



Australian Government

Attorney-General's Department

November 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 questions on notice

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This document responds to questions on notice provided to the Attorney-General's Department by the Parliamentary Joint Committee on Intelligence and Security Secretariat in a letter dated 31 October 2017. This response incorporates comments from the Australian Security Intelligence Organisation (ASIO).

1. How does ASIO's request for an extension of powers fit with what the Commonwealth is proposing following the CT COAG meeting?

At the special meeting of the Council of Australian Governments on counter-terrorism (CT COAG) on 5 October 2017, First Ministers agreed to a range of legislative measures focused on strengthening the powers of law enforcement agencies in relation to terrorism offences in Australia and ensuring Australia has an effective, robust and nationally consistent counter-terrorism legal framework. The proposed measures do *not* seek to amend or create new powers for the Australian Security Intelligence Organisation (ASIO) or any other intelligence agencies.

Of these measures, the Commonwealth pre-charge detention regime raises the closest comparison with ASIO's questioning and detention powers. However, while detention is a common element of both regimes, it is directed at different objectives.

The Commonwealth pre-charge detention regime under Part IC of the *Crimes Act 1914* allows police to detain and question an individual who has been arrested on suspicion of having committed a Commonwealth terrorism offence prior to the individual being charged. The purpose of detention is to investigate the individual in relation to the offence for which they have been arrested, or any other Commonwealth offence that the investigating official reasonably suspects that the person has committed. Currently an individual can be detained under Part IC for a maximum investigation period of 24 hours. However, certain categories of time when investigators are not questioning the person can be disregarded from this investigation period (for example, time for the person to rest and recuperate, or time approved by a magistrate that cannot total more than 7 days). In practice, this can amount to a person being detained for up to 9 or 10 days.

The key features of the proposed model to enhance the Commonwealth pre-charge detention regime are:

- an initial detention period of 8 hours, and
- a maximum overall detention period of 14 days based on a tiered extension application process that enables:
 - magistrate-approved extensions for up to 7 days based on the existing extension application criteria in Part IC of the *Crimes Act 1914*, and
 - magistrate-approved extensions for a further 7 days based on a magistrate being satisfied to a higher threshold that ongoing detention is necessary.

These powers, and any amendments to them, are distinct from the detention power ASIO and the Attorney-General's Department (AGD) are seeking under a new compulsory questioning model. This is because ASIO's detention power is *not* aimed at achieving a law enforcement objective but rather is focused on assisting ASIO to collect security intelligence *at any stage of an investigation, without an offence having been committed*.

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2. Why does ASIO need its own detention power when there is a whole set of detention powers already available to police forces and a proposal to extend the investigative detention powers in New South Wales to all police forces?

The Commonwealth pre-charge detention regime in Part IC of the *Crimes Act 1914* applies uniformly to all States and Territories, and continued reliance on this regime would support national consistency and interoperability in the investigation of Commonwealth terrorism offences. The agreement by First Ministers at CT COAG to enhance the Commonwealth pre-charge detention regime may mean that States and Territories no longer find it necessary to implement a model similar to the NSW investigative detention regime.

In any case, a power to compel immediate attendance under a revised questioning warrant (QW) regime would be directed at a significantly different objective from the detention power under PDO and pre-charge detention regimes.

As previously submitted to the Committee, comparisons of law enforcement arrest powers, such as the Commonwealth pre-charge detention regime under Part IC of the *Crimes Act 1914* and the NSW investigative detention regime, and intelligence gathering powers, such as ASIO's compulsory questioning provisions, must account for the fact that they are directed towards different objectives:

- Arrest and pre-charge detention powers (including arrest under NSW investigative detention powers) are generally directed at ensuring a person is prevented from the commission (or ongoing commission) of a criminal offence and/or gathering evidence for the purposes of charging an individual with a criminal 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), ensuring 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.

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 risks of non-attendance, tipping-off others as to the investigation, or destroying records or things will be unlikely to arise. However, there will be some circumstances in which a person who is the subject of the questioning warrant will be likely to tip-off others about the investigation, or destroy records of things of intelligence value. This may be the case where the person feels obliged to alert or assist the subject of the investigation, or to protect their interests.

Detention under PDOs and NSW investigative detention regime

Should a power to compel immediate attendance be included in a revised ASIO questioning warrant, this power would continue to serve a different objective to detention under preventative detention orders (PDOs), the Commonwealth pre-charge detention regime under Part IC of the *Crimes Act 1914* or the NSW investigative detention regime (which is focused on the arrest, detention and questioning of persons who are suspected of involvement in a recent or imminent terrorist act).

