others, and obligations, including obligations of non-disclosure, that apply to the person under Division 3. Division 3 further provides for the right to contact a legal representative or another person as identified and approved of in the warrant.

Under the regime a person cannot be detained for more than the maximum of 168 hours (seven days) and must be released from detention after this time. The period of seven days ensures that there are

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appropriate opportunities for breaks in questioning (which is limited to 24 hours in total) so that a person has adequate opportunity to rest, have meals, engage in religious practices, exercise his or her rights of contact with a legal representative, a family member or another permitted person, contact the IGIS or the Ombudsman to make a complaint, and to accommodate any necessary suspension as a result of the use of an interpreter during questioning.

Accordingly, detention under a questioning and detention warrant is not arbitrary because it is limited to those circumstances in which it is necessary – that is, a last resort because all other means of collecting intelligence would be ineffective, and there is a risk that the person may fail to attend questioning, may tip off another person involved in a terrorism offence, or may tamper with things required to be produced under the warrant.

In addition, warrants are limited to the collection of intelligence that would substantially assist in relation to a terrorism offence, being a class of offence that poses a grave risk to both national security and to the right to life under Article 6 of the ICCPR, be and are subject to the oversight of an independent issuing authority and a prescribed authority, together with a specific oversight role conferred upon the IGIS (which is additional to the ability of both the IGIS and the Ombudsman to receive and consider complaints in relation to ASIO and the AFP respectively, in the execution of a warrant). The maximum duration of detention is also fixed in legislation, and a person is legally required to be released from detention at this time.

Right to Privacy

Article 17 of the ICCPR provides that no-one shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. The use of the term 'arbitrary' means that any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. The United Nations Human Rights Committee interpreted 'reasonableness' to imply that any limitation must be proportionate and necessary in the circumstances.

Entry to premises to execute a warrant

Under the regime a police officer may enter a person's premises at any time, using such force as is reasonable and necessary in the circumstances, in order to take the person into custody pursuant to a questioning and detention warrant or in the event that the person fails to appear before a prescribed authority (as required by a warrant or direction given by the prescribed authority).

This power to enter a person's premises is necessary and proportional to ensuring the reasonable execution of warrants under Division 3. If a questioning and detention warrant is issued, this will mean that there are reasonable grounds for believing that, if a person is not immediately brought into custody, the person may alert others involved in a terrorist offence of the investigation, may not appear before the prescribed authority or may destroy, damage or alter a record or thing requested under the warrant.

It is also necessary to ensure that police officers can enter any premises in order to bring a person before a prescribed authority for questioning if the person fails to do so pursuant to a warrant or direction given by this prescribed authority. If police officers were not afforded the power to enter any premises, they would be effectively precluded from enforcing a warrant while the person subject to a warrant remains situated on any land, place, vehicle or aircraft. Execution of a warrant or direction would rely on this person voluntarily leaving the premises which could hold up the process of enforcing the warrant and potentially jeopardise an investigation into a terrorist offence.

The police are also subject to their own guidelines in relation to the use of force. For example, the AFP are bound by the Commissioner's Order on Operational Safety, which provides that guidelines as to what is considered reasonable or excessive force while emphasising principles of negotiation and conflict de-escalation. Once a police officer brings a person into custody, they are also bound to bring the person before a prescribed authority, who must inform the person of their rights and obligations.

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Obligations to answer questions and produce documents or things under a warrant

Division 3 requires that a person who is the subject of a warrant under this Division must appear before a prescribed authority for questioning and must not:

- fail to give any information requested under the warrant;
- make a statement in purported compliance with a request for information under the warrant that is, to the person's knowledge, false or misleading;
- fail to produce any record or thing that the person is requested in accordance with the warrant to produce; or
- engage in conduct which results in the record or thing requested under the warrant being unable to be produced, or produced in wholly legible or usable form.

Under these laws, an individual may be compelled to provide information which could be considered private or confidential. These offences, however, are, reasonable and proportionate measures which are necessary to ensure the effectiveness of warrants issued under Division 3. As outlined previously, a warrant may only be issued under Division 3 when the issuing of a warrant is either is reasonable in all the circumstances, having regard to the possibility that information would be disclosed voluntarily, or when obtaining the information through voluntary disclosure would be ineffective. Accordingly, these warrants target individuals who are unwilling to voluntarily provide information relevant to a terrorism offence. If a reluctant individual is permitted to withhold information, this would undermine the central purpose of warrants issued under Division 3, which are primarily used to gather potentially critical intelligence relevant to the prevention, or investigation of, a terrorist attack. In order to ensure the functionality of these warrants, it is therefore necessary to impose a positive obligation to provide information on a person who is the subject of a warrant, as this obligation will allow the prescribed authority to obtain frank and honest information which could be used to prevent a potential terrorist attack.

