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Australian Government

Australian Security
Intelligence Organisation

ASIO response to PJCIS questions on questioning and detention powers—June 2017

The Australian Security Intelligence Organisation welcomes the opportunity to provide responses to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) written questions on the operation, effectiveness and implications of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (questioning and detention powers).

Questions

1. What are the unique benefits to ASIO of a compulsory questioning power that other available powers cannot provide? What specifically does compulsory questioning offer as a collection tool?

ASIO endeavours to collect security intelligence using both overt and covert methodologies. A gap in that intelligence can mean that the assessment of a security threat, and the means of dealing with that threat, is incomplete and not properly informed. The capacity to compel answers in appropriate cases offers a means of narrowing or closing that intelligence gap.

In many cases, when faced with criminal offences for non-cooperation, persons being questioned may be more inclined to give truthful answers and provide information that ASIO would otherwise not have obtained. There are situations where some people will be reluctant to volunteer information to ASIO because of perceived competing loyalties or obligations, notwithstanding that they have serious security concerns about the conduct of an individual. Those competing loyalties or obligations may include personal and professional relationships which cause people to hesitate in volunteering information to ASIO. In many cases, the lawful requirement to provide information may be an effective means of overcoming those competing loyalties and gaining full cooperation.

Even where a person who is required to answer questions is uncooperative and it may be apparent that the answers are not truthful, the information gained from evasive responses to particular questioning can be of considerable intelligence value in itself, confirming or alerting ASIO to areas of particular sensitivity and identifying lines of inquiry for further intelligence collection.

Counter-terrorism

A compulsory questioning power remains an important and unique intelligence collection tool for ASIO to utilise in our counter-terrorism investigations. However, the current environment—where ASIO is dealing with an unprecedented volume of fast-moving, high-threat counter-terrorism investigations—has not been conducive to the use of ASIO's compulsory questioning powers as they are currently constructed.

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Compulsory questioning powers are nevertheless an effective intelligence collection tool. Our judgement is that in future the compulsory questioning powers would be usefully deployed within the current environment if the authorising regime were more tactically flexible and the requirement for linkages to specific terror-related offences were removed.

ASIO envisages that the compulsory questioning powers could be used to obtain information from individuals who are not necessarily directly involved in conduct prejudicial to security, or who cannot contribute to matters of an evidentiary nature, but who are associated with a target and can substantially assist the collection of intelligence. While the current threshold for a questioning warrant provision would enable this to occur in certain circumstances, a revised threshold removing the necessary link to a terrorism offence would provide a greater opportunity to utilise compulsory questioning in regard to persons who are not themselves targets but who may hold valuable information related to ASIO investigations.

Countering espionage and interference (CEI)

A security intelligence interview is often the most effective and efficient manner to resolve complex investigations. A non-adversarial compulsory interview regime with exemption from prosecution would provide an incentive for individuals to cooperate with ASIO during CEI investigations and afford ASIO the opportunity to meet face to face with an individual who could substantially assist in resolving a complex investigation. In addition, it would provide a more intimate, controlled environment without external distractions or interruptions for subjects of investigative interest to be fully explored.

2. We note ASIO's in-principle agreement to a questioning framework broadly similar to the ACC Act examination model. We also note the reported regularity with which the ACIC conducts examinations under that legislation. Would this model, if incorporated into the ASIO Act and adapted for ASIO as detailed in Part 3 of ASIO's submission, provide ASIO with the effective and modernised compulsory questioning framework it is seeking? If not, what are the specific required features of a compulsory questioning framework for ASIO?

ASIO notes the ACIC model has far fewer constraints than the current ASIO questioning warrant model in that it is largely regulated by what the examiner considers reasonable in the circumstances.

The current questioning model, set out in Part III Division 3 of the ASIO Act, with appropriate modifications would serve ASIO's requirements for an effective questioning framework. The removal of the current two-step authorisation process, the removal of the specific link to a 'terrorism offence' and expansion of the power to all heads of security, in particular, would enhance the utility of these powers.

Drawing from the current ACC Act model, further modifications such as the use of a statutorily appointed examiner to preside over questioning and specific post-charge questioning provisions would also be of particular value.

