



Australian  
Human Rights  
Commission

# Review of ASIO's questioning and detention powers

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE  
PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY**

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## Table of Contents

	<b><i>Australian Human Rights Commission Submission to the Parliamentary Joint Committee on Intelligence and Security .....</i></b>	<b><i>1</i></b>
1	Introduction.....	3
2	Recommendations.....	3
3	The current questioning warrant and questioning and detention warrant regimes.....	4
4	The Human Rights Framework .....	6
5	The 2016 INSLM Review .....	8
5.1	<i>INSLM Recommendation — the Questioning and Detention Warrant provisions should be repealed or allowed to lapse .....</i>	<i>9</i>
5.2	<i>INSLM Recommendation — the Questioning Warrant provisions should be repealed or allowed to lapse, and should be replaced with a scheme modelled on the Australian Criminal Intelligence Commission's compulsory questioning powers.....</i>	<i>9</i>
(a)	<i>'Warrant authorisation' .....</i>	<i>10</i>
(b)	<i>'Freedom of movement' .....</i>	<i>11</i>
(c)	<i>Conclusion .....</i>	<i>12</i>
6	ASIO's preferred model.....	12
7	Conclusion and Recommendations .....	17

## **1 Introduction**

1. The Australian Human Rights Commission makes this submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its Review of the Australian Security Intelligence Organisation's (ASIO) questioning and detention powers.
2. The purpose of this submission is to address submissions made to the PJCIS by ASIO and the Attorney-General's Department (AGD) in relation to ASIO's 'preferred questioning model'. Those submissions have been published by the PJCIS on its website as Submissions 8.6 and 7.3 respectively.<sup>1</sup>
3. This submission is not intended to constitute a comprehensive submission about the consistency of compulsory questioning powers in general with international human rights law, nor does this submission provide a comprehensive human rights analysis of the questioning warrant (QW) and questioning and detention warrant (QDW) schemes as they presently stand. Instead, this submission analyses the current questioning and detention powers regime, as well as reforms proposed by ASIO, with reference to Australia's obligations under international and domestic human rights law.
4. The Commission considers that many aspects of ASIO's preferred questioning model:
  - (a) are inconsistent with recommendations made by the former Independent National Security Legislation Monitor (INSLM);
  - (b) would significantly increase the extent to which human rights are infringed; and
  - (c) have not been demonstrated to be necessary and proportionate.
5. The Commission therefore considers that ASIO's proposed model should not be implemented. Rather, the regime should be amended in a manner that is consistent with the recommendations made by the former INSLM following his 2016 review of the provisions.

## **2 Recommendations**

6. The Australian Human Rights Commission makes the following recommendations:

### **Recommendation 1**

The questioning and detention warrant regime should be repealed or allowed to lapse.

### **Recommendation 2**

No equivalent regime (ie one allowing for pre-authorised detention of a person for the purposes of questioning by ASIO) should be implemented in place of the questioning and detention warrant regime.

### **Recommendation 3**

In the event that the PJCIS considers that the retention of compulsory questioning powers by ASIO is necessary and proportionate to addressing the risk to the community and to national security posed by terrorism, the questioning warrant regime should be amended in a manner consistent with the recommendations made by the INSLM in 2016.

### **Recommendation 4**

The changes to the questioning and detention warrant and questioning warrant regime contemplated by ASIO's 'preferred questioning model' should not be implemented.

## **3 The current questioning warrant and questioning and detention warrant regimes**

7. The current QW and QDW regime is described in the review conducted in 2016 by the former INSLM the Hon Roger Gyles AO QC (the 2016 Gyles Review),<sup>2</sup> as well as in various submissions made to the present Review. The legislative history of those provisions has also been addressed in those materials.<sup>3</sup> The Commission does not reproduce that history here. However, the following outline is given to provide context for the discussion of ASIO's preferred questioning model.
8. Requests for both QWs and QDWs are made by the Director-General of ASIO. Before making a request, the Director-General must obtain the consent of the Attorney-General.<sup>4</sup>
9. The Attorney-General may consent to the Director-General making a request for a QW if, among other things, he is satisfied that there are reasonable grounds for believing that issuing the warrant would substantially assist the collection of intelligence that is important in relation to a terrorism offence, and that, having regard to other methods of collecting the intelligence that are likely to be effective, it is reasonable in all the circumstances for the warrant to be issued.<sup>5</sup>
10. The Attorney-General may consent to the Director-General making a request for a QDW if, among other things, he is satisfied that there are reasonable grounds for believing that issuing the warrant would substantially assist the collection of intelligence that is important in relation to a terrorism offence; that relying on other methods of collecting that evidence would be ineffective (this has been termed the 'last resort' requirement); and, that there are reasonable grounds for believing that if the person is not immediately detained, they may not appear for questioning, may alert another of the investigation, or may destroy records or things ASIO seeks to obtain.<sup>6</sup>
11. If the Minister provides consent in relation to either a QW or a QDW, the Director-General may apply to an 'issuing authority' for the grant of a warrant. An issuing authority must be a Judge of a federal court.<sup>7</sup> The issuing authority may issue a warrant if satisfied that there are reasonable grounds for believing

Australian Human Rights Commission  
*Review of ASIO's questioning and detention powers – 22 January 2018*

that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.<sup>8</sup> As has frequently been observed, the issuing authority is not required to consider all the matters the Attorney-General must consider in deciding whether to consent to the request for a warrant being made. Most importantly, in deciding whether to issue a QDW, the issuing authority is not required to consider whether other methods of collecting intelligence would be ineffective, or whether the subject is likely to tip off others, abscond, or destroy evidence.

