



**Australian Government**  
**Australian Security**  
**Intelligence Organisation**

# **ASIO Submission to Parliamentary Joint Committee on Intelligence and Security**

## **Review of ASIO's questioning and detention powers**

**09 May 2017**

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### Introduction

1. The Australian Security Intelligence Organisation (ASIO) welcomes the review by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) and thanks the committee for the opportunity to present this submission. This review provides an opportunity for the PJCIS to consider further the compulsory questioning powers available to ASIO, to ensure they remain appropriate and effective within the national security environment.
2. The provisions establishing questioning warrants and questioning and detention warrants are subject to a sunset clause and are due to expire on 7 September 2018. Over the past five years, these warrants have been the subject of two reports by the Independent National Security Legislation Monitor (INSLM)—one in October 2016 by the Hon. Roger Gyles AO QC, and the second Annual Report by Mr Bret Walker SC in December 2012. They were also examined by the PJCIS in 2005 in the PJCIS report *ASIO's questioning and detention powers: review of the operation, effectiveness and implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979* and in 2014 as part of the Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.
3. This submission is divided into four parts.

**Part 1** outlines the current security environment and operational challenges faced by ASIO.

**Part 2** argues that compulsory questioning and questioning and detention powers be retained, noting that an effective and modernised compulsory questioning framework, adapted to the current security environment, is an important intelligence collection tool to support ASIO's role in the protection of Australian persons and Australia from threats to security.

Part 2 demonstrates that an effective compulsory questioning capability for ASIO:

- a. remains an essential intelligence collection tool and must evolve to suit the changing security environment;
- b. requires a regime, such as the current questioning and detention regime, to ensure that persons required to appear for questioning do not alert other targets or destroy relevant documents;

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- c. must address the change in age profile of those involved in terrorism-related activities by lowering the age to which the regime may apply from 16 years old to 14 years old; and
- d. should be available to support ASIO in collecting intelligence relevant to 'security' as a whole and not only in relation to terrorism offences.

**Part 3** of this submission addresses the recent INSLM recommendation that ASIO's current compulsory questioning framework be replaced with one broadly similar to the *Australian Crime Commission Act 2002* model. Part 3 outlines how such a model would require modification to accommodate ASIO's security intelligence operations, functions and processes.

**Part 4** of this submission summarises ASIO's recommendations in relation to questioning warrants and questioning and detention warrants.

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### Part 1: Current security environment

4. The consideration of whether the provisions in Part III, Division 3 of the ASIO Act should be permitted to cease on 7 September 2018 and what shape retained provisions, if any, should take, must be conducted in the context of the current and predicted security environment.
5. Australia's security environment is impacted upon by the interaction between national interests and threats that could potentially harm those interests. The sources of threats to Australia's security out to 2026 are likely to continue to be, as they are now, defined primarily by manifestations of violent Islamist extremism, hostile espionage and interference activities (including through cyber means). They will be framed by changing political and economic dynamics, technological change and more astute and determined adversaries.
6. Threats will also transcend national borders. Australia is part of a globalised world. Events overseas have shaped and will continue to shape the security challenges we face. The scale of the challenges posed has increased, while the evolution of technology and the way the subjects of security investigations operate have made, and will continue to make, responding to them more difficult. The challenge of predicting the shape of global security in the coming decade is near impossible, yet the trends we are seeing do not provide us with confidence that the situation will improve. Rather we expect the threats we face to worsen.

#### Politically motivated violence

7. The counter-terrorism challenge Australia faces is underscored by recent events. Since September 2014, there have been four onshore terrorist attacks in Australia and over 12 disruption operations in response to imminent attack planning in Australia. These events highlight the enduring and dynamic nature of the extremism challenge to Australia, with the conflicts in Syria and Iraq energising local extremists in a way no other terrorism arena ever has. Over the same time frame, we have seen the subjects of our counter-terrorism investigations greatly increase in number, reduce in average age and diversify in ethnicity and gender.
8. Like our Western partners, Australia is challenged by a trend of individuals acting alone and using weapons that are simple to acquire and tactics that are simple to employ. Three of Australia's four terrorist attacks since 2014 were characterised by the involvement of single actors. All involved either edged weapons (knives) or firearms. The use of these weapons is consistent with the trend in terrorism in the West, where extremists aim to exploit vulnerabilities in protective security measures. This trend is most evident in recent international attacks that have used vehicles against places of mass gatherings. Significantly, there is a shorter time frame from inception of attack planning to actualisation.

