



Law Council  
OF AUSTRALIA

# Review of ASIO's questioning and detention powers

Parliamentary Joint Committee on Intelligence and Security

19 April 2017

## Table of Contents

About the Law Council of Australia .....	3
Acknowledgement .....	4
Executive Summary .....	5
Questioning and Detention Warrants .....	7
Questioning Warrants .....	8
Advantages of adopting the ACIC model .....	9
Need for appropriate safeguards in ACIC model.....	10
The ACIC model.....	11
Multiple questioning .....	13
Definition of 'terrorism offence' .....	14

## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council acknowledges the assistance of its National Criminal Law Committee and the Law Society of New South Wales in the preparation of this submission.

## Executive Summary

1. The Law Council is grateful for the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security's (**the Committee**) inquiry into the Australian Security and Intelligence Organisation's (**ASIO**) questioning and detention powers.
2. The Law Council accepts the need, in principle, to provide intelligence, security and law enforcement authorities with adequate powers to effectively investigate and obtain evidence in relation to appropriately defined terrorism offences. However, any such powers must be accompanied by sufficient safeguards to ensure that measures against terrorism do not offend fundamental principles of the rule of law and human rights.
3. The Law Council is not satisfied as to the sufficiency of the safeguards against arbitrary interference with the liberties of the citizen which are provided in the current ASIO questioning and detention powers.
4. The Law Council generally supports the recommendations of the former Independent National Security Legislation Monitor's (**INSLM**), the Hon Roger Gyles AO QC, *Report into Certain Questioning and Detention Powers in Relation to Terrorism* (**the Gyles' Report**)<sup>1</sup>. The former INSLM made a number of recommendations (**the Gyles' recommendations**) in relation to the questioning and detention powers of agencies, including that:
  - the legislation governing ASIO's compulsory questioning power be brought into line with the equivalent power available under the *Australian Crime Commission Act 2002* (Cth) (**the ACC Act**);
  - ASIO's questioning and detention power – which has never been sought, or used, by ASIO – be repealed or cease when the sunset date is reached;
  - the definition of a 'terrorism offence' in the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**) should be amended to include the foreign incursion and recruitment offences in part 5.5 of the *Criminal Code Act 1995* (Cth) schedule 1 (**Commonwealth Criminal Code**) and the terrorism financing offences in the *Charter of the United Nations Act 1945* (Cth), and the phrase 'important in relation to a terrorism offence' should be amended to read 'important in relation to an actual or threatened terrorism offence' wherever appearing; and
  - a protocol be developed between ASIO, the Australian Criminal Intelligence Commission (**ACIC**), and any relevant state body that shares information obtained by compulsory questioning, to avoid oppression by successive examinations. This protocol should then be approved and given appropriate status by the Attorney-General. The INSLM and other supervisory bodies such as the Inspector-General of Intelligence and Security (**IGIS**) and the Commonwealth Ombudsman should be able to monitor how this protocol operates in practice.<sup>2</sup>

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<sup>1</sup> Independent National Security Legislation Monitor, *Report into Certain Questioning and Detention Powers in Relation to Terrorism* (October 2016) <<https://www.inslm.gov.au/sites/default/files/files/Certain-Questioning-and-Detention-Powers.pdf>>.

<sup>2</sup> Ibid 1-2.

5. The former INSLM's recommendations are similar to the Law Council's longstanding and consistent approach regarding ASIO's questioning and detention powers.
6. While the Law Council broadly supports the Gyles' recommendations, appropriate safeguards should be put in place when adopting the ACIC model about who can be present, what can be published and to whom and what use can and cannot be made of the information obtained in the interrogation. The Law Council's preference is for stronger safeguards to be implemented in the ACIC model. However, if the Parliament is minded to apply the same regime to ASIO's powers, it should be understood as a base from which standards ought not drop in the future.
7. In addition to the Gyles' Report recommendations, key recommendations of this submission include:
  - The examination of an accused person by ASIO and the ACIC should be deferred until after the disposition of any charges. In the alternative, the ASIO Act and ACIC Act should require authorisation from a Federal Court judge before a summons is issued to a person who is subject to criminal proceedings, and for that Judge to prescribe limitations on the matters which may be covered by the examination.
  - The ACC Act and any ACIC model adapted to ASIO's questioning and detention powers should require the existence of an earlier compulsory examination to be a factor to be taken into account by the issuing authority and the examiner (the one person) if the recommendations as to questioning warrants (**QWs**) are implemented, accompanied by a register of examinees to be kept and shared with the bodies concerned.