12. A QW requires a person to attend for questioning, either immediately or at a specified time. It is an offence for a person to fail to attend at the required time.<sup>9</sup>
13. A QDW allows a police officer immediately to detain a person for questioning.<sup>10</sup>
14. It is an offence for a person to fail to answer questions asked pursuant to a QW or a QDW.<sup>11</sup> Information provided under compulsion may not be used directly in evidence in subsequent criminal proceedings against the subject of questioning, but there is no 'indirect use' immunity in the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act).<sup>12</sup>
15. Questioning under QDWs and QWs is conducted before 'prescribed authorities'.<sup>13</sup> These must generally be retired Judges of superior State or federal Courts.<sup>14</sup>
16. While a person may not immediately be detained under a QW, a prescribed authority may in certain circumstances authorise the subject to be detained.<sup>15</sup>
17. Once detained, a person's contact with others is severely curtailed. They may be prohibited from contacting anyone other than a single lawyer. While they are entitled to contact a lawyer and a lawyer may attend questioning, the role the lawyer may play is severely limited. Communications between the subject and their lawyer may be monitored.<sup>16</sup>
18. Except for very limited purposes, it is an offence to reveal that a QW or QDW has been made while it remains in force.<sup>17</sup>
19. QWs and QDWs are only available to allow questioning to obtain intelligence information relating to terrorism offences.<sup>18</sup> They may not currently be issued for the purpose of obtaining intelligence about other aspects of 'security' as defined in the ASIO Act.
20. QWs and QDWs may be issued in relation to children aged 16 and over.<sup>19</sup> However, such a warrant may only be issued in relation to a person aged between 16 and 18 if the Attorney-General is satisfied that it is likely that the subject will commit, is committing, or has committed a terrorism offence.<sup>20</sup> That is, QWs and QDWs may not be issued to question a person under the age of 16 in any circumstances; and such warrants may only be issued in respect of a person between the ages of 16 – 18 if, in addition to the other criteria noted above being satisfied, the person is also suspected of wrongdoing. Some provision is also made for minors to contact a parent or guardian.<sup>21</sup>

21. A QW may be in force for up to 28 days, and can provide for a maximum of 24 hours of questioning.<sup>22</sup> Detention under either a QW or a QDW must not exceed 168 hours.<sup>23</sup>
22. The Inspector-General of Intelligence and Security (IGIS) must be notified of each QW and QDW that is issued, and is entitled to attend at any questioning that takes place under such a warrant.<sup>24</sup> The IGIS has indicated that they have been present to observe at least part of the questioning conducted under each of the QWs issued to date, and would propose to continue that practice under any QWs or QDWs issued in future.<sup>25</sup>
23. To date, no QDWs have been issued. Sixteen QWs have been issued, though none since 2010.<sup>26</sup>
24. As the AGD has acknowledged, these laws appear to be unique. No equivalent laws in comparable jurisdictions have been identified. That is despite the security situation in those countries being no less serious than that in Australia.<sup>27</sup>

#### **4 The Human Rights Framework**

25. The current QW and QDW regimes impose significant limitations on a number of human rights. In particular, they impinge on the following rights protected by the *International Covenant on Civil and Political Rights* (ICCPR):<sup>28</sup>
  - (a) The right to freedom of movement, protected by article 12 of the ICCPR
  - (b) The right not to be subject to arbitrary detention, protected by article 9 of the ICCPR
  - (c) The right to privacy, protected by article 17 of the ICCPR
  - (d) The right to freedom of thought and freedom of opinion (protected by articles 18 and 19 of the ICCPR)
  - (e) The right not to be compelled to confess guilt (protected by article 14 of the ICCPR).
26. Insofar as the QW and QDW regimes permit the detention and compulsory questioning of minors, they also implicate a number of rights protected by the *Convention on the Rights of the Child* (CRC).<sup>29</sup> These include:
  - (a) 'in all actions concerning children ... the best interests of the child must be a primary consideration' (CRC, article 3)
  - (b) 'no child shall be deprived of their liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child ... shall be used only as a measure of last resort and for the shortest appropriate period of time' (CRC, article 37(b))

Australian Human Rights Commission  
*Review of ASIO's questioning and detention powers – 22 January 2018*