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9. The conflict in Syria and Iraq has now shaped a generation of violent Islamist extremists here, some of whom will pose a threat to security for at least the coming decade. Returning foreign fighters who have spent time with extremist groups globally will further affect the threat. Some will have greatly enhanced capabilities to undertake terrorist attacks. Any planning to do so may take many years to manifest. The shift in what is deemed to be a successful Islamist extremist terrorist attack—from complex methodologies to simple, but very difficult to prevent, low-capability attacks undertaken by individuals enabled by technologies, including encrypted-by-default internet communications and device security—will challenge our ability to disrupt future terrorist attacks. Regardless of actions taken, highly sophisticated violent Islamist extremist propaganda in English and a range of other languages will continue to be accessible to potential extremists, including here, to justify their actions for years to come. As such, the threat we face is self-sustaining.
10. We are also unlikely to see a decrease in the threat of violence here from those inspired by extreme right-wing and left-wing ideologies and those who draw inspiration from anti-immigration and anti-Islam sentiment. The flow-on effect to Australian extreme right-wing groups and individuals has been significant, with elements seeking to harness events overseas to boost their own domestic propaganda, activism and recruiting efforts. The Australian extreme right-wing scene remains relatively small from an international perspective but continues to exert a violent influence here, with varying degrees of notoriety and support in online and real-world terms.
11. Globally, we are confronted with a greater range of violent Islamist extremist groups and more ungoverned spaces in Africa, the Middle East, South Asia and South-East Asia than we have seen before. The Islamic State of Iraq and the Levant (ISIL) has created empowered affiliates and emboldened sympathisers who will outlive the organisation; and al-Qa'ida and its affiliates, despite losses in personnel and continuous pressure, are stronger than they have been in over a decade. They will continue to draw on local grievances to support their global agenda. Other new groups may also emerge inspired by a violent Islamist extremist ideology. We expect Australians and Australian interests to continue to be potential targets for their violence, either directly through activities such as hostage taking or indirectly caught up in terrorist attacks targeting local or Western interests. The most likely venue for this will remain our immediate region of South-East Asia. The return of seasoned fighters from Syria, Iraq or other jihadist theatres in the future, even if few in numbers, could further increase the threat there and elsewhere.

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### **Espionage and foreign interference**

12. We continue to identify espionage and foreign interference activity by a growing range of state actors targeting Australian interests. Foreign powers are seeking to advance their own economic and strategic interests, at the expense of our own. We expect this trend to continue over the next decade. Such espionage and foreign interference can cause severe harm to Australia's national security, sovereignty, economic wellbeing and other interests.

### **Cyber**

13. Cyber represents a new, relatively hidden and increasingly utilised vector in which intelligence can be exfiltrated—and with plausible deniability. The harm to Australia is often impossible to immediately measure, but it is likely to be substantial and ongoing. Its true impact may take years to measure and may only become obvious at the most crucial of times.
14. Terrorists too continue to develop a cyber capability to harm Australia's interests. We will see more sophisticated targeting of Australian interests by terrorists using this vector.

### **Border security**

15. Our border security focus over the next decade will continue to be partnering with the Department of Immigration and Border Protection, including supporting the delivery of the annual migration program (and additional places that may be allocated to Syrian refugees). The scale of international migration will challenge Australia for years to come. Planned and actual illegal maritime ventures to Australia will be an enduring challenge over the next decade. There will be a growing need for us to manage downstream security risks associated with the flows of people seeking entry to Australia and applying for citizenship. There will be some complex cases, including ones where we recommend against entry, visa retention or grant of citizenship on security grounds. Enhancements in the way we identify people of security concern will represent an important aspect of our activities in support of border security.

### **Encryption**

16. Ubiquitous encryption on the internet and the use of encrypted-by-default communication applications will remain an ongoing challenge for law enforcement and intelligence agencies, hampering their ability to collect intelligence, conduct investigations and disrupt planned attacks. The use of such applications conceals the content of communications and frequently also the identity of users. Secure, encrypted communications are increasingly being used by extremists and terrorist groups to avoid detection. To this end, ASIO requires a range of traditional tools, including compulsory questioning, to assist it in obtaining intelligence on matters relevant to

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security in a timely way as well as new tools and techniques that help mitigate the loss of intelligence.