There are also a number of safeguards which protect an individual's private information. In carrying out his or her questioning, the prescribed authority will be bound by the Attorney General's Guidelines, which relevantly provide that information must be obtained by ASIO using as little intrusion into individual privacy as possible, consistent with the performance of ASIO's functions. ASIO's functions dictate that the organisation must only collect information which is relevant to security, meaning that ASIO will be precluded from collecting personal information which is not connected to a national security issue. The Guidelines also provide that the means used for obtaining information must be proportionate to the gravity of the threat and the probability of its occurrence.

If private information is obtained, specific safeguards exist which prevent it from being unnecessarily exposed to the general public. If the Director-General is satisfied that private information obtained under a warrant is not required for the purposes of ASIO's functions, ASIO must cause any record or copy of this information to be destroyed.

Should the prescribed authority request private information which is not related to a terrorism offence, the subject of a warrant retains the right to make a complaint to the IGIS. The IGIS may be present at the questioning of an individual and it remains open to the IGIS to raise any concern about the impropriety or illegality of any exercise of the powers under Division 3. If such a concern is raised, the prescribed authority may give a direction to suspend questioning under the warrant.

Freedom of expression

Article 19(2) of the ICCPR provides that everyone has the right to freedom of expression, including the freedom to impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media. Division 3 engages this right through its compulsory questioning powers, secrecy provisions and the limitations it places on contacting family members or legal representatives. Article 19(3), however, provides that the right to freedom of expression may be limited on grounds of national security, provided that any limitation has been prescribed by legislation and is reasonable, necessary and proportionate to achieve the desired purpose.

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Non-disclosure obligations

Division 3 contains two secrecy provisions which engage the right to freedom of expression by restricting the disclosure of information. Subsection 34ZS(1) operates while a warrant is in force, and prevents a person from disclosing information without authorisation where the information is operational information or relates to the warrant or the questioning or detention of a person under the warrant. Subsection 34ZS(2), on the other hand, operates for two years after the warrant ceases to be in force, and prevents a person from disclosing operational information without authorisation where that information has been obtained as a direct or indirect result of a warrant being issued or executed. Operational information is defined as information that ASIO has or had a source of information or an operational capability, method or plan of ASIO. These offences are punishable by a maximum penalty of 5 years imprisonment and will apply whether or not the relevant conduct, or result of the conduct, occurred in Australia.

These secrecy provisions are necessary to ensure the effectiveness of intelligence gathering operations which are conducted in relation to terrorist offences. While a warrant is in force, subsection 34ZS(1) prevents the disclosure of information that could have significant implications for the integrity of the questioning process under the warrant and the effectiveness of related investigations. The additional protections provided under subsection 34ZS(2) operate to protect ASIO's sources, holdings of intelligence and its method of operations, as the release of this information could seriously affect ongoing and related investigations which can be long-running.

These secrecy laws also contain a number of safeguards which allow them to function in a reasonable and proportionate manner. Persons who are subject to a warrant may disclose information which would ordinarily be subject to secrecy laws if authorised to do so by the Director-General of Security or the Attorney-General. As a principle of administrative law, the Director-General or Attorney-General may not unreasonably withhold such consent. A person may also disclose information to a lawyer for the purpose of seeking legal advice, to a court for the purpose of seeking a remedy in connection to a warrant or to the IGIS or the Commonwealth Ombudsman in relation to a warrant under Division 3. These permitted disclosures ensure that the rights of the subject of a warrant are maintained while appropriately protecting sensitive information.

Cruel, inhuman or degrading treatment or punishment

Article 10 of the ICCPR provides that all people who are deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person. Division 3 engages humane treatment obligations under Article 10, because people who are the subject of warrants issued under that Division are deprived of their liberty for the duration of their custody or detention under a warrant.

Treatment of people being questioned or detained under a warrant

Division 3 provides for an extensive range of safeguards to ensure the humane treatment of people who are subject to warrants issued under that Division. This includes an express obligation on people exercising authority under a warrant (or implementing or enforcing a direction given by a prescribed authority) to treat the subject with humanity and respect for human dignity, and a prohibition on subjecting them to cruel, inhuman or degrading treatment (s 34T). Criminal offences, carrying maximum penalties of two years' imprisonment also apply to people who knowingly contravene safeguards, including directions given by prescribed authorities about the conduct of questioning, or searches of the subject where authorised.