- (c) 'every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance....' (CRC, article 37(d)).
27. Many human rights are not absolute, and may be subject to some degree of limitation, either for purposes expressly contemplated by the ICCPR or to accommodate other human rights.
28. In general, laws which authorise restrictions on human rights:
- (a) Should use precise criteria;
  - (b) May not confer unfettered discretion on those charged with their execution.
29. For a limitation on human rights to be permissible, it must:
- (a) be prescribed by law
  - (b) be directed towards a legitimate purpose, and be necessary to achieve that purpose
  - (c) not impair the essence of any human right
  - (d) be necessary *in a democratic society*
  - (e) be proportionate to achieving its legitimate purpose
  - (f) be appropriate to achieve its legitimate purpose, and be the least intrusive measures necessary to achieve that purpose
  - (g) be compatible with the objects and purposes of human rights treaties
  - (h) respect the principle of non-discrimination
  - (i) not be arbitrarily applied.<sup>30</sup>
30. The assertion or existence of a pressing need is not, by itself, sufficient to satisfy these criteria. Instead, any significant limitation of a human right must be justified by reference to compelling evidence that satisfies each of the above criteria.
31. The powers currently under review are extremely intrusive of the rights of affected persons. They allow for the compulsory detention of persons, virtually incommunicado. They allow for compulsory interrogation under threat of criminal sanction. The powers may be applied to persons who are not suspected of having engaged in any wrongdoing. Only the most pressing demonstrated need for such laws, and overwhelming evidence of that need, could justify their existence. Even if that threshold is met, such laws call for the most robust safeguards to ensure fundamental rights are impinged to the minimum extent necessary in order to achieve the law's legitimate aim, both by protecting against arbitrary use or abuse of the powers, and by regulating lawful use to minimise human rights limitations.

32. Some of the human rights protected by the ICCPR may not be subject to any limitation. For instance, it is never permissible to subject a person to torture, cruel, inhuman or degrading punishment or treatment (contrary to article 7 of the ICCPR).<sup>31</sup> By way of further example, article 18, relevantly for present purposes, provides:

Everyone shall have the right to freedom of thought....

33. Article 19 relevantly provides:

Everyone shall have the right to hold opinions without interference.

34. As the UN Human Rights Committee has stated:

Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. **It does not permit any limitations whatsoever on the freedom of thought and conscience** or on the freedom to have or adopt a religion or belief of one's choice. **These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in article 19(1). In accordance with articles 18 (2) and 17, no one can be compelled to reveal his thoughts or adherence to a religion or belief.** [emphasis added]<sup>32</sup>

35. The field of national security provides unique practical challenges in assessing whether particular measures which limit human rights may be justified. That is because a complete assessment of whether a measure is necessary and proportionate will frequently require the consideration of sensitive or classified material. The number of persons or bodies with access to all relevant material is necessarily limited. On the other hand, it is important that claims made by intelligence agencies be subject to independent scrutiny to ensure that measures designed to protect the community from, for example, acts of terrorism do not limit human rights beyond the extent that is strictly necessary to achieve that legitimate aim.
36. In this context, bodies such as the INSLM play a vital role in ensuring that such laws comply with international human rights law. The INSLM is able to receive and consider classified and security-sensitive information in assessing whether counter-terrorism measures are necessary, and whether the restrictions they may impose on human rights are warranted. The present review of the QW and QDW provisions is specifically intended to benefit from the review of these same provisions conducted by the INSLM in 2016.<sup>33</sup> The Commission submits that the views of the INSLM in the 2016 review, while not determinative, carry strong persuasive weight.

## 5 The 2016 INSLM Review

37. As noted above, the provisions under review here were reviewed by the then INSLM, the Hon Roger Gyles AO QC (the 2016 Gyles Review).<sup>34</sup>
38. In conducting the 2016 Gyles Review, the INSLM called for, and received, oral and/or written submissions from ASIO, the AFP and the AGD. He considered the history of the provisions, the use of the QW and QDW warrant regimes since their inception, and the current security environment, including changes



to the 'security landscape' since 2003. The INSLM's findings about these matters are contained in his report, and the Commission does not repeat them in full. The Commission does, however, wish to draw particular attention to several aspects of the INSLM's findings.

### **5.1 *INSLM Recommendation — the Questioning and Detention Warrant provisions should be repealed or allowed to lapse***

39. The INSLM recommended that the QDW regime be repealed or allowed to lapse. He concluded that such powers are 'odious', subject to abuse that cannot entirely be ruled out by procedural safeguards, and are not proportionate.<sup>35</sup> Significantly, the INSLM did not even recommend that it be replaced with a new scheme of executive detention for the purposes of interrogation by ASIO. On the contrary, he stated:

it can be concluded that QDWs are not proportionate to the threat of terrorism and are not necessary to carry out Australia's counter-terrorism and international security obligations. It is time to accept that the capacity to secretly and immediately detain persons whether or not they are implicated in terrorism is a step too far.<sup>36</sup>

