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Attorney-General's Department

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# **Parliamentary Joint Committee on Intelligence and Security**

## **Review of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979 – Special powers relating to terrorism offences**

**Attorney-General's Department Submission**

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# 1. Introduction

1.1 The Attorney-General's Department (AGD) welcomes the opportunity to assist the Parliamentary Joint Committee on Intelligence and Security (PJCS) in its review of ASIO's special powers in relation to terrorism offences. Noting the series of reviews of the regime, including the most recent by the Independent National Security Legislation Monitor (INSLM) (which recommended aligning the questioning warrant (QW) regime with the Australian Criminal Intelligence Commission's (ACIC) scheme), this submission:

- reviews **the current ASIO QW and questioning detention warrant (QDW) regime** and the ACIC examination regime
- summarises the **history of the reviews** of the current ASIO QW and QDW regime
- considers the necessity of ASIO having a **compulsory questioning power available to it for the breadth of its functions**
- considers the **adaptability of the current ACIC examination** regime to the ASIO context
- considers the establishment of a questioning **protocol between agencies**, and
- summarises **other compulsory questioning legislative models**.

1.2 AGD is the policy department responsible for administering the *Australian Security Intelligence Organisation Act 1979* (ASIO Act), and works closely with ASIO to ensure that the legislative frameworks which govern its powers remain up to date in the ever changing security environment. AGD is also responsible for the development of national security policy more broadly, as well as for the ACIC and *Australian Crime Commission Act 2002* (ACC Act).

1.3 ASIO is Australia's security service. ASIO's primary role is to collect and analyse intelligence that will enable it to warn the government about activities or situations that might endanger Australia's national security. In comparison with law enforcement agencies, such as the ACIC or AFP, ASIO does not focus on the collection of evidence, nor on the identification of criminal conduct, although these may be by-products of the performance by ASIO of its functions. The thresholds for the information gathering powers available to ASIO, and the limitations placed on intelligence officers when gathering information, recognise these different functions.

1.4 Division 3 of Part III was inserted in the ASIO Act in 2003 following an internal review of Australia's legal and operational counter-terrorism capabilities in the aftermath of the terrorist attacks in the United States on 11 September 2001 and in Bali on 12 October 2002. The enactment of Division 3 of Part III acknowledged that, while ASIO has a range of warrant-based intelligence collection powers available to it under Division 2 of Part III and in other acts, ASIO had no ability to question people who are unwilling to cooperate voluntarily. Division 3 of Part III was developed to protect the community from the threat of terrorism without unfairly or unnecessarily encroaching on the individual rights and liberties that are fundamental to our democratic system.

1.5 Division 3 of Part III establishes two types of warrants under which ASIO may – subject to extensive safeguards – be authorised to exercise powers of compulsory questioning. These powers enable ASIO to obtain

intelligence that is important in relation to a terrorism offence, including in situations where an offence has not yet occurred. The warrants were not designed as a law enforcement power or a punitive measure.

1.6 AGD understands that, in the current threat environment, the utility of the scheme set out in Division 3 of Part III is decreasing due to the delays created by the significant steps required to obtain a warrant and the strict limitation to terrorism offences. Since September 2014, when the national terrorism threat level was raised to PROBABLE, there have been four attacks and twelve major counter terrorism disruption operations in response to potential attack planning in Australia. In addition, close cooperation between intelligence and law enforcement agencies has led to a series of targeted disruptions and other activities to contain threats. Around 200 people in Australia are being investigated for providing support to individuals and groups in the Syria/Iraq conflict, including through funding and facilitation, or are seeking to travel.

1.7 There is an emerging trend of lone actors mounting low-capability attacks in Australia with little or no forewarning. The four terrorist attacks in Australia since 2014 were all perpetrated by single individuals using knives or basic firearms. Further, the consequences of returnees from the conflict in Syria and Iraq who may return to Australia with the potential increased intent and capability to conduct an attack raises significant security concerns. In this context, it is increasingly important for ASIO to be flexible and agile. ASIO must be able to rapidly gather intelligence on emerging plots in circumstances where technical/physical surveillance may not be possible or useful. However, it is fundamental that any coercive powers that may be exercised by ASIO are proportionate and appropriately balanced against the protection of civil liberties.