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### **Part 2: Requirement for an effective compulsory questioning capability to meet the challenges of the current security environment**

17. A compulsory questioning power remains an important intelligence collection tool to enable ASIO to perform its statutory intelligence collection function independently and, where appropriate, in partnership with law enforcement and intelligence partners. ASIO anticipates future scenarios where compulsory questioning and questioning and detention powers will increasingly be of importance in obtaining intelligence relevant to terrorism. Further, ASIO is of the view that a modernised regime that better reflects ASIO's security intelligence collection functions could be deployed to assist in countering the very real threats posed by terrorism in Australia as well as other significant national security threats such as espionage, sabotage, acts of communal violence and foreign interference.
18. ASIO has executed 16 questioning warrants since 2003, with the last questioning warrant being used in 2010. ASIO's lack of recourse to these powers since 2010 is reflective of three factors. First, ASIO is judicious in its use of these resource-intensive and intrusive powers. This is in line with the Attorney-General's Guidelines, which require ASIO to undertake inquiries and investigations using, wherever possible, the least intrusive techniques to collect information; therefore, they are only considered in a limited number of cases. Second, the current framework does not lend itself to the collection of intelligence with the agility and speed regularly demanded of ASIO in current terrorist offence investigations. Third, the earlier 'last resort criterion' statutory threshold, repealed in October 2014 and replaced with a 'most effective' requirement, has been difficult to satisfy and has limited ASIO's ability to obtain a questioning warrant.



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### Questioning capability must evolve to suit the changing security environment

#### Current authorisation process should be streamlined

19. Currently, ASIO Act questioning warrants and questioning and detention warrants are issued by an 'issuing authority'. An issuing authority must be a current judge who is appointed by the Attorney-General and who acts in their personal capacity. Before a warrant request is presented to an issuing authority, the Director-General must first seek the Attorney-General's consent to the making of the request. The Attorney-General must be satisfied that the request satisfies the requirements of section 34D(4) of the ASIO Act before granting his or her consent.
20. This multi-step process is not conducive to an efficient or timely execution of a warrant in circumstances where it could be deployed to have optimal operational outcomes, particularly where there is an imminent threat to public safety and immediate action is required. ASIO needs to rely upon capabilities that are suitably tailored to a fast-paced, high-threat environment to support time-critical opportunities to collect vital intelligence.
21. Since the last questioning warrant in 2010, the security environment in Australia has changed significantly. The conflict in Syria and Iraq and the rise of ISIL have inspired a multiplicity of fast-evolving terrorist threats in Australia—unprecedented in both tempo and volume—reflected in the elevation of the Terrorism Public Alert level in September 2014. The current terrorist threat is primarily propelled by individuals and small groups inspired by the message promoted by ISIL and other extremist groups for attacks in the West. These extremist groups emphasise the need for followers to conduct lone-actor attacks in the West using any means at their disposal. Recent years have seen a steady stream of attacks around the world inspired by this message, and the promotion of low-complexity attacks by lone actors or small groups means that attack planning usually involves short lead times and that opportunities to identify and intervene are abridged. The transition from an intelligence collection phase (where the objective is to understand the capabilities and intentions of an individual or a group) to a law enforcement-led disruption (where the objective is to neutralise the threat to public safety) must often take place within days.
22. ASIO considers that the current authorisation process should be streamlined to align with processes for the authorisation of other ASIO warrants. ASIO submits that a process where the Director-General seeks the Attorney-General to authorise compulsory questioning is both administratively appropriate and operationally effective. ASIO also submits that the current operating environment requires a mechanism for the Attorney-General to give an emergency oral, rather than written, authorisation for compulsory questioning, with confirmation in writing from

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the Attorney-General as soon as practicable. This is consistent with authorisation of special intelligence operations under Division 4 of Part III of the ASIO Act.