PDOs allow the detention of a person for the purposes of preventing 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

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recent terrorist act. A Commonwealth PDO under Division 105 of the *Criminal Code* can extend for up to 48 hours, while State and Territory PDOs can allow for detention up to 14 days.

Questioning of a person under a PDO is prohibited except to check on the safety and well-being of the person detained. A person subject to a PDO can be released for the purposes of being questioned by ASIO under a questioning or questioning and detention warrant (s 105.25 *Criminal Code Act 1995* (Cth)).

The investigative detention powers in NSW allow police to arrest and detain a terrorism suspect for up to four days or, if a detention warrant is obtained, up to 14 days. As with ordinary arrest, this power does not include a compulsory questioning power. Further information regarding NSW's investigative detention regime was provided to the Committee on 17 October 2017 in AGD and ASIO's response to a question on notice received on 14 September 2017.

By comparison, AGD considers detention in the form of immediate attendance for the purpose of conducting compulsory questioning would take place:

- where there is a risk that a person who is the subject of the warrant will abscond, destroy items of intelligence value or tip off associates
- in relation to any person who may have information of intelligence value, not just an individual suspect
- in relation to all heads of security, not only in relation to a terrorism offence, and
- at any stage of an investigation, including at an early stage before any offences may be identified.

In contrasting the different objectives of the respective detention powers, the critical point of difference in operation is that under the NSW investigative detention regime, police can only detain and question an individual who has been arrested on suspicion of being "involved in" a recent or imminent terrorist act. ASIO has requested an extension of its compulsory questioning powers, including the power to compel immediate attendance, for use when doing so could substantially assist in the *collection of intelligence* that is important to *all heads of security* (not just terrorism offences).

Furthermore, the NSW investigative detention regime only authorises questioning of an individual involved in a recent or imminent terrorist act following arrest, and *prior to the individual being charged*. Similarly, the Commonwealth pre-charge detention regime under Part IC of the *Crimes Act 1914* only enables questioning following the arrest of an individual in relation to a Commonwealth offence, and prior to the individual being charged. In respect of the powers ASIO is seeking, AGD considers it appropriate that ASIO be able to exercise its compulsory questioning powers, including a power to compel immediate attendance, irrespective of whether or not an individual has been arrested, and irrespective of whether or not charges have been laid. Intelligence collection can be central to the mitigation of further harm and should not be conditioned on or limited to whether offences have been committed.

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3. AGD and ASIO response to the Inspector-General of Intelligence and Security's *Further submission to the Parliamentary Joint Committee on Intelligence and Security – Review of certain questioning and detention in relation to terrorism (16 October 2017)*

a) Expansion of compulsory questioning regime to all heads of security

In the Inspector-General of Intelligence and Security's (IGIS) *Further submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) – Review of certain questioning and detention in relation to terrorism* (the IGIS submission), the IGIS queried the proposal that compulsory questioning powers be extended beyond terrorism offences to all parts of the definition of security under section 7 of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act).

Requirement for extension to all heads of security

ASIO's key function is to obtain, correlate and evaluate intelligence relevant to security. Security includes the protection of the Australian people from espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia's defence system or acts of foreign interference, and the carrying out of Australia's responsibilities to any foreign country in relation to those matters. It is important ASIO has all the powers necessary to protect Australia from all current and emerging security threats, not only those relating to terrorism.

As outlined in the *Attorney-General's Department's submission to the PJCIS* (AGD submission) (para 3.28):

AGD considers it appropriate for ASIO to utilise its compulsory questioning power to gather intelligence in its broader role in protecting Australia from the spectrum of security threats. ASIO operational areas have identified that broadening the application of the questioning power to include activity in relation to all of ASIO's heads of security would benefit the operational utility of ASIO's questioning power in the current security environment.

Additionally, (...) ASIO is an intelligence agency, rather than a law enforcement agency. The current requirement in paragraph 34D(4)(a) that the intelligence that ASIO seeks to collect be important in relation to an 'offence' is at odds with ASIO's role as an intelligence agency. It has the potential to prevent ASIO from collecting vital intelligence about terrorist threats (and other security threats) in circumstances where ASIO has not yet identified a specific offence that is being (or, subject to the INSLM's recommendation, is threatened to be) committed. In particular, this limitation is likely to inhibit ASIO from collecting intelligence about emerging threats, where an ASIO investigation may commence months or even years prior to any law enforcement involvement.