40. In addition to these findings, it may be observed that:

- (a) the first INSLM, Bret Walker SC, also called for the repeal of the QDW provisions<sup>37</sup>
- (b) no comparable jurisdiction has found it necessary to implement an equivalent regime.<sup>38</sup>

41. All of the factors identified in the 2016 Gyles Review in support of the conclusion that the QDW regime should be discontinued would apply equally to any regime allowing for the issuing of a warrant authorising immediate detention by or on behalf of ASIO for compulsory questioning.
42. As the 2016 Gyles Review concluded, 'the case for abolition is compelling'.<sup>39</sup>

### **5.2 *INSLM Recommendation — the Questioning Warrant provisions should be repealed or allowed to lapse, and should be replaced with a scheme modelled on the Australian Criminal Intelligence Commission's compulsory questioning powers***

43. This recommendation of the 2016 Gyles Review was made on the basis of a finding that the retention of some compulsory questioning power by ASIO is justified, despite its intrusiveness.<sup>40</sup> The reasons underlying the recommendation that a new regime be implemented, modelled on the Australian Criminal Intelligence Commission's (ACIC's) compulsory questioning powers, appear to be:

- (a) The present regime 'lacks utility and cannot be regarded as effective'.<sup>41</sup>

Australian Human Rights Commission  
*Review of ASIO's questioning and detention powers – 22 January 2018*

- (b) Criticisms of the safeguards in the current provisions 'must be' addressed,<sup>42</sup> to 'satisfy legitimate concerns about the scope for executive over-reach and oppression'.<sup>43</sup>
- (c) It would be difficult to devise a wholly new regime 'from scratch'. ACIC's functions bear some similarity to those of ASIO. The ACIC model is known and has been well-used; it would therefore be efficient to adapt it for use by ASIO. However, some (unspecified) modifications would have to be made.<sup>44</sup>

44. The first of these factors cannot be considered to be of great weight. The INSLM observed of the current QW regime:

The procedure governing the ASIO power is more complicated than the procedure governing the ACIC power. This may affect the ease of use of the ASIO power, and involve more time and effort, but would hardly preclude its use.<sup>45</sup>

45. Of course, if the QW regime could be made more 'streamlined' or 'efficient' without diminishing the effectiveness of safeguards against abuse, it would make sense to amend it accordingly. However, further limitations on human rights cannot be justified only on the basis of administrative efficiency.
46. The consideration in paragraph (c) above indicates that the ACIC model is not suggested because it is a perfect one; rather, it is one that is available 'off the shelf'. Together with paragraph (b), this indicates that the most critical part of the INSLM's recommendation is that the QW regime should be amended to increase safeguards and reduce the impact of the regime on fundamental rights. Modification of the ACIC model is simply proposed as the most direct way to achieve that goal.
47. That leaves the criticisms of the current QW regime referred to in paragraph (b) above. These are addressed at some length in the 2016 Gyles Review. Two of the principal concerns addressed in the Gyles Review are discussed below.

(a) *'Warrant authorisation'*

48. The 2016 Gyles Review suggests that the two-step process for applying for QWs, and requirement that QWs be issued by an independent 'issuing authority', may not provide a significant protection against misuse of the provisions.
49. The Commission respectfully disagrees with this part of the INSLM's analysis. The powers under contemplation involve very significant restrictions of a number of human rights. The Commission considers that the requirement that warrants be both issued and supervised by independent persons (who must be current or former judges) is an important safeguard against misuse by the executive. It is likely to ensure that applications are well-prepared and documented, and that decisions to issue warrants are made objectively. In particular:

Australian Human Rights Commission  
*Review of ASIO's questioning and detention powers – 22 January 2018*

- (a) requiring approval by the Minister provides a degree of oversight by a person to some degree independent of ASIO. It also provides a degree of political accountability for the use (and any misuse) of the powers.
- (b) requiring that warrants be issued by an issuing authority (normally a sitting judge) helps ensure that decisions to allow compulsory questioning are made on objective grounds and provides at least some safeguard against executive overreach in the use of the powers.
- (c) while it is true that both the Minister and an issuing authority will be to a significant degree required to rely on material supplied by ASIO, the fact that applications for warrants must be subject to scrutiny by both a senior member of the executive and a highly-qualified independent authority encourages ASIO to have high standards in preparing applications for warrants.

50. The 2016 Gyles Review stated:

[T]he procedure governing the ASIO power is more complicated than the procedure governing the ACIC power. This may affect the ease of use of the ASIO power, and involve more time and effort, but would hardly preclude its use.<sup>46</sup>

That is, the 2016 Gyles Review made clear that the current, two-step process for obtaining QWs does not render the current QW regime unworkable. There can, therefore, be no argument that simplification of that process is necessary to protect the community from terrorism. For the reasons above, the Commission submits that the current two-step approval process involving both the Minister and an issuing authority (who must be a judge) provides a real safeguard to reduce the risk of the inappropriate use of the power. The highly intrusive nature of these provisions necessitates strong safeguards, even if they decrease the 'ease of use' of the provisions.<sup>47</sup> The Commission therefore submits that the current approval and issuing process for QWs should be retained, and that it would be appropriate to include an equivalent process in any new regime that may be designed to replace it.