If the committee considered it more appropriate to develop a new compulsory questioning framework, ASIO believes that the ACC Act examination process is an appropriate starting point. However, there

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are several modifications that would be necessary to adapt it to the security intelligence environment. For example, we consider that the Attorney-General, rather than the equivalent of an examiner, would be the most appropriate person to issue an examination summons; this would ensure the framework remained consistent with other ASIO processes that maintain a high level of accountability.

As outlined in ASIO's written submission, other examples of key areas where modifications would be required are:

- a simplified direct-use immunity provision based on the existing ASIO Act provision;
- retention of the ability to prevent contact with particular lawyers, to avoid others being tipped off about the investigation or to prevent the destruction of records or other things; and
- retention of the ability to pre-emptively prevent absconding, the tipping off of others that there is an investigation by ASIO, and/or the destruction of records or other things required to be produced.

A further modification is an express ability to search the subject of questioning on presentation at the premises where questioning is to occur.

The adjustments to an ACC Act model highlighted in ASIO's submission are not exhaustive. Should an ACC Act model be considered an appropriate model for ASIO, there may be further adjustments necessary in order for it to be appropriate and adapted to ASIO's statutory remit.

These amendments would likely become apparent following a closer examination of the ACC Act model during the drafting of any new compulsory questioning power. It is not possible at this time to exhaustively outline all the modifications that ASIO may require.

3. During joint operations/investigations, has the stated problems with the ASIO Act questioning model resulted in the use of other agencies' compulsory questioning models? If so, or if ASIO has observed other models being used, what does ASIO see as the benefits of those other compulsory questioning models? Could those benefits be adapted for the ASIO Act?

ASIO has not 'used' other agencies' compulsory questioning powers. However, ASIO has worked jointly with other agencies on matters that are of shared interest and has had some experience in seeing how other models have been used.

ASIO has worked with other agencies in matters that are outside the counter-terrorism sphere, and for which questioning and questioning-and-detention warrants are currently unavailable to ASIO.

ASIO routinely works with law enforcement agencies on counter-terrorism matters as part of the whole-of-government counter-terrorism effort, and at times the ACIC coercive powers have been used in those investigations. This experience has been beneficial in informing strategies that could be adapted by ASIO in its collection of security intelligence under the ASIO Act.

ASIO's exposure to those powers has not necessarily been the result of problems with the ASIO Act model. Rather, it reflects the fact that compulsory questioning powers are now relatively common in Australia, and the opportunity to have input when other powers have been used has been taken. ASIO has also noted the benefits of a more streamlined approval process, such as that utilised by the ACIC.

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The benefits of the ACC Act model, and its practical application by the ACIC, was noted by the Independent National Security Legislation Monitor (INSLM) and underpin many of the suggestions that ASIO has made in its submission.

4. We note ASIO's requirement that any amended compulsory questioning framework must allow the pre-emptive detention of a person to ensure they do not fail to attend questioning, do not tip off others, and do not destroy records or other things. Are the current questioning warrant (QW) provisions—which can require immediate attendance for questioning and, presumably, would allow an individual to be arrested if they do not comply with that term of the warrant—insufficient to address these concerns? Does ASIO have other powers available to it which, when combined with a QW, could ensure a person does not tip off others or destroy records or other things?

The current QW provisions are insufficient. In particular, they do not prevent the person tipping off others or destroying records or other things. The only way to ensure that the subject of a QW does not tip off others is to have the capacity to detain them the moment they become aware they are required to attend questioning.

While the subject of a QW may commit an offence if they were to tip off others or destroy evidence, the act sought to be avoided will have been carried out, and the harm will have been done. Even where a QW requires immediate attendance at a specific location, a police officer can only take a person into custody in relation to a QW once they have failed to appear before the prescribed authority (section 34K(7) of the ASIO Act). In practice, this will involve a time delay between the service of the warrant and the trigger for detaining the person, which may allow for contact with others or the destruction of material (for example, electronic records). ASIO requires a preventative measure to ensure that, where there is a demonstrable risk of those acts occurring, they can be prevented.