The particular value of ASIO's compulsory questioning powers is that they enable ASIO to collect intelligence that is peculiar to the mind of the person concerned. This can enable ASIO to collect intelligence in circumstances where, for example, a person has not committed information about their activities into documentary form, which could be seized under a search warrant, or does not communicate such information electronically, which could be intercepted under a telecommunications interception warrant.

ASIO advises that persons involved in espionage, sabotage, attacks on Australia's defence system or foreign interference, in particular could typically be reasonably expected to take steps to conceal their activities. In particular, such persons could typically be reasonably expected to practice counter-surveillance techniques in an attempt to limit the effectiveness of ASIO's other special powers (search, computer access, surveillance

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device, and inspection of postal and delivery articles powers). Accordingly, compulsory questioning powers would be of relatively greater value for such investigations, where critical intelligence may exist only in the minds of persons involved.

Threshold and accountability measures

If a compulsory questioning power was available in respect of all heads of security, the power would continue to be subject to robust safeguards. Firstly, it would only be authorised in appropriate circumstances where a high legislative threshold could be met. Elements of the current threshold to obtain a questioning warrant include that the warrant will substantially assist the collection of intelligence (section 34D(4)(a)) and that, having regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued (s34D(4)(b)).

As stated in the AGD submission (paras 4.18 - 4.19):

At present, one of the elements in the threshold test for ministerial authorisation of a QW or a QDW under the ASIO Act requires the Attorney-General to be satisfied that 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**.

If the scope of these warrants was expanded beyond terrorism to encompass all of ASIO's functions relating to 'security' (...), AGD suggests that the appropriate threshold test should be that there are reasonable grounds for believing that issuing a warrant **would substantially assist the collection of intelligence that is important to security** (within the definition of 'security' in the ASIO Act).

Such a threshold would be consistent with the threshold for the issuing of search warrants, under section 25 and computer access warrants under section 25A. Computer access and search warrants can be among ASIO's most intrusive powers. AGD considers that it would be appropriate for QWs to share this statutory threshold.

Furthermore, the request, authorisation and exercise of such a power would continue to be subject to robust IGIS oversight and accountability.

The model proposed by ASIO seeks to maintain the existing thresholds. AGD supports this approach.

Compulsory questioning of foreign individuals in Australia

The IGIS noted that extension of the compulsory questioning power to all heads of security could result in ASIO compulsorily questioning a person in Australia about a matter in another country, in circumstances where the equivalent intelligence agency in that country would not be able to do such a thing.

Paragraph (b) of the definition of 'security' under section 7 of the ASIO Act defines security as the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa). Paragraph (b) is limited to the carrying out of *Australia's responsibilities* to any foreign power. This means that in the event ASIO's compulsory questions powers were extended to all heads of security including paragraph (b), ASIO could only question a foreign person in Australia in relation to a security matter if the warrant threshold was met *and* if questioning would be consistent with the carrying out of Australia's responsibilities to that foreign country. This would prevent ASIO from merely carrying out the collection requirements of a foreign country.

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Paragraph (b) is also limited by section 20 of the ASIO Act, which requires the Director-General to take all reasonable steps to ensure that the work of the Organisation is limited to what is necessary for the purposes of the discharge of its functions.

Noting these limitations, AGD considers it would be appropriate for a compulsory questioning power to be available to ASIO in relation to its function under paragraph (b) of the definition of security, to enable ASIO to compulsorily question a person located in Australia in appropriate circumstances. The fact that such powers would not be available to the intelligence agency of that foreign country in equivalent circumstances should not affect ASIO's ability to protect Australia's interests and to discharge its responsibilities to other countries. This is an important consideration given Australians have been extensively affected by terrorist attacks overseas. Furthermore, as noted in the AGD submission (para 3.25), ASIO has observed increased targeting of Australian interests in Australia and abroad through a variety of methods against an array of sectors in matters of espionage and foreign interference.

Comparison of compulsory questioning regime in Australia with equivalent powers in foreign countries

The IGIS noted that AGD was unable to identify any comparable domestic intelligence agencies which have the power to conduct compulsory questioning for the purposes of gathering intelligence (footnote 4, page 2).

As stated in *AGD's response to the PJCIS' post-hearing questions* (July 2017), many of these comparable jurisdictions have other powers available to meet collection requirements which do not exist in Australia. Please refer to pages 1—4 of that response for further background.