51. Further, the Commission endorses the recommendation of the first INSLM, Bret Walker, to the effect that before compulsory questioning is allowed, the issuing authority should be independently satisfied that all relevant criteria are met.<sup>48</sup>

(b) *'Freedom of movement'*

52. The 2016 Gyles Review states that the power of prescribed authorities to authorise detention of a person subject to a QW is 'out of the ordinary', and must be revisited.<sup>49</sup>

53. The Commission notes that ACIC's compulsory questioning powers do not contain an equivalent provision. Rather, ACIC may apply to a judge of the Federal Court or a Supreme Court to issue a warrant for the arrest of a person.<sup>50</sup> The judge may issue such a warrant if satisfied of relevant matters. That process guarantees independent oversight of the power to detain.

54. In endorsing the adoption of an ACIC-type model for compulsory questioning by ASIO, the 2016 Gyles Review must be read as supporting increased, rather than decreased, safeguards in relation to the power to detain.

(c) *Conclusion*

55. Other aspects of the ACIC compulsory questioning regime are discussed below in assessing whether aspects of ASIO's preferred questioning model are consistent with the former INSLM's recommendation that the QW regime be replaced with one modelled on ACIC's powers.
56. Given the extreme intrusiveness of a compulsory questioning power, it is critical that, in the event the QW regime is retained or replaced, the concerns identified in the 2016 Gyles Review be addressed.

## **6 ASIO's preferred model**

57. In its submission to this inquiry dated 4 September 2017 (submission 8.6), ASIO describes the features of its preferred questioning model.
58. Many of ASIO's proposals would dramatically expand ASIO's power to question under compulsion, as well as to detain for the purpose of questioning. The Commission submits:
- (a) Many of the proposals would involve a significant extension of ASIO's powers and/or a reduction in the safeguards applying to these powers. The proposals therefore would impose significant further limitations on human rights.
  - (b) Most of the proposals are not consistent with the recommendations made in the 2016 Gyles Review.
  - (c) No satisfactory justification has been given in the publicly accessible submissions of ASIO or the AGD for the increased limitations ASIO's proposals would place on human rights.
59. The Commission therefore recommends that each of these proposals not be adopted. Each of ASIO's principal proposals is summarised below, followed by a brief discussion.
- (a) ASIO proposes continuing provision for what it terms 'compulsory attendance' for questioning. However, ASIO's submission makes clear that it intends this to include the power immediately to detain subjects for questioning. ASIO indicates that this could be achieved either by retention of the QDW regime or by modification of the QW regime to allow a QW to be issued requiring a person immediately to accompany a police officer to the location of questioning, and authorising the police officer to detain the person in the event of non-compliance.<sup>51</sup>
- The Commission agrees with the observation of the IGIS that a requirement that a person immediately accompany a police officer to a place of questioning amounts to detention.<sup>52</sup>

Australian Human Rights Commission  
*Review of ASIO's questioning and detention powers – 22 January 2018*

ASIO's proposal is inconsistent with the conclusions of the 2016 Gyles Review. That review concluded that a scheme of immediate executive detention for the purpose of compulsory questioning is 'a step too far'.<sup>53</sup> As noted above, that finding applies equally to the QDW regime as it stands and to any equivalent scheme. The former INSLM's findings necessarily entail the conclusion that any equivalent to the QDW scheme is not necessary or proportionate to achieving a legitimate objective.

The Commission considers that the QDW regime should be repealed or allowed to lapse. It should not be replaced with any alternative scheme of preauthorised detention.

- (b) ASIO proposes expanding the grounds on which questioning may be conducted. Currently, QWs and QDWs may be used only to collect intelligence relating to terrorism offences. ASIO proposes that its questioning powers should be available to collect intelligence in relation to any aspect of 'security', as defined in the ASIO Act.<sup>54</sup>

ASIO's proposal would expand its powers and involve further serious limitations on human rights. Compelling justification is needed for any extension of ASIO's powers along these lines, and yet the Commission observes that none has been provided.

In particular, in relation to ASIO's submissions in support of this proposal, the fact that other warrant powers may be exercised in a wider range of circumstances does not support an argument that these more intrusive warrant powers should be too.<sup>55</sup> That is so even if increasing the availability of QDWs and QWs would have 'potential value' in collecting intelligence in relation to other aspects of 'security',<sup>56</sup> and acknowledging that those other aspects of security are 'of serious concern'.<sup>57</sup> Because QDWs and QWs limit human rights to a greater extent than other warrants, the principle of proportionality requires that the use of those warrants will be justified only in more pressing circumstances. The Commission notes, in this context, the IGIS's comments about the 'hierarchy of threats'.<sup>58</sup> The Commission understands the IGIS's remarks to mean that while all aspects of 'security' may be of high importance, preventing 'terrorism offences' may be seen to be the most pressing, or more pressing than some others. It follows that combatting terrorism may justify the retention of a compulsory questioning power, while addressing other kinds of risk to security may not.