## 2. Context of this Inquiry

### *Overview of Division 3 of Part III of the ASIO Act*

2.1 Questioning warrants (QWs) allow ASIO to conduct compulsory questioning of a person for the purpose of collecting intelligence that is important in relation to a terrorism offence.

2.2 Questioning and detention warrants (QDWs) allow ASIO to detain a person in order to conduct compulsory questioning for the same purpose. They can be issued only where there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained for the purpose of conducting questioning, he or she may tip off others, tamper with or destroy evidence, or fail to attend questioning. QDWs are available only as a last resort—that is, if the Attorney-General is satisfied there are reasonable grounds on which to believe that other means of collecting the intelligence would be ineffective.

2.3 Amendments were made to Division 3 of Part III in 2003, including the provisions to reduce the risk of a subject leaving the country.<sup>1</sup> Following a comprehensive review by the Parliamentary Joint Committee on ASIO, ASIS and DSD (PJCAAD) in 2005, significant amendments were made in 2006. These included amendments to clearly separate the QW and QDW regimes, to enhance safeguards relating to access to a lawyer and to clarify the role of the Prescribed Authority.

2.4 The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* repealed the last resort criterion for issuing a QW (noting that this remains a criterion for QDWs). This requirement was substituted with a requirement that the Minister must be satisfied that it is reasonable in all the circumstances, including whether other methods of collecting that intelligence would likely be as effective. This implemented the Government's response to a recommendation in the former INSLM, Bret Walker SC's Declassified Annual Report of 2012.<sup>2</sup> The explanatory memorandum outlines the Government's response to his recommendation.

*The Government supports the reasoning of the INSLM, who concluded that it would be reasonable to substitute the 'last resort' requirement in section 34D(4)(b) with a 'most effective' requirement, on the basis that the latter requirement would be a 'fair balance of security and liberty' having regard to the range of other safeguards governing the exercise of powers to issue questioning warrants. These safeguards include the requirement for questioning warrants to be issued by an issuing authority who, before issuing a questioning warrant, must be satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence. They also include the Attorney-General's Guidelines to ASIO, which are made under section 8A of the ASIO Act, and the ability for Statement of Procedures for the exercise of authority under Part III, Division 3 to be issued by the Director General of Security in accordance with section 34C of the ASIO Act. Importantly, the*

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<sup>1</sup> ASIO Act, s 34W. Surrender of travel documents by person in relation to whom a warrant under Division 3 is sought.

<sup>2</sup> Independent National Security Legislation Monitor, *Declassified Annual Report (2012)* 71.

*Attorney General's Guidelines require ASIO to undertake inquiries and investigations, wherever possible, using the least intrusive techniques to collect information.<sup>3</sup> The Guidelines and the reasonableness requirement ensure that the same level of rigour is exercised in a decision to issue a questioning warrant.<sup>4</sup>*

2.5 The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* also introduced a new offence for destroying or tampering with a record or thing, and amended the provision authorising law enforcement officers to use force in the execution of a QW.

2.6 Division 3 of Part III of the ASIO Act will sunset on 7 September 2018.

### *Other counter-terrorism powers*

2.7 Since the introduction of ASIO's QW and QDW regime in 2003, a number of other special counter-terrorism powers have been introduced, including:

- arrest and detention powers in relation to a terrorism offence under Part IC of the *Crimes Act 1914*, and
- control orders and preventive detention orders under Part 5.3 of the *Criminal Code Act 1995*.

2.8 These powers are utilised by law enforcement in order to gather evidence in relation to a terrorist offence and prevent or protect the public from a terrorist act. In contrast, ASIO's questioning powers are available to substantially assist in the gathering of information which is important in relation to a terrorism offence. The significant distinctions between the functions of ASIO and law enforcement and the purpose and thresholds of these special powers highlight the importance of agencies having a suite of powers available to them in order to effectively respond to the changing national security threat.

### **Arrest and detention for a terrorism offence**

2.9 Law enforcement authorities have the power to arrest and detain a person for the purposes of investigating a terrorism offence with a view to charging and prosecuting that person. In 2014, amendments were made to the *Crimes Act* giving constables the power to arrest a person without a warrant for a terrorism offence based on the threshold of 'reasonable grounds to suspect'. This threshold was lowered from 'reasonable grounds to believe', and is appropriate in relation to terrorism offences due to the serious potential consequences and rapidly developing nature of terrorist threats.