Proportionality

The IGIS stated that 'other threats to Australia, including from espionage and foreign interference, can also be serious but this does not mean that there is no hierarchy of threats' (page 3). AGD, respectfully, does not agree with this proposition. While threats to life will always remain a high priority, the protection of Australia's national security extends well beyond the prevention of major terrorist attacks and must encompass longer-term threats posed by espionage (including cyber espionage) and foreign interference activities if Australia's national interests are to remain secure. AGD considers questions of proportionality should be determined by application of a robust legislative framework available in respect to all heads of security, rather than by reference a hierarchy of threats. This approach is consistent with ASIO's wider warrant regime.

Furthermore, the availability of compulsory questioning powers in respect of other heads of security would assist ASIO in its allocation of appropriate resources to its investigations. As outlined in *AGD response to the PJCIS' post-hearing questions* (July 2017) (page 12):

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, counter espionage investigations, and the reallocation of limited resources to other high priority investigations.

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b) Inclusion of compulsory questioning powers in the identified person warrant regime

The IGIS noted that compulsory questioning powers were proposed to be included in ASIO's identified person warrant (IPW) regime (page 3).

Requirement for inclusion

AGD understands inclusion of a compulsory questioning power in the IPW regime would increase efficiency during an investigation by enabling ASIO to seek conditional approval for a compulsory questioning authorisation in relation to a person reasonably suspected of being engaged in activities prejudicial to security in appropriate circumstances at the same time as requesting other IPW authorisations.

As outlined in the AGD submission (para 4.36 – 4.38):

An identified person warrant provides conditional approval for the Director-General to approve the use of a suite of special powers in relation to a person, if (and only if) the Director-General is satisfied that the particular criterion for each power is met at the time each power is to be used. The Attorney-General may only issue an identified person warrant if he or she is satisfied that the person is engaged in or is reasonably suspected of being engaged in, or being likely to engage in activities prejudicial to security; and the issuing of the warrant will, or is likely to, substantially assist the collection of intelligence relevant to security.

AGD recommends that the Attorney-General should be permitted to pre-authorise the use of questioning powers under an identified person warrant. This would align ASIO's compulsory questioning powers more closely with ASIO's other special powers in Division 2 of Part III of the ASIO Act, allowing ASIO to respond more quickly, efficiently and effectively to threats as they arise, by employing the investigative power that is best-adapted to changing operational circumstances.

If ASIO's QDW powers are retained, AGD does not recommend that those powers be able to be pre-authorised under an identified person warrant.

In relation to the IGIS's concern that including the compulsory questioning power in the IPW regime would limit the availability of the questioning power, AGD would propose to maintain a stand-alone questioning warrant framework *as well as* including the power in the IPW regime. This is consistent with the other powers that may be conditionally authorised under an IPW. The IPW framework allows the Attorney-General to pre-authorise the use of ASIO's special powers in respect of a person reasonably suspected of being engaged in activities prejudicial to security. Where ASIO seeks to use its special powers in respect of other persons, it must obtain separate, standard special powers warrants for each power.

Threshold and decision-making considerations

Should a compulsory questioning power be included in the IPW regime, AGD would not support a lower threshold for requesting the power than what has been proposed for a revised QW power (noting AGD's support for extension of paragraph (a) to all heads of security).

In the context of the IPW regime, AGD can envisage a requirement that the Minister consider a higher threshold, or satisfy an additional limb, in relation to a request for a compulsory questioning authorisation

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under an IPW. To this effect, AGD has previously suggested that one of the appropriate threshold tests should be that there are reasonable grounds for believing that issuing a warrant would substantially assist the collection of intelligence that is important to security (see AGD submission, para 4.19). This requirement would reflect the higher level of intrusion involved in exercise of a compulsory questioning power, when compared with existing powers that can be authorised under an IPW.

Similarly, AGD can envisage a requirement that the Director-General be required to consider the same higher threshold for a compulsory questioning authorisation at the time the authorisation is requested. In effect, both the Minister and the Director-General would therefore be required to consider the higher threshold for the exercise of a compulsory questioning power at the time of issuing the warrant and at the time of authorising the power respectively.

ASIO agrees that the inclusion of a compulsory questioning power in the IPW framework should be done in a way that does not lead to effectively lower thresholds than what ASIO has already proposed for a revised QW power. However, ASIO also would want any adjustments to be consistent with the approach in the current IPW framework. ASIO notes that the threshold for an IPW necessarily will be different from the proposed QW threshold because it is tied to a person 'engaged in or reasonably suspected by the Director-General of being engaged in, or of being likely to engage in, activities prejudicial to security'. This inherently requires the IPW application to have greater specificity about a particular person's activities than under what ASIO has proposed for a revised QW.