## Questioning and Detention Warrants

8. In 2002, when ASIO's questioning and detention powers were introduced, and subsequently in 2005 when they were reviewed, the Law Council proposed an alternative approach be adopted. The alternative was utilisation of the existing coercive power regime by the former Australian Crime Commission, with appropriate statutory modification as necessary.<sup>3</sup>
9. The Law Council has also long called for repeal of ASIO's questioning and detention warrants (**QDWs**). The Law Council's opposition rests on the basis that:
  - QDWs involve the ability of ASIO to secretly and immediately detain persons whether or not they are terrorist suspects;
  - The decision whether the grounds to make a QDW application rather than a QW application lies with a member of the executive;
  - The QDW power appears unnecessary to prevent or disrupt a terrorist act, in light of all of ASIO's other powers including QWs, and the questioning and detention powers of federal, state and territory police and the ACIC;
  - QDWs give rise to questions of constitutional validity on the grounds that a warrant may be issued for detention on the basis of a decision by the executive by a judge acting in a personal capacity rather than the judiciary thereby testing the doctrine of separation of powers;
  - QDWs are likely to be incompatible with human rights, including the right to freedom of movement.<sup>4</sup> They are not a necessary and proportionate response to the threat of terrorism;
  - QDWs have not been used since they were introduced which suggests that the efficacy and worth of the provisions as an intelligence tool does not appear to have been clearly demonstrated;
  - The privilege against self-incrimination is removed, providing for a use only immunity and no derivative use immunity;
  - There is no statutory right of judicial review of an administrative decision or conduct for the purpose of making an administrative decision under the ASIO Act. Such decisions are excluded from the operation of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1997* (Cth); and

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<sup>3</sup> See Law Council of Australia, *Submission to the Senate Legal and Constitutional References Committee Inquiry into the Australian Security Intelligence Organisation Legislation (Terrorism) Bill 2002* (December 2002) <[https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-O-1999/1623%20Inquiry%20Into%20the%20Australian%20Security%20Intelligence%20Organisation%20Legislation%20\(Terrorism\)%20Bill%202002.pdf](https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-O-1999/1623%20Inquiry%20Into%20the%20Australian%20Security%20Intelligence%20Organisation%20Legislation%20(Terrorism)%20Bill%202002.pdf)>; Law Council of Australia, *Submission to the Joint Parliamentary Committee on ASIO Review of ASIO Questioning and Detention Powers* (4 April 2005) <<https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-O-1999/1811%20Review%20of%20ASIO%20questioning%20and%20detention%20powers.pdf>>.

<sup>4</sup> Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Fourteenth Report of the 44<sup>th</sup> Parliament* (October 2014) 12.

- Section 34ZQ(2) of the ASIO Act requires that all contact between a person subject to a QDW and their lawyer be monitored by an ASIO official. This raises questions as to the possible impact on client legal privilege.

10. The Law Council's position on these matters is set out in more detail in a number of submissions previously made to the INSLM.<sup>5</sup> The Law Council also notes that the case for the abolishment of ASIO's QDWs was also clearly made out by the first INSLM, Bret Walker SC.<sup>6</sup>

**Recommendation:**

- **Subdivision C of division 3 of part III of the ASIO Act should be repealed or cease when the sunset date is reached. Successive extensions of the sunset date since 2006 should end.**

## Questioning Warrants

11. The Gyles' Report noted that on the basis that the QDW would be abolished, the previous INSLM recommended that the provisions of the ASIO Act relating to QWs should be amended.<sup>7</sup> Several of the recommendations were not implemented, or have only been partly implemented.<sup>8</sup> However, in light of the experience of ASIO, the ACIC and the AFP in the intervening years, the Gyles' Report noted that the first INSLM's recommendations relating to QWs needed to be revisited.<sup>9</sup>