2.10 Once a person is arrested, Part IC of the *Crimes Act* provides a framework for how the person can be detained and questioned by law enforcement authorities. Part IC was amended by the *Anti-terrorism Act 2004* to allow for the detention and questioning of a person who has been arrested for a terrorism offence. These provisions are different to those for other Commonwealth offences and reflect the complex nature of terrorism investigations, including the potential for international aspects.

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<sup>3</sup> Explanatory Memorandum, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*, 85 [460].

2.11 Part IC allows a constable to question a person for a maximum investigation period of 24 hours (as opposed to 12 hours for a non-terrorism offence). However, there are certain categories of time that do not count towards the investigation period, so long as they are reasonable. These categories include time to allow authorities to collect information from outside of Australia, or to translate material. Part IC contains various safeguards to protect the rights of the person being questioned, including the right to contact a lawyer and the right to not answer questions.

### **Preventative Detention Orders**

2.12 Law enforcement authorities also have the power to detain a person under the Commonwealth's preventative detention regime, which is contained in Division 105 of the Criminal Code. The regime was inserted into the Criminal Code by the *Anti-terrorism Act (No. 2) 2005* and allows an AFP member to apply to an issuing authority for an order to detain a person for a maximum period of up to 48 hours. An issuing authority can make an order if satisfied that there are reasonable grounds to suspect the person will engage in a terrorist act, possesses a thing that is connected with preparation for or engagement in a terrorist act, or has done an act in preparation for or planning of a terrorist act. The issuing authority also needs to be satisfied that making the order would substantially assist in preventing a terrorist act occurring, and that the period of detention is reasonably necessary.

2.13 Questioning of the person subject to a preventative detention order is prohibited except in very limited circumstances, such as ensuring the safety and wellbeing of the person. If the police formally intend to question a person about an offence, they are required to release the person from preventative detention, arrest the person and use the detention and questioning powers under Part IC of the Crimes Act.

### **Interaction of counter terrorism powers**

2.14 Agencies work together where it is appropriate and necessary to ensure the effective performance of their functions. It is important to effective discharge of their respective and distinct functions that each agency to have the power to question a person for purposes relevant to the function of that agency.

2.15 While ASIO cooperates with other agencies as appropriate to ensure intelligence gathering and investigation of terrorism offences is conducted consistently among agencies, Part III gives ASIO the capacity to conduct its own investigations independently of other agencies. ASIO requires a questioning function for its own intelligence gathering purposes. The fact that another agency may have a questioning power for its distinct purposes, which may at time closely align with ASIO's, is an incident of the intersection of functions, and not an effective or adapted alternative to ASIO having its own questioning power.

### ***History of Reviews of Division 3 of Part III of the ASIO Act***

2.16 Division 3 of Part III of the ASIO Act was introduced in 2003<sup>5</sup> and has been considered and reviewed a number of times, including by:

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<sup>5</sup> *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003.*



- the Parliamentary Joint Committee on ASIO, ASIS and DSD (PJCAAD) in 2002<sup>6</sup>
- the PJCAAD again in 2005<sup>7</sup>
- the previous INSLM, Mr Bret Walker SC, in his 2011 and 2012 Annual Report
- the Parliamentary Joint Committee on Human Rights, in the context of its review of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014,<sup>8</sup> and
- the previous INSLM, the Hon Roger Gyles AO QC, in his review of Certain Questioning and Detention Powers in Relation to Terrorism.<sup>9</sup>

2.17 When they were first introduced, ASIO's QW and QDW powers were not subject to a sunset period. A 3-year sunset period was inserted prior to the passage of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*, in response to recommendations of the PJCAAD. The *ASIO Legislation Amendment Act 2006* (which comprehensively revised the QW and QDW regime, in response to the recommendations of the PJCAAD) extended the sunset period by a further 10 years, to expire on 22 July 2016. The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* further extended the sunset date of the regime to 7 September 2018, subject to statutory reviews by the PJCS<sup>10</sup> and the INSLM.<sup>11</sup>