### **Authorisation to question under Identified Person Warrant**

23. In 2014 the ASIO Act was amended to allow the Attorney-General to issue an Identified Person Warrant where satisfied that the identified person is engaged, or reasonably suspected by the Director-General of being engaged, in activities prejudicial to security, and the issue of the warrant will, or is likely to, substantially assist the collection of intelligence relevant to security. Once issued, an identified person warrant grants conditional approval for the Director-General, or the Attorney-General, to approve the use of certain special powers, such as search of premises or use of surveillance devices, provided he or she is satisfied that the relevant threshold for each power is met.
24. Extension of the identified person warrant regime to allow the Attorney-General to grant conditional approval for questioning an identified person would allow ASIO to select the most appropriate power for intelligence collection, available in the ASIO Act, at each point in time of an investigation, enhancing ASIO's ability to respond quickly, efficiently and effectively to threats as they arise. As with the exercise of other special powers under an Identified Person Warrant, questioning would only take place under the warrant once further specific authorisation has been obtained from the Director-General or Attorney-General for such questioning, and provided he or she is satisfied the relevant thresholds have been met. Questioning under an identified person warrant would otherwise be subject to the same safeguards as under a questioning warrant.

### **Removal of specific link to 'terrorism offence'**

25. To obtain a questioning warrant or questioning and detention warrant under the ASIO Act, the issuing authority must be satisfied 'there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence'.<sup>1</sup> A 'terrorism offence' is defined in section 4 of the ASIO Act to mean an offence against Subdivision A of Division 72 of the *Criminal Code* (Cth) (international terrorist activities involving explosive or lethal devices) and an offence against Part 5.3 of the Criminal Code (terrorist act and terrorist organisation offences). The definition of 'terrorism offence' does not currently include foreign incursions offences in Part 5.5 of the Criminal Code or terrorism financing offences in the *Charter of the United Nations Act 1945* (Cth).<sup>2</sup>

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<sup>1</sup> ss34E(1) and 34G(1) ASIO Act

<sup>2</sup> Note that INSLM the Hon Roger Gyles AO QC recommended the definition of 'terrorism offence' be amended to include these two categories of offence—INSLM Report, October 2016, Recommendation 9, p.52

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26. ASIO's role, consistent with its functions, is anticipatory. ASIO collects intelligence to protect Australians from politically motivated violence, the promotion of communal violence, espionage, sabotage, acts of foreign interference and attacks on Australian's defence system. In contrast to law enforcement, ASIO's activities are not focused on the investigation of offences but rather in anticipating threats to security to advise government and work with partner agencies to protect Australians from the occurrence of such events. Consequently, ASIO's involvement often precedes that of law enforcement and is at a time before it is possible to clearly identify a threatened terrorism offence. The reference to a 'terrorism offence' in the questioning and questioning and detention warrant threshold limits ASIO's ability to utilise the questioning capability and should be removed.<sup>3</sup>

### **Minimum age for questioning should be lowered from 16 to 14 years**

27. Since May 2015, three major terrorist attacks involving teenagers under the age of 18 have been disrupted by law enforcement, often with critical security intelligence being provided by ASIO. During this period one terrorist attack by a teenager was the murder of NSW Police employee Curtis Cheng in October 2015 by a 15-year-old male.

28. The seriousness of threats posed by persons as young as 14 was recently recognised by the Commonwealth Parliament when it enacted amendments to the control order regime in the Criminal Code reducing the minimum age for those who can be subject to control orders from 16 to 14.<sup>4</sup>

29. The existing questioning warrant and questioning and detention warrant provisions allow ASIO to question minors between 16 and 18 where it is likely that the person will commit, is committing or has committed a terrorism offence.<sup>5</sup> Any ASIO compulsory questioning model must address the change in age profile of those involved in terrorism-related activities by lowering the age to which the regime may apply from 16 years to 14 years. ASIO notes that existing safeguards apply to the questioning of minors—in particular, the ability for a parent, guardian or other support person to be present during questioning and a shorter maximum continuous questioning period of

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<sup>3</sup> In his report INSLM the Hon Roger Gyles AO QC, at paragraph 9.48, stated in regard to this issue:

*The key to an effective but reasonable questioning power for ASIO is to accept that it should not be seen as a front-line means of disruption of an imminent terrorist attack, nor as a primary means of collecting evidence to support a criminal prosecution, but rather it should be seen as a tool for the collection of intelligence relating to the threat of terrorist activity.*

<sup>4</sup> Counter-Terrorism Legislation Amendment Act (No 1) 2016

<sup>5</sup> s34ZE(4) ASIO Act

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two hours.<sup>6</sup> A person under the age of 16 cannot currently be questioned under a questioning warrant or questioning and detention warrant.