In addition, the Statement of Procedures issued under section 34C sets out a number of requirements in relation to the humane treatment of people subject to questioning and questioning and detention warrants. These include requirements to ensure the health and welfare of people while in detention or 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 minute breaks after every four hours of continuous questioning).

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A person who is the subject of a warrant is required to be permitted to conduct the IGIS or the Ombudsman during or after his or her detention, and has the opportunity to make complaints about his or her treatment.

Detention of a child

Australia's obligations with respect to children arise principally under the Convention on the Rights of the Child.

Detention of children under a questioning and detention warrant

The ability to detain a person who is 16 or 17 years under a questioning and detention warrant engages the rights under Article 37(b), in relation to the prohibition of the arbitrary detention of children, and the right that detention should only occur as a measure of last resort, and for the shortest appropriate period of time, and the humane treatment obligations in Article 37(c). The ability to detain a young person under such a warrant further engages the right to legal assistance and a right to challenge that detention under Article 37(d).

There can be a legitimate need to issue a warrant in relation to a child – namely, where that person is likely to have engaged, or to engage, in a terrorism offence. The exclusion of people under the age of 18 years from questioning and detention warrants would leave a significant gap in ASIO's ability to collect crucial intelligence about people who have engaged in, or are likely to engage in, terrorism offences.

However, a special scheme applies to the detention of people who are 16 or 17 years or age, to ensure that detention is not arbitrary, is a measure of last resort, and adheres to the specific humane treatment obligations in relation to children in detention. In particular, as noted above in relation to questioning and detention warrants for people aged 18 years or over, questioning and detention warrants in relation to people aged 16 or 17 years can only be issued as a last resort.

The additional requirements in subsection 34ZE(4) apply to questioning and detention warrants issued in relation to people who are 16 or 17 years of age. That is, the Attorney-General must be satisfied on reasonable grounds that it is likely that the person will commit, is committing or has committed a terrorism offence, and the warrant will meet all of the special requirements for young people in subsection (6) of section 34ZE. The further requirements in subsection 34ZE(6) (permission to contact a parent, guardian or other appropriate person) and subsection 34ZC(1)(f) (any search to happen in the presence of a parent, guardian to other appropriate person) apply to questioning and detention warrants issued in relation to people who are 16 or 17 years of age.

In addition, people who are 16 or 17 years of age who are subject to a questioning warrant or a questioning and detention warrant have the same rights as people 18 years and over to access a lawyer, to seek a judicial remedy in relation to their detention, make a complaint to the IGIS or the Ombudsman, and to be informed by the prescribed authority of their rights.

Potential discriminatory impact

The Government does not target particular religious or ethnic groups within our community. Australia's counter terrorism laws and operational arrangements are aimed at countering the threat of terrorism and protecting our tolerant and multicultural Australian community, not dividing it.

Further to the above, the *Racial Discrimination Act 1975* prohibits a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life (s 9(1)).

In accordance with s 8(1)(a)(v) of the *Inspector-General of Intelligence and Security Act 1986*, one of the key functions of the Inspector-General in relation to its oversight of ASIO is to conduct an inquiry into any act or practice of ASIO that is or may be inconsistent with any human right, that constitutes or may constitute

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discrimination or that may be unlawful under Australia's various anti-discrimination laws referred to it by the Australian Human Rights Commission.

The ASIO Act provides further statutory protections from discrimination by placing a special responsibility on the Director-General in relation to functions of the Organisation. More specifically, a responsibility to ensure that ASIO is kept free from any influence or considerations not relevant to its functions and nothing is done that might lend colour to any suggestion that it is concerned to further or protect the interests of any particular section of the community, or with any matters other than the discharge of its functions (section 20(b)).

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5. At the public hearing, the Acting Director-General mentioned the possible benefits in questioning family members and associates of a target. To clarify, is ASIO seeking the ability to detain non-suspects.

ASIO is currently able to request a QDW where the Attorney-General is satisfied that, among other matters, issuing the warrant 'will substantially assist in the collection of intelligence that is important in relation to a terrorism offence'. This statutory test focuses on the value of the intelligence that is likely to be obtained, rather than the person from whom the intelligence will be obtained, and reflects the fact that persons other than the subject of an ASIO investigation may possess critical intelligence. Similar, intelligence-focused tests apply for ASIO's other special powers warrants under Part III of the ASIO Act.