### *INSLM review into ASIO questioning powers in his Declassified Annual Report of 2012*

2.18 In his Declassified Annual Report of 2012, the former INSLM, Bret Walker SC, ultimately concluded that QWs are sufficiently effective, appropriate, and necessary.<sup>12</sup>

2.19 Mr Walker had no objections in principle to ASIO's compulsory powers of questioning given the need to counter terrorism, the frequently conspiratorial character of terrorist activity and the requirement for cogent evidence. He highlighted that 'modern concepts of privacy and traditional preferences to be left alone by the government are properly given great weight as values of our kind of society. But they cannot sensibly outweigh an official power to question people about suspected terrorism'.<sup>13</sup>

2.20 After thorough review of the ASIO QW records and discussions with relevant agencies, Mr Walker supported the efficacy of the QW provisions and their worth as an intelligence collection tool.

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<sup>6</sup> Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002* (2002).

<sup>7</sup> Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *ASIO's Questioning and Detention Powers*, (2005).

<sup>8</sup> Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44<sup>th</sup> Parliament*, October 2014.

<sup>9</sup> Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism*, 2016.

<sup>10</sup> *Intelligence Services Act 2001* (Cth), s 29(1)(bb).

<sup>11</sup> *Independent National Security Legislation Monitor Act 2010* (Cth), s 6(1B).

<sup>12</sup> Independent National Security Legislation Monitor, *Declassified Annual Report* (2012) 4.

<sup>13</sup> Independent National Security Legislation Monitor, *Declassified Annual Report* (2012), 70.

## *INSLM review of Certain Questioning and Detention Powers in Relation to Terrorism of 2016*

2.21 On 8 February 2017, the then INSLM, the Hon Roger Gyles AO QC tabled his Review into Certain Questioning and Detention Powers in Relation to Terrorism to the Parliament. The INSLM combined the mandated reviews of the Division 3 of Part III of the ASIO Act and Part IC of the Crimes Act. In his report, the INSLM compared the powers available to ASIO under Division 3 of Part III to the ACIC's compulsory examination powers under the ACC Act.

2.22 The Review expanded upon the operation, effectiveness and implications of ASIO's QW and QDW regime, considering whether the regime contains appropriate safeguards for protecting the rights of individuals; remains proportionate to the threat of terrorism or threat to national security, or both; and remains necessary.

2.23 In the Review, the INSLM highlighted that the ACIC's examination powers are regularly used across a broad range of serious criminal activity and are widely known and understood in the legal profession. He also noted that the powers have been scrutinised by both the Parliament and the courts in recent times.<sup>14</sup> In the context of these considerations, the former INSLM recommended the following in relation to Division 3 of Part III of the ASIO Act:

- **Recommendation 7:** 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.
- **Recommendation 8:** The balance of Division 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 ACC Act model as closely as possible. A sunset clause should not be necessary for such a questioning power.
- **Recommendation 9:** In that context, the definition of a terrorism offence should be amended to include the foreign incursion and recruitment offences in Part 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.

2.24 The INSLM justified recommendation 8 by highlighting the fact that the ACIC has used its examination powers on many occasions in relation to terrorism, gathering useful intelligence without any complaints. He suggested that, while different constitutional considerations apply to the ACIC and ASIO, the ACC Act is the appropriate model and it would not be appropriate to cherry-pick parts of other models and graft them on, or to excise some parts unless it is necessary to accommodate the different repository of power.<sup>15</sup>

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<sup>14</sup> Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism*, 2016, 51 [9.50].

<sup>15</sup> Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism*, 2016, 51 [9.51].

2.25 Against this background, this submission will consider the ACC Act compulsory questioning model in the context of the possible adaptation of this model to the unique functions, structure and operational requirements of ASIO.

### 3. Designing a new coercive questioning framework for ASIO

3.1 As INSLM, both Bret Walker SC and the Hon Roger Gyles AO QC supported the retention of a compulsory questioning power for ASIO. However, both INSLMs recommend that a number of amendments be made to the legislative framework in order for it to operate more appropriately and effectively. AGD welcomes the opportunity to thoroughly consider amendments to the regime in the context of Australia's changing security environment.