30. ASIO acknowledges that the compulsory questioning of persons as young as 14 is a significant step; however, ASIO considers that the formality of such a hearing, the criminal consequences of non-cooperation, and the presence of a parent or guardian, may in certain circumstances lead to valuable, accurate security intelligence being able to be collected from young persons.

### **Removal of the 'terrorism offence' threshold requirement**

31. ASIO submits that the current restriction that the questioning of minors only take place where the Attorney-General is satisfied on reasonable grounds that it is likely that the person will commit, is committing or has committed a terrorism offence should be removed for similar reasons as set out in paragraphs 25 and 26 above. This requirement which ties the warrant to an offence is more aligned to the role of a law enforcement agency rather than ASIO's intelligence collection function.

### **Use of compulsory questioning in relation to ASIO's full security remit**

32. ASIO contributes to protecting the people of Australia, the nation and its interests from a range of security threats including politically motivated violence, promotion of communal violence, espionage, sabotage, acts of foreign interference and attacks on Australia's defence systems. While the threat of terrorism is an ongoing focus for ASIO, the threat from espionage and foreign interference has worsened. In the decades since 9/11, while our strong security and intelligence focus has been on counter-terrorism, our adversaries have industrialised their espionage and foreign interference activities against us. Overlaying this trend is the rapidly changing and evolving technological landscape. Encryption is an everyday feature of digital communications and easy-to-use communications and security applications with strong encryption are readily accessible to Australia's adversaries as well as those posing a terrorism threat.
33. These challenges reinforce the need for ASIO to develop, maintain and integrate a range of intelligence collection and analytical capabilities, including by examining the utility of expanding the scope of existing intelligence collection capabilities.
34. Currently, ASIO can interview any person on a voluntary basis in the performance of its functions. The circumstances where a person can be compulsorily questioned under the ASIO Act are far more limited. Currently, ASIO is unable to use compulsory questioning except where 'there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence'. This means

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<sup>6</sup> s34ZE ASIO Act

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compulsory questioning powers are not available for any other security-relevant investigations carried out by ASIO—for example, in regard to activities detrimental to Australian interests conducted by foreign governments in Australia.

35. A range of Commonwealth and state investigative, intelligence and regulatory agencies have the ability to compel answers and produce documents to assist them to perform their functions. A sample of agencies at the Commonwealth level that have a compulsory questioning power available to them includes the Australian Taxation Office (ATO), the Australian Securities and Investments Commission (ASIC), the Australian Consumer and Competition Commission (ACCC), the Australian Federal Police (AFP) in proceeds of crime matters, and the Australian Criminal Intelligence Commission (ACIC). This power is also routinely granted to those bodies charged with overseeing government agencies' activities, notably the Commonwealth Ombudsman, the Inspector-General of Intelligence and Security (IGIS), the Law Enforcement Integrity Commissioner (LEIC) and the Independent National Security Legislation Monitor (INSLM). Compulsory questioning powers, while a tool that should always be used carefully, are not unusual or extraordinary in their availability. In both INSLM reports, the availability of compulsory questioning powers to various other agencies was acknowledged. Mr Bret Walker SC in particular noted the relatively unremarkable nature of compulsory questioning powers now used against targets of investigation by government agencies as well as persons who are not suspected of any wrongdoing but who may hold useful information.<sup>7</sup>
36. ASIO submits that circumstances in which it may have recourse to a compulsory questioning framework should be extended to encompass all elements of the definition of 'security' under the ASIO Act.<sup>8</sup>

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<sup>7</sup>INSLM Report, December 2012, pp69-70

<sup>8</sup>s4 ASIO Act 1979

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### Part 3: Modelling an effective compulsory questioning capability to meet the challenges of the current security environment

37. The 2016 report of the Hon. Roger Gyles AO QC recommends that ASIO's compulsory questioning framework be replaced by a questioning power 'following the ACC Act model as closely as possible'. In his view, such a model would not necessitate a sunset clause. ASIO agrees in principle to a compulsory questioning framework that is broadly similar to the ACC Act model but is appropriately modified, as outlined below, to meet the challenges of the current security environment. ASIO considers that the proposals outlined in Part 2 of this submission, to modernise ASIO's compulsory questioning capability to reflect the current security threat environment, should also apply in the context of this modified ACC Act model.