One particular concern with this proposal is that it appears to have the potential to impinge on the right to freedom of thought, opinion and belief.

- (c) ASIO proposes removing what it terms the 'last resort' threshold for QDWs.<sup>59</sup>

As stated above, the Commission considers the QDW regime should be discontinued.

Australian Human Rights Commission  
*Review of ASIO's questioning and detention powers – 22 January 2018*

In the event that the operation of the QDW regime were extended, the 'last resort' threshold should be retained.

As noted above, for restrictions on human rights to be permissible, they must be demonstrated to be necessary, as that term is used in international human rights law. That entails that there must not be alternative measures available that are less destructive of rights. The last resort threshold is therefore a vital component of the protections in the QDW regime.

Rather than removing this protection, the Commission recommends that it be made more robust. Currently, only the Minister needs to be satisfied of the 'last resort' threshold. If, contrary to the Commission's recommendation, the QDW regime is retained, it should be modified so that the 'last resort' threshold is applied both by the Minister and by the issuing authority when deciding whether a QDW should be issued.

Further, the last resort threshold should be introduced as a requirement for the issue of a QW (or as a precondition for compulsory questioning under any new alternative legislative scheme).

- (d) ASIO proposes that QDWs and QWs should be able to be issued by the responsible Minister, rather than an 'issuing authority'.<sup>60</sup> It also proposes allowing the responsible Minister to issue 'emergency oral warrants'.<sup>61</sup>

For the reasons given above, the requirement for both ministerial consent and a decision by an issuing authority provides a real safeguard against arbitrary or unjustified use of the QW provisions. No compelling reasons have been given to justify removing either of these requirements.

If either the QW or the QDW provisions are retained, there should be no lessening of the safeguards applying to them.

- (e) ASIO proposes including a power for police to take a person subject to a QW into custody in certain circumstances, including where the police officer suspects the person intends not to comply with the warrant or that the person intends to alert another person.<sup>62</sup>

The Commission notes that the former INSLM's preferred model for compulsory questioning is one modelled on the provisions in the *Australian Crime Commission Act 2002* (Cth). The relevant provisions do not include a power of detention equivalent to that proposed by ASIO.

In the absence of compelling evidence that such a provision is necessary, the Commission considers that this proposal would involve the increased likelihood of QWs resulting in arbitrary detention, and would be inconsistent with the recommendations of the 2016 Gyles Review.

Australian Human Rights Commission  
*Review of ASIO's questioning and detention powers – 22 January 2018*

- (f) ASIO proposes changing the qualifications for 'prescribed authorities' who supervise QWs and QDWs. Currently, a prescribed authority must be a retired judge of a superior court. ASIO proposes that the qualification be changed to a legal practitioner who has been admitted to practice for at least five years.<sup>63</sup> It appears that ASIO envisages that appointees would be ASIO officers or employees.<sup>64</sup>

The Commission considers that the exacting qualifications required for persons to be appointed as prescribed authorities provide a vital safeguard against arbitrary exercise of the powers in the ASIO Act. No compelling reasons have been given to reduce the required qualifications. The powers have been exercised infrequently, and ASIO has not submitted that there has ever been, or that it is likely there will be, insuperable difficulties in finding enough qualified candidates. The Commission considers that the present qualifications for prescribed authorities should be maintained.

It is true that the 2016 Gyles Review appears to contemplate that under an ACIC-style compulsory questioning regime, questioning might take place before an 'examiner', who would be likely to be an ASIO officer. However, as the Review also observes, the powers exercised by ACIC examiners are significantly more limited than those exercised by a prescribed authority. Most importantly, an ACIC examiner may not make directions restricting a person's choice of lawyer and may not direct that an examinee be detained. Unless the powers exercisable by a prescribed authority were to significantly reduced, there are compelling reasons to require higher qualifications and increased guarantees of independence for prescribed authorities under the ASIO Act than those applying to ACIC examiners.

- (g) ASIO proposes lowering the minimum age for subjects of questioning and detention by ASIO from 16 to 14.<sup>65</sup> ASIO also proposes changing the threshold for the questioning and detention of minors, to allow persons under the age of 18 to be detained and questioned even when they are not themselves suspected of any engagement in conduct connected to terrorism.<sup>66</sup>

The Commission observes that the current provision for detention and compulsory questioning of minors is itself highly controversial.

When the QW and QDW provisions were first proposed, they were the subject of an inquiry by the Parliamentary Joint Committee on ASIO, ASIS and DSD (PJCAAD), the precursor to the PJCIS. In considering the possible application of this regime to children, the PJCAAD concluded:

It is a major concern that children could be subject to the provisions in the Bill. The Committee does not support the right to detain ... children as provided for under the legislation. There already exists a procedure under the Crimes Act which allows for the questioning of children.