#### *Scope*

3.2 Other than the powers in Division 3 of Part III, ASIO has no ability to question people who are unwilling to cooperate voluntarily. In certain situations, the use of ASIO's other warrant-based powers will not be able to provide the same level or type of information about security matters as the exercise of questioning powers under Division 3. This is due to a number of reasons including the sophistication of current targets with respect to technological advances such as encryption, and certain information being peculiar to the mind of individuals being questioned. The formal setting in which compulsory questioning is conducted, combined with the ramifications for failing to answer questions or answering falsely, can assist in drawing out more honest responses compared to when the same people are interviewed by ASIO on a voluntary basis.

3.3 The Division 3 regime enables ASIO to compel a person to attend questioning and answer questions to obtain information that is, or may be, important in relation to a terrorism offence.

3.4 ASIO works closely with law enforcement, sharing information where possible in order to assist each agency to best perform their functions. ASIO's role is much broader than investigating instances of actual criminal activity, which is the role of law enforcement agencies, and extends to maintaining an awareness of the security environment to anticipate where threats are likely to or may arise.<sup>16</sup> Given this different focus, ASIO will often need to utilise coercive intelligence gathering techniques at an early stage of inquiry. However, it is clear that given the limited use of QWs to date and the clear requirement within the Attorney-General's Guidelines, ASIO will use the least intrusive forms of intelligence collection first.

#### *Questioning of third parties*

3.5 A number of ASIO's powers used to gather intelligence can be used on a person who is regarded as an innocent bystander or a person who is not necessarily implicated in wrongdoing but may nevertheless hold

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<sup>16</sup> ASIO Act, ss 4 and 17. Section 4 of the ASIO Act defines security as (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; (vi) acts of foreign interference...(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).

information that is valuable to ASIO (third party). For example, in applying for a search warrant the Attorney-General must be satisfied that there are reasonable grounds for believing that access by ASIO to records or other things on the subject's premises will substantially assist the collection of intelligence.<sup>17</sup> In relation to computer access warrants, the Attorney-General must be satisfied that there are reasonable grounds for believing that access by ASIO to data held in the subject's computer will substantially assist the collection of intelligence.<sup>18</sup>

3.6 At present, ASIO also has the ability to compel the questioning of a third party. Pursuant to paragraph 34D(4)(a) of the ASIO Act, the Attorney-General may provide consent to the Director-General to apply to an issuing authority for a QW if he is satisfied that there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist in the collection of intelligence that is important in relation to a terrorism offence.

3.7 The former INSLM, Bret Walker SC, highlighted that, as at 2012, almost all QWs issued and executed had been directed against persons of interest, meaning suspected, in relation to terrorism offences. After reviewing a number of ASIO questioning warrant files he noted that none of the cases could fairly be seen as the questioning of third parties.<sup>19</sup>

3.8 The ability of Commonwealth and State and Territory law enforcement and regulatory bodies to compel questioning on a third party is long established. More specifically in relation to intelligence gathering people may have vital intelligence, even if they are not directly involved in the matter being investigated. For example, the person may have observed or overheard something, or have wittingly or unwittingly provided assistance or support to someone who is a subject to inquiry by ASIO. A number of other investigatory agencies also maintain this power. The ACIC and Australian Securities and Investment Commission (ASIC) have the ability to examine third parties in order to assist in intelligence gathering in relation to special operations or investigations into insolvent corporations respectively. Maintaining ASIO's power to question third parties would be consistent with the ACIC model recommended by the former INSLM, the Hon Roger Gyles AO QC.

3.9 Although ASIO has rarely utilised this questioning power in relation to a third party, AGD considers that this power should remain available to ASIO.

## *Detention powers*

3.10 Division 3 of Part III enables ASIO to gather intelligence related to a terrorism offence. More specifically, section 34D of the ASIO Act provides ASIO with the ability to apply to an issuing authority for a questioning and detention warrant where appropriate. In order for the Director-General to apply to an issuing authority for the issuance of such a warrant the Attorney-General must be satisfied that there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a terrorism offence, and that there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person:

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<sup>17</sup> ASIO Act, s 25(2).

<sup>18</sup> ASIO Act, s 25A(2).