#### Proposals for a modified ACC Act model

38. ASIO submits that a modified ACC Act model should provide for the following additional elements to reflect ASIO's operational and functional context:

- a. **The Attorney-General should authorise ASIO's use of compulsory questioning powers.**
- b. The ability for the **IGIS to be present** during compulsory questioning as is presently the case should be retained.
- c. A **direct use immunity provision** that is similar to that under the existing questioning warrant and questioning and detention warrant framework should be retained.
- d. The ability to prevent the subject of detention for compulsory questioning from contacting a **particular lawyer of their choice** should also be retained.
- e. The provision regarding a **statutorily appointed 'examiner'** position before whom compulsory questioning would occur, as is the case in the current ACC Act model, should be included.
- f. The future of a questioning and questioning and detention regime requires the ability to **compel the subject of compulsory questioning to appear for questioning, and to prevent them from alerting other targets or destroying relevant documents.**
- g. An explicit provision for **compulsory questioning of a person to occur following the laying of charges against that person, as is the case in the current ACC Act model,** should be included.

39. These elements are discussed in more detail below.

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### ***a. Attorney-General should authorise ASIO's use of compulsory questioning powers***

40. The rationale for this proposal is outlined in paragraphs 19 to 22 of this submission.

### ***b. Retain IGIS presence during compulsory questioning***

41. The IGIS, as an independent statutory office holder, has responsibility for reviewing the activities of ASIO to ensure they are undertaken lawfully, with propriety and with due regard to human rights. Currently, the IGIS is expressly entitled to be present for any questioning that takes place under a questioning warrant or questioning and detention warrant. Further, questioning may be suspended to address any concerns identified by the IGIS about impropriety or illegality in connection with the use of the questioning powers.<sup>9</sup>

42. ASIO submits that, given the IGIS role in overseeing ASIO's activities, any compulsory questioning framework based on the ACC Act model should continue to allow for the IGIS to be present during questioning and to raise any concerns of impropriety or illegality in connection with the use of the questioning powers. ASIO considers that the presence of the IGIS would provide assurance that the compulsory questioning is proper and legally compliant.

### ***c. Continue ASIO Act direct-use immunity provision***

43. The ASIO Act currently contains a 'direct use immunity' for criminal proceedings for information said or produced under a questioning warrant or questioning and detention warrant. That is, nothing said or produced by a person in response to compulsory questioning may be used in evidence against them in criminal proceedings (other than for noncompliance with the warrant).<sup>10</sup> The ACC Act provisions dealing with this same issue are more complex and require the person appearing to specifically claim the immunity.<sup>11</sup> The ACC Act provisions are closer to the manner in which a witness testifying under oath is expected to claim immunity from prosecution for providing self-incriminating evidence under the common law. This formula is likely to be appropriate in a criminal intelligence and law enforcement context. However, ASIO submits the automatic application of a direct-use immunity in regard to criminal proceedings is the more appropriate formula for any compulsory questioning framework related to the collection of security intelligence as the information is not obtained specifically for evidential purposes or to achieve law enforcement outcomes.

44. Further, ASIO submits that direct-use immunity in regard to compulsory questioning by ASIO should not extend beyond immunity from direct use in criminal proceedings. The ACC Act additionally provides direct-use immunity in regard to proceedings involving the imposition of a

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<sup>9</sup> ss35P, 35Q ASIO Act

<sup>10</sup> s34L(9) ASIO Act

<sup>11</sup> s30(4), (5) ACC Act

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penalty and confiscation proceedings. ASIO's functions specifically include furnishing security assessments to Commonwealth and state agencies that could result in certain administrative action ('prescribed administrative action') being taken in respect of a person.<sup>12</sup> It is possible that proceedings initiated for review of an ASIO security assessment could in certain circumstances be viewed as proceedings that involve the imposition of a penalty.

45. Information obtained under compulsory questioning by ASIO could in many cases be relevant to and be included in security assessments that are used by agencies in considering prescribed administrative action—for example, an application for a passport. ASIO should not be prevented from using information obtained under compulsory questioning in performing its essential function of furnishing security assessments to Australian agencies.