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<sup>5</sup> See Law Council of Australia, *Submission to the INSLM on Questioning and Detention Powers* (June 2016) <[http://www.lawcouncil.asn.au/lawcouncil/images/3159\\_-\\_INSLM\\_QDPs.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/3159_-_INSLM_QDPs.pdf)>; *Supplementary Submission to the INSLM on Questioning and Detention Powers* (September 2016) <[http://www.lawcouncil.asn.au/lawcouncil/images/3181\\_-\\_Supplementary\\_Submission\\_INSLM\\_certain\\_questioning\\_and\\_detention\\_powers.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/3181_-_Supplementary_Submission_INSLM_certain_questioning_and_detention_powers.pdf)>; *Submission to the INSLM Inquiry into Questioning and Detention Warrants, Control Orders and Preventative Detention* (September 2012) <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2645%20-%20Inquiry%20into%20questioning%20and%20detention%20warrants,%20control%20orders%20and%20preventative%20detention%20orders.pdf>>; *Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD Review of ASIO Questioning and Detention Powers* (April 2005) <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-O-1999/1811%20Review%20of%20ASIO%20questioning%20and%20detention%20powers.pdf>>; *Submission to the Senate Legal and Constitutional References Committee Inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (November 2002)* <[http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-O-1999/1623%20Inquiry%20into%20the%20Australian%20Security%20Intelligence%20Organisation%20Legislation%20\(Terrorism\)%20Bill%202002.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-O-1999/1623%20Inquiry%20into%20the%20Australian%20Security%20Intelligence%20Organisation%20Legislation%20(Terrorism)%20Bill%202002.pdf)>.

<sup>6</sup> See Independent National Security Legislation Monitor, *Declassified Annual Report* (20 December 2012) 106 <<https://www.inslm.gov.au/sites/default/files/publications/inslm-annual-report-2012.pdf>>.

<sup>7</sup> Independent National Security Legislation Monitor, *Report into Certain Questioning and Detention Powers in Relation to Terrorism* (October 2016) 46 <<https://www.inslm.gov.au/sites/default/files/files/Certain-Questioning-and-Detention-Powers.pdf>>.

<sup>8</sup> Law Council of Australia, *Submission to the Independent National Security Legislation Monitor on Questioning and Detention Powers* (16 June 2016) 20-21 <[http://www.lawcouncil.asn.au/lawcouncil/images/3159\\_-\\_INSLM\\_QDPs.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/3159_-_INSLM_QDPs.pdf)>.

<sup>9</sup> Independent National Security Legislation Monitor, *Report into Certain Questioning and Detention Powers in Relation to Terrorism* (October 2016) 46 <<https://www.inslm.gov.au/sites/default/files/files/Certain-Questioning-and-Detention-Powers.pdf>>.



12. The Law Council considers that there are a number of concerns with ASIO's QWs, including:

- The strict secrecy obligations imposed by section 34ZS of the ASIO Act mean that, while a warrant is in force, no one can disclose information indicating that a warrant has been issued, or a fact relating to the content of the warrant, or to the questioning or detention of a person in connection with a warrant, except for a limited category of permitted disclosures that do not include family (except in the case of a minor), employers or friends, unless permission is granted by the Director-General, the Minister or a prescribed authority.<sup>10</sup> Strict liability applies to the subject of the warrant and the subject's lawyer.<sup>11</sup> The penalty is imprisonment for five years;<sup>12</sup>
- There is a limit on contact with the subject's lawyer of choice;
- Contact between the subject and the lawyer can be monitored;<sup>13</sup>
- A lawyer cannot intervene in questioning or address the prescribed authority during questioning, except to request clarification of an ambiguous question or, with leave, address the prescribed authority on a matter during a break in questioning.<sup>14</sup>

## Advantages of adopting the ACIC model

13. The Law Council considers that there are a number of advantages in adopting the ACIC model for ASIO's questioning powers, including:

- The coercive powers would be triggered through a decision of the executive and granted after judicial confirmation that the legislative tests have been met;
- Consistent coercive power mechanisms in the Australian domestic intelligence agency environment is desirable given that both the ACIC and ASIO have a broadly similar function of intelligence gathering rather than law enforcement. They also have, as the Gyles' Report notes, partially overlapping responsibilities with regard to counter-terrorism;<sup>15</sup>
- Certainty about legal rights and obligations created with consistent schemes;
- The ACC Act provisions have been regularly used by the ACIC and as a result the legal profession has an understanding about their operation in order to adequately advise clients;

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<sup>10</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZS(1), (2), (5).