<sup>19</sup> Independent National Security Legislation Monitor, *Declassified Annual Report* (2012) 69-70.

- may alert a person involved in a terrorism offence that the offence is being investigated; or
- may not appear before the prescribed authority; or
- may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.<sup>20</sup>

3.11 In its 2005 report, the PJCAAD noted that Division 3 of Part III was primarily thought of as a detention regime.<sup>21</sup> Initially, the regime only contained one type of warrant that allowed ASIO to either question a person, or to question and detain them. However, in the same report, the PJCAAD also raised concerns about the lack of clarity in the legislation and remarked that the distinction between the provisions relating to QWs and those relating to QDWs were confusing. The PJCAAD recommended that the legislation be amended to distinguish more clearly between the QW and QDW regimes. This recommendation was implemented by the *ASIO Legislation Amendment Act 2006*, which amended the structure and language of Division 3 of Part III to clearly separate the two regimes.

3.12 In the 2016 review undertaken by the former INSLM, the Hon Roger Gyles AO QC, he recommended that the questioning and detention warrant regime be repealed or cease when the sunset date is reached.<sup>22</sup> The former INSLM 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.<sup>23</sup>

3.13 AGD acknowledges that ASIO is yet to utilise a QDW. A number of factors have contributed to this. Due to the consequences of such a warrant, ASIO has been rightly judicious in its use. Further, since the introduction of the QDW scheme, a number of other arrest and detention regimes have been introduced with lower thresholds. For example, the *Anti-Terrorism Act (No 2) 2005* introduced preventative detention orders. Preventative detention orders can be used by police in order to take a person into custody and detain them for a short period of time in order to prevent a terrorist act or preserve evidence of, or relating to, a terrorist act.<sup>24</sup> In the case of a preventative detention order, the issuing authority must be satisfied that there are **reasonable grounds to suspect** that the subject will engage in a terrorist act, possess a thing that is connected in preparation or planning of a terrorist act; or has done an act in preparation for planning a terrorist act; and that making the order would substantially assist in preventing a terrorist act occurring.<sup>25</sup>

3.14 The QDW regime contains a number of additional safeguards to reflect the gravity of detention and the limited circumstances in which it can be used. For example, a QDW is a method of last resort and may only be requested where the Attorney-General is satisfied that relying on other methods of intelligence collection would

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<sup>20</sup> ASIO Act, s 34F(4).

<sup>21</sup> Parliamentary Joint Committee on ASIO, ASIS & DSD, *ASIO's Questioning and Detention Powers*, November 2005 [2.40]

<sup>22</sup> Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism*, 2016, 42.

<sup>23</sup> *Ibid*, 41 [9.10].

<sup>24</sup> *Criminal Code Act 1995* (Cth), Schedule 1, Division 105.

<sup>25</sup> *Ibid*, s 105.4(4).

be ineffective.<sup>26</sup> In issuing a warrant, the issuing authority must consider any previous warrants or detentions.<sup>27</sup> It is also important to note that, despite ASIO having the ability to detain a person to answer questions; Division 3 of Part III does not provide ASIO officers with the ability to use force. The ability to arrest and detain remains with police, demonstrating ASIO's intention to operate as solely an intelligence gathering body and leave the law enforcement powers with police.

3.15 Further safeguards exist insofar as that the entire process is overseen by the IGIS and the prescribed authority has the ability to direct maximum periods of detention.<sup>28</sup>

### *Apprehension and detention to ensure compliance with a warrant*

3.16 Should the QDW regime be repealed, it is important that persons can be apprehended if they attempt to avoid questioning.

3.17 Under the ACC Act model, a judge of the Federal Court or a Supreme Court of a state or territory can issue a warrant for the apprehension of a person who has failed to attend, or answer questions in, an examination, as well as if satisfied that there are reasonable grounds to believe that the person is likely to leave Australia, has absconded or is likely to abscond, or is otherwise avoiding service of a summons.<sup>29</sup> A member of the AFP or a state or territory police force may then execute the warrant for arrest, and use reasonable force as necessary.<sup>30</sup>

3.18 In the ASIO context, a similar power to arrest and apprehend an individual for failing to attend and answer questions would mitigate the risk of a person absconding or inflicting harm. However, there is the potential for this to jeopardise the covert nature of ASIO's operations if, for example, a judge was required to issue a warrant for arrest making it discoverable that a particular person or activity is being investigated by ASIO. The possibility of keeping such determinations private and not open to the public would therefore be an aspect worth considering in adapting the ACC Act model to ASIO. For example, existing secrecy provisions in the ASIO Act may need to be extended to protect the issuance of such a warrant, or it may require a standalone secrecy framework.