***d. Continue ability to prevent contact with particular lawyer***

46. Currently, under the questioning warrant and questioning and detention warrant framework in the ASIO Act, the presiding officer (the prescribed authority) may prevent the person subject to questioning from contacting a particular lawyer of their choice, if the person is at that point being detained under the warrant or a direction by the prescribed authority. The prescribed authority may only make such a direction if satisfied that contact with that lawyer may result in a person involved in a terrorism offence being alerted that the offence is being investigated, or a record or thing requested under the warrant may be destroyed, damaged or altered.<sup>13</sup> This provision does not prevent the person contacting another lawyer of their choice.
47. ASIO maintains that any future compulsory questioning framework must contain similar provision to prevent contact with certain lawyers, with approval from the presiding officer, in the same circumstances as outlined above. This is an unusual power, only to be used in extreme circumstances where preventative steps are needed to avoid the commission of a terrorism offence or destruction of relevant material that may assist the investigation of a terrorism offence.

***e. Introduce statutorily appointed 'examiner'***

48. ASIO supports a framework based on the ACC Act where compulsory questioning is presided over by a statutory appointee who has specified threshold legal qualifications. Under the ACC Act, compulsory questioning is presided over by an 'examiner'. An examiner is appointed under the ACC Act by the Governor-General for a period of up to five years. For a person to be appointed as an examiner they must have been enrolled as a legal practitioner for at least five years.

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<sup>12</sup> s17(1)(c),(ca) and Part IV ASIO Act

<sup>13</sup> s34ZO ASIO Act



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49. As statutory appointees, examiners are separate from regular staff-members of ACIC. However, full-time examiners may only engage in paid employment outside their examiner duties with the approval of the minister. Part-time examiners are required to avoid any conflicts with their examiner role in outside employment, and there is provision in the ACC Act for oversight of this matter by the Chief Executive Officer of the ACIC.
50. ASIO submits that the statutory appointment of a presiding officer brings an important level of independence to the role and would provide an added element of assurance in addition to the oversight of the IGIS.
- f. the future of a questioning and questioning and detention regime requires the ability to ensure that persons appear for questioning, do not alert other targets or destroy relevant documents***
51. While acknowledging the views in two INSLM reports that questioning and detention warrants should be repealed or allowed to sunset<sup>14</sup> and notwithstanding that questioning and detention warrants have not been used to date, ASIO considers it operationally imperative to retain the questioning and detention warrant power, or a similar ability to pre-emptively detain the subject of a compulsory questioning warrant, so that he or she cannot tip off others about the investigation, avoid attending questioning or destroy records or other material that may be required to be produced as part of the compulsory questioning process. As outlined in paragraph 18 of this submission, ASIO's lack of recourse to these powers since 2010 is reflective of judicious usage of these resource-intensive and intrusive powers, the agility and speed demanded of ASIO in current terrorist offence investigations and the statutory threshold being difficult to satisfy.
52. ASIO further acknowledges the suggestion of Mr Bret Walker SC, former INSLM, that rather than retain the detention power, it may instead be feasible for a member of the police force to arrest the subject of a questioning warrant, where the subject of the warrant appears to not intend to comply with the questioning warrant. ASIO notes that it is the pre-emptive ability to detain that is operationally imperative. The ability to arrest only once there has been a failure to comply is a significant limitation. In the current threat environment ASIO can foresee scenarios where it is appropriate for preventive action to be taken to mitigate the risk that the subject will seek to abscond, tip off others or destroy documents, or where the evidence of attention from authorities might trigger the individual or associates to accelerate planning for a terrorist act.

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<sup>14</sup>INSLM Report, December 2012. Recommendation V/1 p. 106; INSLM Report, October 2016. Recommendation 7 p.42

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### *Alternative regimes*

53. Preventative detention is not unique to ASIO's questioning and detention warrants and a number of other regimes currently provide powers that achieve a similar effect.
54. An alternative or possible additional preventative detention power was noted in a recommendation by Mr Bret Walker SC which would enable a police officer serving the summons/warrant to arrest the person, if they believe on reasonable grounds from anything said or done by the person served that there is a serious possibility that they intended not to comply with the summons/warrant.<sup>15</sup> This recommendation was based on now repealed provisions governing the NSW Crime Commission's compulsory questioning process. While ASIO considers there could be utility in such a framework, this framework nonetheless places reliance on demonstrable actions of the subject as perceived by the relevant police officer. ASIO can envisage scenarios where a law enforcement officer serving a questioning warrant, with access to that instrument but not the facts and grounds of the ASIO warrant, may not have access to the body of relevant information available to ASIO to inform judgements about the likely behaviour of the subject.
55. The ACC Act also contains a regime under which a judge can issue a warrant for the arrest of a person who, among other things, is likely to abscond.<sup>16</sup> In keeping with the other intrusive powers used by ASIO, the Attorney-General could be given the authority to issue this warrant.
56. In considering the suitability of alternative regimes, it is ASIO's view that a detention power needs to extend beyond circumstances where the person may not attend. To mitigate the threat to security it also needs to be available to prevent the subject alerting others or destroying documents.