The purpose of the detention power under a QDW is to enable ASIO to question a person under a warrant, while ensuring that the person does not:

- fail to attend questioning;
- alert others as to the existence of the investigation; or
- destroy, damage or alter records or other things relevant to the collection of intelligence.

At present, ASIO may only request a QDW where the Attorney-General is satisfied that there are reasonable grounds for believing that if detention is not authorised, one or more of these outcomes may occur.

As outlined in response to the Committee's question 2b, above, the department and ASIO are considering alternative models that may provide mechanisms to ensure the same ends are achieved as a QDW, in a more targeted fashion. The department and ASIO consider that it would be appropriate for any alternative model to continue to enable ASIO to seek the authority to question a person, other than the subject of its investigation.

In most cases where ASIO wishes to compulsorily question a person who is not the subject of an investigation, such as a family member or associate, the abovementioned risks will be unlikely to arise. However, there will be circumstances in which a person who is not the subject of an investigation will, nevertheless, be likely to tip off others about the investigation, or destroy records of things. For example, a person may not be involved in the activities under investigation, but may:

- be sympathetic to the objectives or worldview of the subject(s) of the investigation;
- feel obliged to alert or assist the subject of the investigation, or to protect their interests; or
- be concerned (rightly or wrongly) that they may be implicated in the activities that are under investigation where, for example, they have provided (wittingly or otherwise) financial or other support to the subject of the investigation, and so take action they perceive may protect their own interests.

There may also be situations where the person is:

- directly involved in the security-relevant activities under investigation, but where ASIO wishes to question them in relation to another person's involvement; or
- separately involved in security-relevant activities unrelated to those that are the subject of the immediate investigation.

Regardless of the nature of the relationship between the target and the person the subject of the warrant, the department and ASIO consider that it is important that ASIO possesses the ability to question persons who possess intelligence that is important in relation to security, and to do so in a manner that minimises the risk of the compromise of operational security.

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6. In what circumstances would ASIO require the ability to question someone post-charge? How would ASIO propose to use and share information obtained via post-charge questioning?

Circumstances where post-charge questioning is required

As an intelligence collection agency, ASIO's focus is not necessarily linked to a criminal prosecution and obtaining a conviction. While ASIO works closely with its law enforcement partners, there are fundamental differences in its operational functions and objectives. ASIO should not be constrained by law enforcement developments in continuing to gather security intelligence information relevant to current threats. As part of this, the inability to compulsorily question a person following the laying of charges has the potential to give rise to critical gaps in intelligence. At present, information obtained by ASIO under its compulsory questioning powers cannot be used against the person in a prosecution, irrespective of whether that questioning takes place prior to or following the laying of charges.

There are circumstances where, notwithstanding the arrest and charging of a person by law enforcement, ASIO requires information related to those charges from the person to assess ongoing security threats and to minimise risk to the community. Given ASIO's role in intelligence collection, it is appropriate that it be able to compulsorily question a charged person on issues that relate to the charges. Post-charge questioning would be valuable in the course of both terrorism, and foreign interference and espionage investigations.

Use and sharing of information obtained from post-charge questioning

The information obtained in post-charge questioning, as with other information ASIO obtains, will feed into existing security intelligence investigations and analyses, to further ASIO's efforts in its role to protect Australian persons and Australia from threats to security.

Following the High Court's decisions in *X7 v Australian Crime Commission* (2013) 248 CLR 92, *Lee v NSW Crime Commission* (2013) 251 CLR 196 and *Lee v R* (2014) 253 CLR 455, it may be necessary to introduce additional limitations on the communication by ASIO of information obtained from post-charge questioning to police officers investigating the charged person and the prosecutors of that person. Amendments to the *Australian Crime Commission Act 2002*, introduced following the above cases, provide one model for such limitations, noting that it would be rare for ASIO to provide information directly to prosecutors in any event.

However, it would be important to ensure that any limitations on ASIO's ability to communicate post-charge information do not unduly limit ASIO's ability to fulfil its function of communicating intelligence to appropriate persons (such as law enforcement agencies) for purposes relevant to security. Information obtained from post-charge questioning is likely to be useful in assisting law enforcement in pursuing public safety functions and to further other investigations. In some circumstances it may be appropriate that the information is used directly by law enforcement to support charges against persons other than those the subject of the post-charge questioning.

Related to these matters, ASIO reiterates its support for retaining automatic direct use immunity for the person the subject of the questioning, regardless of whether the questioning occurs pre-charge or post-charge. This means any responses to compulsory questioning by the person would not be admissible in criminal proceedings against that person.

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