<sup>11</sup> *Ibid* s 34ZS(3).

<sup>12</sup> *Ibid* s 34ZS(1), (2).

<sup>13</sup> *Ibid* s 34Q(2), (3).

<sup>14</sup> *Ibid* s 34ZQ(5)–(10). See also Independent National Security Legislation Monitor, *Report into Certain Questioning and Detention Powers in Relation to Terrorism* (October 2016), 46–50 <<https://www.inslm.gov.au/sites/default/files/files/Certain-Questioning-and-Detention-Powers.pdf>>.

<sup>15</sup> Independent National Security Legislation Monitor, *Report into Certain Questioning and Detention Powers in Relation to Terrorism* (October 2016) 43 <<https://www.inslm.gov.au/sites/default/files/files/Certain-Questioning-and-Detention-Powers.pdf>>.

- In contrast to the current ASIO questioning and detention power secrecy provisions, an examiner under the ACIC model issuing the summons makes a decision regarding the application of the statutory criteria and has a discretion as to when a disclosure may be made.<sup>16</sup> The penalty for breach is imprisonment for two years, or 120 penalty units, or both.<sup>17</sup> There is no strict liability offence for the subject of an examination and the subject's lawyer;
- In contrast to the current ASIO questioning and detention powers, a person giving evidence before an examiner may be represented by a legal practitioner, and in some circumstances, a practitioner can be granted leave to represent a person not giving evidence;<sup>18</sup> and
- The ACIC model includes provisions which identify what should happen in terms of post-charge examinations. While the Law Council disagrees with the manner in which the ACIC model does so (discussed below), legislative certainty in this regard when compared with the current ASIO regime is welcomed; and
- There is a lack of a detention power in the ACC Act which would be appropriate for the ASIO adaptation.<sup>19</sup> An examiner does not have the same power as a prescribed authority, particularly regarding detention; and
- The appointment of an examiner under the ACIC model is more transparent and formal. Under the ASIO Act, the Minister simply appoints a qualified person in writing and with that person's consent;<sup>20</sup> there is no disclosure process for the appointment. By contrast, under the ACC Act, the Governor-General makes the appointment by way of an instrument of appointment and the examiner holds a statutory appointment.<sup>21</sup>

#### Recommendation

- **The balance of div 3 of part III of the ASIO Act should either be repealed, or not extended beyond the present sunset date, and should be replaced by a questioning power following the model of coercive questioning available under the ACC Act as closely as possible. A sunset clause should not be necessary for such a questioning power.**

## Need for appropriate safeguards in ACIC model

14. The Law Council is concerned about the possibility of constitutional invalidity of the ACC provisions and the impact on a defendant's right to a fair trial. For this reason, safeguards should be put in place when adopting the ACIC model for ASIO's questioning and detention powers about who can be present, what can be published and to whom

<sup>16</sup> *Australian Crime Commission Act 2002* (Cth) ss 29A and 29B.

<sup>17</sup> *Ibid* s 21C(1).

<sup>18</sup> *Ibid* s 25A(2).

<sup>19</sup> The ACC Act permits detention only as an ancillary to an application to a court for contempt: see *Australian Crime Commission Act 2002* (Cth) s 34D.

<sup>20</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s 34B.

<sup>21</sup> *Australian Crime Commission Act 2002* (Cth) part II division 3 subdivision B; s 46B. See also Independent National Security Legislation Monitor, *Report into Certain Questioning and Detention Powers in Relation to Terrorism* (October 2016) 46 <<https://www.inslm.gov.au/sites/default/files/files/Certain-Questioning-and-Detention-Powers.pdf>>.

and what use can and cannot be made of the information obtained in the interrogation. The Law Council's preference is for stronger safeguards to be implemented in the ACIC model. However, if the Parliament is minded to apply the same regime to ASIO's powers, it should be understood as a base from which standards ought not drop in the future.