While it may in some circumstances be possible to execute a search warrant of the person's premises at the same time as serving a QW, to enable seizure of relevant items and thus prevent their destruction, this is far more cumbersome than what the current QDW provisions allow. ASIO could not rely on this as a mechanism to prevent destruction of records or other things sought to be produced. The execution of a search warrant would also not prevent a person from tipping off others about the matter.

In the absence of another solution, ASIO submits that the detention capability is required in the hopefully rare event that it is needed. In many national security cases, the destruction of documents or the collusion between individuals who are alerted to the interest of authorities in their activities by the service of a QW notice could have extremely serious consequences.

The bar is set at a high level to obtain a QDW. It is not something that ASIO would pursue lightly. Even when it is not used, the existence of the detention capability underscores the seriousness of the matters under investigation, and in some cases this might be a deterrent in itself to persons destroying intelligence or alerting targets.

As mentioned above, ASIO also now seeks the express ability to search the subject of a QW on presentation at the premises where questioning is to occur. While a QDW enables a search of the

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person, a QW does not. Given the current security environment, ASIO believes it appropriate that its officers and others involved in questioning should be able to undertake their responsibilities safely. The ability to search a person prior to attending questioning to ensure they do not hold any weapons or other items that could cause damage to participants is appropriate in these circumstances.

5. ASIO has recommended that its compulsory questioning power be extended to allow compulsory questioning in relation to ASIO's full security remit. ASIO has also recommended that the ACC Act model would need to be modified to suit ASIO's requirements, including allowing the ability to detain, to question a minor, to refuse certain lawyers, and to question post-charge. Is there an operational requirement for such modifications to apply to questioning across ASIO's full security remit, or would those modifications only apply to questioning in relation to terrorism?

ASIO considers that modifications would be required across its full security remit.

As set out in ASIO's submission, there would be operational benefits in questioning minors given recent events, particularly in relation to counter-terrorism matters. ASIO knows of minors having been exploited by terrorist groups and directly involved in terrorist activities. ASIO recognises that appropriate safeguards similar to the existing provisions will be necessary.

It should be noted that, under the ACC Act, there is no express restriction on the questioning of minors, and questioning post-charge is expressly allowed with certain limitations on post-charge disclosures to prosecutors.

The capacity to detain a person in appropriate circumstances has been discussed in our answer to your Question 4, above.

With respect to refusing access to certain lawyers in circumstances where the person has been detained, it would undermine the basis for detaining a person to avoid tipping off of others or destruction of certain material if they were represented by a lawyer whose involvement could lead to one of those outcomes. This would place at risk the security of the investigation and the information expected to be disclosed during questioning.

Complications might also arise if the lawyer were representing other persons about whom ASIO proposed asking questions. While ASIO does not anticipate that this provision would be used regularly, ASIO requires that the basis for excluding lawyers in circumstances where the person has been detained remains set out in statute, as it is currently.

Counter-terrorism

There remains a requirement for these modifications to apply to questioning in relation to terrorism.

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Countering espionage and interference (CEI)

There is a requirement for these modifications to be applied to espionage and foreign interference investigations.

Detention

There is a range of scenarios where we might seek to detain an individual including the following:

- The individual to be questioned is about to provide privileged information to a foreign intelligence service or to publish the material in a public domain, detrimental to Australia's national security.
- The individual to be questioned is about to destroy/alter/remove intelligence/information critical to the investigation.
- The individual to be questioned could advise a foreign intelligence officer or other agents working for this person of ASIO interest in them, preventing ASIO's ability to detect and degrade the intelligence activity.
- The individual to be questioned could have intimate knowledge of weaknesses in Australian Government or private sector security practices which, if made public, could result in critical infrastructure being vulnerable to attack.

Questioning of minors

Espionage and foreign interference activity is not age dependent. Espionage and foreign interference activity through cyber means could be perpetrated by a minor. In addition, there are positions such as in Defence where individuals entering are minors and have access to privileged information. There is the potential they could become the subject of a non-CT security intelligence investigation.

Lawyers

There are situations where lawyers may be precluded from attending a compulsory questioning, such as the following:

- the lawyer is subject to the security intelligence investigation;
- the lawyer is working on behalf of a foreign power or an entity with intent prejudicial to Australia's security; or
- there is a real and not remote chance the lawyer will advise other individuals of interest.

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