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Availability of NSW police investigative detention powers in scenario involving returnee foreign fighter

The application of NSW investigative detention powers to 'Counter-Terrorism Scenario 1' will depend on the circumstances and whether the NSW Police consider that there is sufficient information to meet relevant thresholds in NSW legislation. Even if the NSW investigative detention powers could apply to a particular situation, ASIO's compulsory questioning powers achieve a separate objective – that is, the collection of security intelligence.

Comparisons of law enforcement arrest powers, such as NSW investigative detention, and intelligence gathering powers such as ASIO's compulsory questioning provisions must account for the fact that they are directed at different objectives:

- Arrest (including arrest under NSW investigative detention powers) is generally directed at ensuring a person is prevented from the ongoing commission of a criminal offence and/or ensuring that person is available to face criminal justice processes in regard to the offence.
- ASIO's compulsory questioning powers are directed at collecting security intelligence, and in the case of a questioning and detention warrant (QDW) (or similar compulsory attendance capability), ensures certain things cannot occur that may jeopardise that intelligence collection or accelerate planning by others. It is important to note that compulsory questioning powers will not always be used in regard to the target of an investigation.

The key advantage of compulsory questioning is that the person the subject of the warrant *must* respond to questions put. Criminal offences apply for not responding to questions or giving false answers. While it is not expected that people subject to compulsory questioning will always answer all questions truthfully, the intelligence value of ASIO carrying out compulsory questioning has been demonstrated by past use of questioning warrants. In comparison, questioning of a suspect following arrest (whether a regular arrest or NSW investigative detention) can only occur under caution and the suspect is not required to respond to questions put by police.

While information obtained through compulsory questioning may in some circumstances help facilitate or trigger law enforcement activities at a later time, this may not always be the case. The primary purpose of the power is to assist build a more comprehensive intelligence picture.

Considerations in regard to 'Counter-Terrorism Scenario 1'

In the counter-terrorism scenario 1 outlined in 'ASIO's Response to August 2017 Written Questions', and discussed at the PJCS hearing on 7 September 2017, a suspected member of ISIL has arrived at the Australian border, and there are concerns the person may have knowledge of or involvement in current attack planning in Australia. However, while there is an intelligence case to suggest the person may have committed terrorism offences under Australian law (for example membership of a terrorist organisation or entering a declared area) and/or is involved in future attack planning, there is very little or no admissible evidence of this at the time the person arrives at the Australian border.

In any scenario such as this, law enforcement and intelligence agencies as members of the Joint Counter-Terrorism Team (JCTT) will consider what objectives they wish to achieve in the circumstances, and the benefits and costs of pursuing different approaches. Depending on the

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specific circumstances, the strategy adopted and powers utilised may sit anywhere on a spectrum of action between immediate overt law enforcement action to ongoing covert intelligence gathering.

In some cases, disruption and arrest will be the overwhelming goals due to factors such as perceived safety risks to the community of not taking action. Where overt law enforcement action is preferred, NSW's investigative detention powers may in certain circumstances be available if the suspect is located in NSW and there is sufficient information to meet relevant thresholds (see below on possible application of investigative detention).

However, there may be other situations where at the time the suspect arrives at the Australian border the JCTT's focus will be directed towards obtaining further intelligence and, if possible, admissible evidence on suspected terrorism-related activity. These objectives may be forefront because, for example, on the information available there is considered little risk of an imminent terrorist attack, there is too little information at that point to trigger overt law enforcement action, and/or it may be thought the suspect is able to give valuable information about bigger players within Australia.

Where further intelligence collection is considered appropriate, rather than law enforcement action, ASIO's compulsory questioning powers may be of significant value. Compulsory questioning, with an ability to ensure immediate attendance and prevent the suspect from contacting others, may enable ASIO to obtain critical information about attack planning. This information could potentially lead to overt law enforcement action against other key suspects (if necessary very soon after the questioning has taken place) and may be able to be used in evidence against those other suspects.

Application of NSW investigative detention

The Department understands Part 2AA *Terrorism (Police Powers) Act 2002* (NSW) (the Act) enables police to arrest a terrorism suspect for investigative detention purposes and detain the suspect for up to 4 days following arrest, or if a detention warrant is obtained from a Supreme Court judge, up to 14 days. Investigative detention must be in relation to investigation of a past or future terrorist act 'for the purposes of assisting in responding to or preventing the terrorist act'.

'Terrorist act' is defined in section 3 of the Act and is very similar to the Commonwealth definition in the *Criminal Code* (Cth), although unlike the Commonwealth definition does not extend to threats of action. Under subsection 3(4) of the Act the definition appears to extend to conduct that occurs outside NSW and Australia.

Subsection 25B(1) of the Act defines a 'terrorism suspect' as follows:

... a person is a **terrorism suspect** if there are reasonable grounds for suspecting that:

- a) the person has committed or will commit a terrorist act, or
- b) the person is or has been involved in preparing or planning for a terrorist act, or
- c) the person possesses a thing that is connected with the commission of, or the preparation or planning for, a terrorist act.

As the focus of NSW investigative detention powers is to assist respond to or prevent a terrorist act, the definition of 'terrorism suspect' in the Act does not extend to persons suspected of committing terrorist organisation offences under Division 102 of the Criminal Code or foreign incursions and recruitment offences under Division 119 of the Criminal Code.

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Under s25E of the Act, a police officer can arrest a terrorism suspect for the purpose of investigative detention if the terrorist act concerned occurred in the last 28 days, or if the police officer has reasonable grounds to suspect that the terrorist act concerned could occur at some time in the next 14 days, and the police officer is satisfied that the investigative detention will substantially assist in responding to or preventing the terrorist act. Under this power, contact with family members and others can be monitored (although contact with the suspect's legal representative cannot be monitored), and can be prohibited in some cases if a detention warrant has been issued by a judge.

In the event these powers were sought in relation to CT scenario 1 outlined above, the threshold under s25E could act as a significant legislative hurdle in the exercise of investigative detention powers if there is limited intelligence in regard to their activities. While police may have information that the returnee has been co-located in Syria/Iraq with ISIL, police may be unable to point to sufficient information evidencing a past or future terrorist act which would enliven the investigative detention power. In regard to past acts, not all returnees may have necessarily engaged in acts amounting to a 'terrorist act' for the purposes of the Act; for example, some ISIL members provide propaganda, security and medical support and do not engage in armed conflict.

In cases where there is limited intelligence going to past or future terrorist acts, and the thresholds for investigative detention or regular arrest cannot be met, as outlined above, the preferable course may be to utilise compulsory questioning powers to try to collect further information. Any further information obtained may then enable law enforcement to take steps such as utilising investigative detention powers.

Given the gravity of the threat posed by returning foreign fighters and the possibility they may hold valuable and unique knowledge about other foreign fighters and/or threats to security, it is important that law enforcement and security agencies have a range of powers available to deal with the broad spectrum of circumstances they may be faced with. In some circumstances, immediate law enforcement action such as arrest will be necessary and appropriate. However, the Department is of the view that in other cases it may be preferable to subject returning foreign fighters to compulsory questioning by ASIO, including with an ability to compel immediate attendance, to achieve an intelligence collection outcome rather than an immediate law enforcement outcome.

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