## The ACIC model

16. The Law Council accepts the Gyles' Report findings that:

*[The ACIC] use of the questioning power in counter-terrorism matters over recent years has been instructive. It provides an example of what an effective questioning powers might look like.<sup>22</sup>*

17. The Gyles' Report also acknowledged that:

*Views may differ on the merit of both the recent legislative solution to the post-charge questioning issue and the High Court's reasoning that led to that solution. The controversy is unlikely to go away and the related constitutional questions also remain to be considered. While these matters will be considered and resolved in the future, the current regime represents a considered response to the issue by Parliament and assists in clarifying uncertainty.<sup>23</sup>*

18. The Law Council agrees that recent amendments to the ACIC Act seek to provide certainty regarding the ACIC's ability to exercise its questioning and detention powers. However, the Law Council has serious concerns that certainty has sought to be established in a manner which may lead to constitutional invalidity.<sup>24</sup> These issues should be addressed in any adoption of a similar ACIC model to ASIO's questioning and detention powers.
19. In a submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the Law Enforcement Legislation Amendment (Powers) Bill 2015 (**attached**), the Law Council made a number of recommendations as to how ACIC model could be improved. Notwithstanding the purported legislative protections, the Law Council is concerned that there remains a real risk that a person who is examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice his or her defence. An accused person should not be forced to divulge his or her position prior to trial or to assist law enforcement officers in gathering supplementary information to aid in his or her prosecution.
20. For these reasons, the Law Council's primary recommendation is that the examination of a person charged or imminently to be charged by the ACIC or Integrity Commissioner should be deferred until after the disposition of any charges.
21. In the possible application of the ACIC model to ASIO's questioning and detention powers, the Law Council considers equally important that the provisions should make it clear that a person who has been charged with a criminal offence cannot be subject to

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<sup>22</sup> Independent National Security Legislation Monitor, *Report into Certain Questioning and Detention Powers in Relation to Terrorism* (October 2016) 38 <<https://www.inslm.gov.au/sites/default/files/files/Certain-Questioning-and-Detention-Powers.pdf>>.

<sup>23</sup> Ibid.

<sup>24</sup> See Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the Law Enforcement Legislation Amendment (Powers) Bill 2015* (4 June 2015) <[https://www.lawcouncil.asn.au/lawcouncil/images/3013\\_-\\_S\\_-\\_LCA\\_submission\\_LELAP\\_Bill\\_2015.pdf](https://www.lawcouncil.asn.au/lawcouncil/images/3013_-_S_-_LCA_submission_LELAP_Bill_2015.pdf)>.

questioning until the end of their criminal trial. The first INSLM, Bret Walker SC, made a similar recommendation that ASIO's QW provisions be amended accordingly.<sup>25</sup>

22. However, if the INSLM is minded not to accept the Law Council's primary recommendation, the Law Council has made a number of alternative recommendations as set out in its submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the Law Enforcement Legislation Amendment (Powers) Bill 2015 (**attached**).
23. If an examination is permitted to occur prior to the resolution of the witness's pending charges, there should be strict regulation of who is present at the examination, what use can be made of the information obtained, and the subject matter able to be covered.
24. The Law Council suggests that it would be appropriate to require authorisation from a Federal Court judge before an ACC summons is issued to a person who is subject to criminal proceedings, and for that Judge to prescribe limitations on the matters which may be covered by the examination.
25. The Law Council notes that the Senate Legal and Constitutional Affairs Committee's Report on the Law Enforcement Legislation Amendment (Powers) Bill 2015 stated that the provisions do:

*... not include any safeguards to limit the proposed power to conduct post-charge examinations and hearings. It follows that an affected person would have limited recourse to the courts in circumstances where a post-charge investigation unduly interferes with that person's right to a fair trial. Therefore, the committee suggests the government to consider adding a provision to the Bill as recommended by the LCA [Law Council] to require an ACC examiner... to seek the authorisation of the Federal Court prior to commencing a post-charge examination or hearing. Such a provision could help to ensure that a court would retain a level of discretion over post-charge investigations and, as such, would provide a further safeguard to the right to a fair trial.*<sup>26</sup>