### ***g. Retain express power to question post-charge***

57. ASIO supports a framework based on the ACC Act model where post-charge compulsory questioning is expressly authorised and appropriate safeguards are put in place to minimise the potential impact on criminal trials. The ACC Act provides that a person who has been charged with an offence, and is yet to have the charge resolved, may be compulsorily questioned on the subject matter to which the offence relates.<sup>17</sup> However, any information derived from the compulsory questioning cannot be used in criminal proceedings against the person ('direct use immunity').

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<sup>15</sup>INSLM Report, December 2012. Recommendation V/2, p.107.

<sup>16</sup>s31(1)(b) ACC Act 2002

<sup>17</sup>s24A ACC Act

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58. The inability to compulsorily question a person following the laying of charges has the potential to give rise to critical gaps in intelligence as there are circumstances where, notwithstanding the arrest and charging of a person by law enforcement, ASIO requires information from the person to assess ongoing security threats and to minimise risks to the community. This is particularly so given existing links between criminal and ideologically motivated persons. ASIO submits that it should not be constrained by law enforcement developments in continuing to gather security intelligence information relevant to current threats.

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### Part 4: Recommendations

59. ASIO welcomes the PJCIS's review of ASIO's special powers under Division 3 of Part III of the ASIO Act, and trusts this submission will assist the committee in its review.
60. As Australia's security environment continues to shift and evolve, the questioning warrant and questioning and detention warrant regime remains an important tool for ASIO. Since their introduction, questioning warrants have 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. Such information could not have been achieved through other collection methods. Given this, it is important that a regime of questioning warrants and questioning and detention warrants in relation to ASIO's intelligence functions be retained beyond the current sunset period.
61. ASIO recommends that:
- a. the current authorisation process be streamlined to align with the process for the authorisation of other warrants obtained by ASIO;
  - b. the Attorney-General be able to give an emergency oral, rather than written, authorisation for compulsory questioning, with confirmation in writing from the Attorney-General as soon as practicable;
  - c. the identified person warrant regime be extended to include questioning warrants;
  - d. the reference to a 'terrorism offence' in the questioning and questioning and detention warrant threshold be removed;
  - e. the minimum age for questioning warrants be lowered from 16 years to 14 years;
  - f. the current restriction that the questioning of minors only take place where the Attorney-General is satisfied on reasonable grounds that it is likely that the person will commit, is committing or has committed a terrorism offence be removed;
  - g. the compulsory questioning regime be extended to allow questioning in relation to all elements of the definition of 'security' under the ASIO Act;
  - h. any modified regime of questioning warrants based on the ACC Act contain the following elements to reflect ASIO's role as a security intelligence agency:

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- i. the Attorney-General be empowered to authorise ASIO's use of compulsory questioning powers;
  - ii. the IGIS be able to be present during compulsory questioning;
  - iii. a similar direct-use immunity provision to that under the existing questioning warrant and questioning and detention warrant framework be retained;
  - iv. a power to prevent the subject of detention for compulsory questioning from contacting a particular lawyer of their choice in particular circumstances be retained;
  - v. compulsory questioning to take place before a statutorily appointed 'examiner', as is the case in the current ACC Act model;
  - vi. the future of a questioning and a questioning and detention regime requires the ability to ensure the subject appears for questioning, is prevented from alerting other targets or destroying relevant documents; and
  - vii. an explicit provision for compulsory questioning of a person to occur following the laying of charges against that person.
62. While ASIO acknowledges the most recent INLSM report recommendation that the questioning and detention warrant regime be repealed, ASIO maintains that the regime offers important powers which, when used judiciously, will continue to assist ASIO in the performance of its critical security functions.