Australian Human Rights Commission  
*Review of ASIO's questioning and detention powers – 22 January 2018*

....

Many protections could be put into the legislation with regard to children under the age of 18, however, it is the view of the Committee that it would be simpler and safer to have the legislation not apply to anyone under 18 year [sic] of age.<sup>67</sup>

The PJCAAD recommended that the relevant Bill 'be amended to ensure that no person under the age of eighteen years may be questioned or detained under the legislation'.<sup>68</sup> Ultimately, of course, that recommendation was not fully implemented.

The preamble to the CRC states that, in light of their physical and mental immaturity, children have special need of safeguards, care and protection. As noted above, article 3 of the CRC requires that in all actions concerning children, the best interests of the child shall be a primary consideration.

The proposal that children as young as 14, who are not suspected of engaging in any wrongdoing, should be subject to detention and compulsory questioning is an extraordinary one. No compelling evidence has been supplied to support the proposition that these amendments are necessary and proportionate.

- (h) ASIO proposes retaining the current provisions about contact with lawyers by persons subject to QWs and QDWs.<sup>69</sup>

The 2016 Gyles Review recommended that an ASIO questioning regime based on the ACIC model be adopted.

The Commission notes that where ACIC conducts compulsory questioning, a person is entitled to be represented by a lawyer of their choosing during questioning. Contact between the person and their lawyer may not be monitored.

The Commission recommends that the PJCIS consider whether the restrictions on contact with lawyers by persons subject to QWs and QDWs be removed or reduced.

- (i) ASIO proposes that the identified person warrant (IPW) regime in the ASIO Act be modified, to allow the Minister to authorise compulsory questioning under an IPW. The Attorney-General's Department's supplementary submission of November 2017 (Submission 7.3) makes clear that this is proposed as an *additional* compulsory questioning power; it is not suggested as an alternative to the QW/QDW regime.<sup>70</sup>

This proposal amounts to a proposal that ASIO be granted an additional power to conduct compulsory questioning.

The IPW regime is currently subject to many fewer safeguards than the QW and QDW regimes. As things stand, that difference may be justified by the fact that IPWs are less intrusive into the rights of those



the subject of them (although monitoring under an IPW may itself be extremely intrusive).

For the reasons given above, there should be no reduction in the thresholds and safeguards applicable to ASIO's compulsory questioning powers. Nor should there be any multiplication of ASIO's powers of compulsory interrogation.

Further, the IGIS has identified substantial practical difficulties that might arise for that office in monitoring questioning conducted pursuant to a modified IPW scheme. That is a further significant reason that the proposal should not be adopted.

## **7 Conclusion and Recommendations**

60. For the reasons above, the proposals comprising ASIO's 'preferred questioning model' would significantly expand ASIO's powers, would lower the thresholds for their exercise, and would reduce the current safeguards against excessive use. The Commission makes the following recommendations:

### **Recommendation 1**

The QDW regime should be repealed or allowed to lapse.

### **Recommendation 2**

No equivalent regime (ie one allowing for pre-authorised detention of a person for the purposes of questioning by ASIO) should be implemented in place of the QDW regime.

### **Recommendation 3**

In the event that the PJCIS considers that the retention of compulsory questioning powers by ASIO is necessary and proportionate to addressing the risk to the community and to national security posed by terrorism, the QW regime should be amended in a manner consistent with the recommendations made by the INSLM in 2016.

### **Recommendation 4**

The changes to the QDW and QW regime contemplated by ASIO's 'preferred questioning model' should not be implemented.

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<sup>1</sup>

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/ASIO/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIO/Submissions) (viewed 16 January 2018).

<sup>2</sup> Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016), [4.24]-[4.37].

<sup>3</sup> See, in particular, the attachments to the submission of N McGarrity and G Williams dated 21 April 2017 (Submission 5).

Australian Human Rights Commission  
*Review of ASIO's questioning and detention powers – 22 January 2018*