26. In addition, Justice Weinberg, Court of Appeal, Supreme Court of Victoria, speaking extra-judicially, has said:

*In my opinion, it is unfair, and quite wrong, to allow the Executive, using statutory coercive powers, to force an accused facing pending trial to answer questions about the very subject matter of the charges brought against him or her. To do so sharply tilts the balance between the interests of the state in bringing to justice those who have committed serious criminal offences, and the right of the accused to a fair trial.*<sup>27</sup>

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<sup>25</sup> Independent National Security Legislation Monitor, *Declassified Annual Report* (20 December 2012) Recommendation IV/7 <<https://www.inslm.gov.au/sites/default/files/publications/inslm-annual-report-2012.pdf>>.

<sup>26</sup> Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Report on the Law Enforcement Legislation Amendment (Powers) Bill 2015* (18 June 2015) 18.

<sup>27</sup> Justice Mark Weinberg, *The impact of special commissions of inquiry/crime commissions on criminal trials* (1 August 2014) 48 <<http://assets.justice.vic.gov.au/supreme/resources/66d960d7-4dae-4b13-853c-71a94e97a424/the+impact+of+special+commissions+of+inquiry+weinberg+j--+1+aug+2014.pdf>>.

**Recommendation:**

- **The examination of an accused person by ASIO and the ACIC should be deferred until after the disposition of any charges.**
- **In the alternative, the ASIO Act and ACIC Act should require authorisation from a Federal Court judge before a summons is issued to a person who is subject to criminal proceedings, and for that Judge to prescribe limitations on the matters which may be covered by the examination.**

## Multiple questioning

27. The Gyles' Report recommended that:

*A protocol should be developed between the Australian Security Intelligence Organisation, the Australian Criminal Intelligence Commission, and any relevant state body which shares information obtained by compulsory questioning, to avoid oppression by successive examinations. This protocol should then be approved and given appropriate status by the Attorney-General. The Independent National Security Legislation Monitor and other supervisory bodies such as the Inspector-General of Intelligence and Security and the Commonwealth Ombudsman should be able to monitor how this protocol operates in practice.<sup>28</sup>*

28. A protocol might be one safety measure but a statutory framework is also necessary to avoid unnecessary duplication of multiple questioning and detention powers and oppression by examiners.

29. The overlap may also give cause to a concern that the powers may be used to operate in close succession, creating significant limitations on individual liberties. The possibility of the powers operating in close succession does not appear to be excluded by any of the regimes. This means that there is the possibility for an individual to be the subject of multiple questioning and detention powers where s/he is asked similar questions, albeit from a different agency. Nor does there appear to be a requirement for an assessment about the impact of a succession of measures on an individual before the powers are exercised.

30. This issue may be exacerbated when a range of other counter-terrorism measures may also be employed, including for example:

- preventative detention orders or control orders;<sup>29</sup> and
- stop, search and seizure regime relating to Commonwealth places.<sup>30</sup>

31. The possible overlap of these extraordinary powers raises serious questions as to the proportionality of the response.

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<sup>28</sup> Independent National Security Legislation Monitor, *Report into Certain Questioning and Detention Powers in Relation to Terrorism* (October 2016) 2 <<https://www.inslm.gov.au/sites/default/files/files/Certain-Questioning-and-Detention-Powers.pdf>>.

<sup>29</sup> *Criminal Code Act 1995* (Cth) divisions 105 and 104, respectively.

<sup>30</sup> *Crimes Act 1914* (Cth) part 1AA, division 3A.

32. The Law Council recognises that the Commonwealth Ombudsman or the IGIS may oversee the appropriateness of particular investigations. It also recognises the important role of the INSLM in reviewing the effectiveness of national security laws. However, it is concerned that there does not appear to be independent oversight of the proportionality of a range of measures in relation to a person *before* those measures are exercised.

33. The Gyles' Report noted that:

*One solution would be to make the existence of an earlier compulsory examination a factor to be taken into account by the issuing authority and the examiner (the one person) if the recommendations as to QWs are implemented, accompanied by a register of examinees to be kept and shared with the bodies concerned. As there is no evidence of a current practical problem, this may be an over-reaction. However, this may change if ASIO has and exercises a more practical questioning power.<sup>31</sup>*

34. The Law Council would support a legislative amendment to the above effect to ensure that possible oppression arising from multiple questioning is minimised from the outset of the establishment of the new scheme.