If a compulsory questioning power were incorporated into the IPW framework, ASIO considers the approval mechanisms should operate in broadly the same way as the other powers available, so there are not separate approval streams or thresholds that need to be met depending on the particular conditional approvals sought.

Reporting requirements

The IGIS noted that the ASIO submission is silent on whether there would be any public reporting of compulsory questioning under ASIO's preferred model (page 4).

Subsections 94(1) and (6) of the ASIO Act require that the unclassified version of ASIO's annual report, tabled in the Parliament, contain information about the use of ASIO's compulsory questioning powers. AGD considers that it would be appropriate for these existing reporting requirements to continue.

c) Proposed incorporation of emergency authorisation framework

The IGIS noted that should an emergency authorisation framework be introduced, clear guidance on what constitutes an emergency would be necessary for effective oversight (page 6).

AGD does not consider a definition of emergency would be required in establishing a QW emergency authorisation framework. AGD's submission highlighted a range of precedents for emergency authorisation frameworks (para 4.15), which do not define 'emergency'.

For example, the ASIO Act contains two different forms of emergency authorisation. Under section 29, the Director-General of Security may issue an emergency warrant, lasting no more than 48 hours, authorising the use of ASIO's special powers in limited circumstances where the Attorney-General is not available. Under section 35C of the ASIO Act, the Attorney-General may give oral, rather than written, authorisation

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for a special intelligence operation, in urgent circumstances.

The Intelligence Services Act 2001 contains a more detailed framework for emergency authorisations in relation to the Australian Signals Directorate, Australian Secret Intelligence Service and Australian Geospatial-Intelligence Organisation, allowing authorisation to be given by a range of different ministers and agency heads, in different circumstances.

The Independent Intelligence Review (June 2017) did not recommend a definition of emergency was required in relation to the above frameworks.

d) Detention and use of force

The IGIS noted that while ASIO does not propose conditional approval for detention linked to compulsory questioning under the IPW regime, a 'compulsory attendance' requirement would, in effect, authorise detention (page 6).

If the QDW framework is repealed, and a QW power inserted into the ASIO warrant regime, AGD considers that it would remain necessary to allow for the apprehension and detention of a person who fails to comply with a QW. AGD can envisage, for example, a compulsory questioning regime inclusive of a power to compel immediate attendance where there are reasonable grounds for believing that, if the person does not immediately attend questioning, the person may do any of the things listed under section 34F(4)(d).

As stated in the AGD submission, if ASIO's existing detention power under the QDW regime *is* retained, AGD does not recommend pre-authorisation be available for this power. AGD considers it would be inappropriate to 'pre-authorise' the use of a power which currently allow detention for up to 168 hours from the time the person is brought before the prescribed authority (under section 34S of the ASIO Act).

ASIO has advised AGD it is not seeking to include detention or the 'compulsory attendance' powers in the IPW framework.

e) Removing external authorisation

The IGIS noted that removing the role of an independent issuing authority would be at odds with the increasing trend of legislating external authorisation requirements seen in other FIVE EYES countries.

The proposed new Australian model does not include judicial approval for intelligence warrants, but shifts responsibility for issuing, or consenting to applications for, those warrants from the Minister responsible for the agency (as remains the case in the United Kingdom, New Zealand and Canada) to the Attorney-General in his or her capacity as the First Law Officer of the Crown and Minister responsible for the oversight and integrity of the intelligence services. This model can be distinguished from warrant authorisation frameworks in countries such as Canada and the United Kingdom, where the decision of the *responsible Minister* (not the Attorney-General) to issue a warrant is subject to judicial approval.

This model would bring the process for issuing questioning warrants into alignment with that of other ASIO warrants. As Justice Hope observed in 1976 '... in respect of matters such as issuing warrants, the minister will obviously be required to adopt an entirely non-partisan approach, an approach which, as the Attorney-General, he has to adopt in many of his other ministerial functions'. Further, it would more closely align ASIO

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with other Commonwealth bodies that have the ability to conduct compulsory questioning, such as the Australian Securities and Investments Commission (ASIC), the Australian Competition and Consumer Commission (ACCC) and the Commonwealth Ombudsman.

AGD has provided a detailed response to the PJCIS on comparison of Australia's legislative framework with the frameworks of partner countries in the context of compulsory questioning powers (pages 1 -4, *AGD's response to the PJCIS' post-hearing questions* (July 2017)). As noted in that response, AGD 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.

If a new compulsory questioning regime were to be developed which included removal of the issuing authority, AGD would do so consistently with Australia's international human rights obligations to ensure appropriate and robust oversight would be maintained through the role of the Attorney-General.

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