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- <sup>4</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), ss 34D, 34F.
- <sup>5</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), s 34D(4).
- <sup>6</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), s 34F.
- <sup>7</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), s 34AB.
- <sup>8</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), ss 34E(1), 34G(1).
- <sup>9</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), ss 34E(2), 34L(1).
- <sup>10</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), s 34G.
- <sup>11</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), s 34L(2).
- <sup>12</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), s 34L(9).
- <sup>13</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), ss 34E, 34G.
- <sup>14</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), s 34B. Alternative appointments may be made if there is an insufficient number of retired superior court judges available.
- <sup>15</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), s 34K(1).
- <sup>16</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), s 34ZQ(2).
- <sup>17</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), s 34ZS(1).
- <sup>18</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), ss 34D, 34E, 34F, 34G.
- <sup>19</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), s 34ZE(1).
- <sup>20</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), ss 34ZE(4)-(5).
- <sup>21</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), ss 34ZE(6)-(8).
- <sup>22</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), ss 34E(5)(b), 34R.
- <sup>23</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), s 34S.
- <sup>24</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), ss 34ZI, 34P.
- <sup>25</sup> IGIS Submission 1 (12 April 2017), 6. IGIS has attended at least for part of the questioning conducted under each relevant warrant issued to date, and proposes to continue that practice.
- <sup>26</sup> Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016), 25 [6.6].
- <sup>27</sup> AGD Submission 7.2 (July 2017), 1-4.
- <sup>28</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- <sup>29</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
- <sup>30</sup> See, for instance, UN High Commissioner for Human Rights, *Human rights: a uniting framework – Report of the High Commissioner submitted pursuant to General Assembly resolution 48/141* UN Doc E/CN.4/2002/18 (27 February 2002), 17-18.
- <sup>31</sup> UN Human Rights Committee, *General Comment 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 44<sup>th</sup> Sess, U.N. Doc. HRI/GEN/1/Rev.1 at 30, (1992), [3].
- <sup>32</sup> UN Human Rights Committee, *General Comment No 22: Article 18 – Freedom of Thought, Conscience or Religion*, 48<sup>th</sup> Sess, UN Doc CCPR/C/21/Rev.1/Add.4, (1993), [3].
- <sup>33</sup> Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (October 2014), [2.302]-[2.306].
- <sup>34</sup> Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016).
- <sup>35</sup> Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016), [9.1]-[9.10].
- <sup>36</sup> Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016), [9.10].
- <sup>37</sup> Independent National Security Legislation Monitor, *Declassified Annual Report: 20<sup>th</sup> December 2012* (2012), chs IV and V).
- <sup>38</sup> AGD Submission 7.2 (July 2017), 1-4.
- <sup>39</sup> Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016), [9.1].
- <sup>40</sup> Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016), [9.13].
- <sup>41</sup> Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016), [9.14].
- <sup>42</sup> Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016), [9.14].
- <sup>43</sup> Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016), [9.49].

<sup>44</sup> Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016), [9.49].

<sup>45</sup> Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016), [9.12].

<sup>46</sup> Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016), [9.12].

<sup>47</sup> cf Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016), [9.12].

<sup>48</sup> Noted in Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016), [9.19].

<sup>49</sup> Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016), [9.23], [9.26].

<sup>50</sup> *Australian Crime Commission Act 2002* (Cth), s 31.

<sup>51</sup> ASIO Submission 8.6 (4 September 2017), [25], [50].

<sup>52</sup> IGIS Submission 1.2 (16 October 2017), 6. Being subject to involuntary transport by law enforcement officials amounts to detention. See UN Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112th Sess, UN Doc CCPR/C/GC/35 (2014), [5].

<sup>53</sup> Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016), [9.10].

<sup>54</sup> ASIO Submission 8.6, (4 September 2017), [27], [59]-[60]. Section 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth) defines 'security' to mean:

(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:

(i) espionage;

(ii) sabotage;

(iii) politically motivated violence;

(iv) promotion of communal violence;

(v) attacks on Australia's defence system; or

(vi) acts of foreign interference;

whether directed from, or committed within, Australia or not; and

(aa) the protection of Australia's territorial and border integrity from serious threats; and

(b) 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).

<sup>55</sup> cf ASIO Submission 8.6 (4 September 2017), [27].

<sup>56</sup> ASIO Submission 8.6 (4 September 2017), [27].

<sup>57</sup> ASIO Submission 8.6 (4 September 2017), [60].

<sup>58</sup> IGIS Submission 1.2 (16 October 2017), 2-3.

<sup>59</sup> ASIO Submission 8.6 (4 September 2017), [28]-[29].

<sup>60</sup> ASIO Submission 8.6 (4 September 2017), [31]-[32].

<sup>61</sup> ASIO Submission 8.6 (4 September 2017), [37].

<sup>62</sup> ASIO Submission 8.6 (4 September 2017), [42].

<sup>63</sup> ASIO Submission 8.6 (4 September 2017), [57]-[58].

<sup>64</sup> ASIO states that its preferred model is that officers presiding over QDWs and QWs be 'statutorily appointed... officers... similar to ACIC examiners'. ASIO Submission 8.6 (4 September 2017), [57]. Under the *Australian Crime Commission Act 2002* (Cth), examiners are members of ACIC (see s 7(2) of that Act).

<sup>65</sup> ASIO Submission 8.6 (4 September 2017), [64]-[65].

<sup>66</sup> ASIO Submission 8.6 (4 September 2017), [65]-[66].

<sup>67</sup> Parliamentary Joint Committee on ASIO, ASIS and DSD, *An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002* (2002), 51 [3.82]-[3.83].

<sup>68</sup> Parliamentary Joint Committee on ASIO, ASIS and DSD, *An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002* (2002), 51 [3.84].

<sup>69</sup> ASIO Submission 8.6 (4 September 2017), [76]-[82].

<sup>70</sup> AGD Submission 7.3 (November 2017), 7.