3.19 An alternative, and a recommendation made by the former INSLM, Bret Walker SC, could be that a police officer could be given the power to arrest a person if the police officer believed that the person was not likely to comply with the warrant, and transport them to be questioned. In AGD's view, it is preferable that powers of arrest be exercised under warrant wherever possible. The power of arrest involves a range of significant interferences with fundamental rights, including the rights to liberty,<sup>31</sup> privacy,<sup>32</sup> and freedom of movement.<sup>33</sup> Section 3W of the Crimes Act provides for circumstances in which a member of a police force may, without

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<sup>26</sup> ASIO Act, s 34F(4)(b).

<sup>27</sup> ACC Act, s 34G(2).

<sup>28</sup> ASIO Act, s 34K(1).

<sup>29</sup> ACC Act, s 31(1).

<sup>30</sup> ACC Act, ss 31(2) and (3).

<sup>31</sup> Article 9, *International Covenant on Civil and Political Rights* (ICCPR).

<sup>32</sup> Article 17, ICCPR.

<sup>33</sup> Article 12, ICCPR.

warrant, arrest a person.<sup>34</sup> Section 3W should generally be sufficient to enable police to arrest a person who has failed to comply with a warrant, where the police believe on reasonable grounds that the person is likely to continue to fail to comply.

### *Expanding the scope of ASIO's compulsory questioning powers*

3.20 At present, ASIO's QW power is available in connection with 'terrorism offences', being offences against Subdivision A of Division 72 of the Criminal Code (International terrorist activities using explosive or lethal devices), or Part 5.3 of the Criminal Code (Terrorism).

3.21 In its submission to the 2016 Review undertaken by the INSLM, the Hon Roger Gyles AO QC, AGD suggested that the definition of a 'terrorism offence' be broadened to include all acts contributing to violent terrorist activities. This would ensure that ASIO has the power to gather intelligence which is important in relation to all serious terrorism offences. The former INSLM accepted this proposal and recommended that:

- the definition be amended to read 'important in relation to an actual or threatened terrorism offence', and
- extended to apply to the foreign incursion and recruitment offences in Part 5.5 of the Criminal Code, and the terrorism financing offences in the *Charter of the United Nations Act 1945*.

3.22 AGD agrees that the scope and application of ASIO's questioning power should be broadened.

3.23 Following the receipt of the INSLM's Report, AGD has consulted further with ASIO in relation to the design of Division 3 of Part III of the ASIO Act. Based on that consultation, AGD considers that ASIO's compulsory questioning powers should be amended to:

- be made available in relation to each of the heads of security listed in section 4 of the ASIO Act, including the protection of the Commonwealth, States and Territories (and the people thereof) from espionage, sabotage, foreign interference, attacks on Australia's defence system, and politically motivated violence, and
- remove the requirement, currently set out in paragraph 34D(4)(a) of the ASIO Act, that the intelligence that ASIO seeks to collect be important in relation to an 'offence'.

3.24 For the avoidance of doubt, AGD does not recommend that ASIO's QDW powers be extended in the above fashion. If they are to be retained, it is appropriate that ASIO's QDW powers be more tightly constrained, as powers of last resort.

3.25 AGD understands the operational impact the increasing national security threat continues to have on our law enforcement and intelligence agencies. In order to appropriately respond to these threats it is important that

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<sup>34</sup> Including, for example, where the person has committed or is committing an offence (such as failing to attend an examination), and proceedings by summons against the person would not prevent the repetition or continuation of the offence, or of another offence.



ASIO has all the powers necessary to protect the security of Australia from all emerging security threats, not only those relating to terrorism. More specifically, ASIO has observed increased targeting of Australian interests in Australia and abroad through a variety of methods against an array of sectors in matters of espionage and foreign interference.<sup>35</sup>

3.26 Terrorism represents a serious threat to Australia's national security, as well as to the safety of Australians. However, terrorism is not necessarily a more serious threat than other matters that fall within the definition of 'security', such as espionage, foreign interference, or other forms of politically motivated violence.