**Recommendations:**

- **The Gyles' Report recommendation 10 should be implemented.**
- **The ACC Act and adapted ACIC model to ASIO's questioning and detention powers should require the existence of an earlier compulsory examination to be a factor to be taken into account by the issuing authority and the examiner (the one person) if the recommendations as to QWs are implemented, accompanied by a register of examinees to be kept and shared with the bodies concerned.**

## Definition of 'terrorism offence'

35. The Law Council considers that consistency across Commonwealth legislation is desirable in terms of how a terrorism offence is defined. Accordingly, the Law Council supports Recommendation 9 in the Gyles' Report that:

*The definition of a 'terrorism offence' in the ASIO Act should be amended to include the foreign incursion and recruitment offences in pt 5.5 of the Commonwealth Criminal Code and the terrorism financing offences in the Charter of the United Nations Act 1945 (Cth), and the phrase 'important in relation to a terrorism offence' should be amended to read 'important in relation to an actual or threatened terrorism offence' wherever appearing.<sup>32</sup>*

36. Further, the former INSLM, Bret Walker SC, said that:

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<sup>31</sup> Independent National Security Legislation Monitor, *Report into Certain Questioning and Detention Powers in Relation to Terrorism* (October 2016) 53 <<https://www.inslm.gov.au/sites/default/files/files/Certain-Questioning-and-Detention-Powers.pdf>>.

<sup>32</sup> Ibid 2.



*There is no policy basis to exclude from the definition of 'terrorism offence' in sec 4 of the ASIO Act, an offence against Part 3 of the UN Charter insofar as it related to terrorism, or Part 4 of the UN Charter Act...Nor is there a policy basis to exclude from the definition of 'terrorism offence' in sec 4 of the ASIO Act, an offence against the Foreign Incursions Act.*<sup>33</sup>

37. However, the Law Council reiterates its concerns regarding the enlivening of foreign incursions offences by conduct (such as serious damage to property or serious physical harm to a person) that does not have the political or ideological intention normally associated with foreign incursion or terrorist offences.<sup>34</sup>
38. The Gyles' Report notes that the current definition of terrorism offence is narrow in the sense that it applies only to a completed offence rather than future conduct and that it blurs the distinction between intelligence gathering and law enforcement.<sup>35</sup> That part of the Recommendation 9 that contemplates replacing 'important in relation to a terrorism offence' with 'important in relation to an actual or threatened terrorism offence' appears to be intended to address that issue with the definition, albeit in terms of the practical aspects of the questioning and detention warrant regime. The Gyles' Report further notes that:

*The key to an effective but reasonable questioning power for ASIO is to accept that it should not be seen as a front-line means of disruption of an imminent terrorist attack, nor as a primary means of collecting evidence to support a criminal prosecution, but rather it should be seen as a tool for the collection of intelligence relation to the threat of terrorist activity.*<sup>36</sup>

39. The Law Council supports such as a basis for the Gyles' Report recommendation.

**Recommendations:**

- **The Gyles' Report recommendation 9 should be implemented.**

<sup>33</sup> Independent National Security Legislation Monitor, *Annual Report* (28 March 2014) 66 <<https://www.inslm.gov.au/sites/default/files/publications/inslm-annual-report-2014.pdf>>.

<sup>34</sup> Law Council of Australia, *Supplementary Submission on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (7 October 2014) 5 <[http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2891\\_-\\_Counter-terrorism\\_Legislation\\_Amendment\\_foreign\\_Fighters\\_Bill\\_2014\\_-\\_Supplementary\\_Submission.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2891_-_Counter-terrorism_Legislation_Amendment_foreign_Fighters_Bill_2014_-_Supplementary_Submission.pdf)>.

<sup>35</sup> Independent National Security Legislation Monitor, *Report into Certain Questioning and Detention Powers in Relation to Terrorism* (October 2016) 44 <<https://www.inslm.gov.au/sites/default/files/files/Certain-Questioning-and-Detention-Powers.pdf>>.

<sup>36</sup> *Ibid* 51.