3.27 A range of compulsory questioning powers are vested in other Commonwealth of agencies with broad functions, without similar limitations as those present in the ASIO Act. The ACIC has the ability to require someone to attend for examination and answer questions for the purposes of a special operation/investigation in relation to serious and organised criminal activity as authorised by the Board.<sup>36</sup> ASIC has the ability to require someone to attend for examination and answer questions for the purposes of providing assistance with the investigation of an alleged or suspected contravention of corporation law, or even the gathering of information on the affairs of a corporation.<sup>37</sup> Similarly, the Australian Taxation Office (ATO) has the power to gather information from a subject for the purposes of the administration of taxation law,<sup>38</sup> and a member of Australian Competition and Consumer Commission (ACCC) may issue a notice requiring a person to provide information, documents, or evidence, if the ACCC has reason to believe that the person has information about a contravention of the *Competition and Consumer Act 2010*.<sup>39</sup>

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

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

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<sup>35</sup> ASIO Annual Report, 2015-2016, 25.

<sup>36</sup> ACC Act, s 24A.

<sup>37</sup> *Australian Security and Investments Commission Act 2001* (Cth), Part III, Division 2.

<sup>38</sup> *Taxation Administration Act (1953)* (Cth), s 353-10.

<sup>39</sup> *Competition and Consumer Act (2010)* (Cth), s 155.

## 4. Authorisation of questioning

4.1 There is a growing trend in domestic terrorism for lone actors to seek to commit low-capability attacks with little or no forewarning. The minimal preparation required for such attacks has complicated investigations conducted by security agencies. The four terrorist attacks in Australia since 2014 were all perpetrated by single individuals using knives and firearms. In addition to this, internationally we continue to see large-scale coordinated terrorist attacks. In the current threat environment, where actors can move from planning to action rapidly, authorities must be able to act to take time-critical actions to help preserve the safety and well-being of Australians. The processes for obtaining QWs and QDWs are not currently sufficiently agile for the powers to be utilised quickly.

4.2 At present, the Director-General must currently seek the Attorney-General's consent to request that an issuing authority issue each QW or QDW.<sup>40</sup> The Attorney-General must be satisfied that the request meets the criteria under section 34D(4) before giving his or her consent. The Director-General must then make an application to an issuing authority for the QW to be issued.<sup>41</sup>

4.3 The requirements for issuing a QW or QDW are cumbersome and resource intensive, and this can result in considerable delay that impacts on operational outcomes and potentially on public safety. The number of authorisations steps required, and the minimal timeframes for this to occur, could see the loss of opportunity in cases where imminent action by ASIO is required to mitigate any potential harm to an individual or to national security.

4.4 Amendments to Division 3 of Part III to enable warrants to be issued more efficiently would best position ASIO to respond in a more agile manner to specific threats as they arise while maintaining appropriate oversight to balance individual rights. One option raised by the previous INSLM was the ACIC examination model.

### *The ACIC model*

4.5 The ACIC has the power to undertake coercive questioning in the form of 'examinations'.<sup>42</sup> Examinations may take place in the context of an ACIC 'special operation', or 'special investigation', which are operations or investigations specifically identified and approved by the ACIC Board<sup>43</sup> in a written instrument.<sup>44</sup>

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<sup>40</sup> ASIO Act, ss 34D(1) and 34F(1).

<sup>41</sup> ASIO Act, s 34E(1)

<sup>42</sup> ACC Act, Part II Division 2.

<sup>43</sup> The Board of the ACIC is established by s7B of the ACC Act, consisting of the Commissioner of the AFP, the Secretary of the Department, the Comptroller-General of Customs, the chairperson of the Australian Securities and Investments Commission, the Director-General of Security, the Commissioner or head of the police force of each State and Territory, the CEO of the Australian Crime Commission and the Commissioner of Taxation. The Board is responsible for providing strategic direction to the ACIC, authorising it to conduct intelligence operations and investigations, and determining whether these are to be 'special operations' or 'special investigations' (in which case the coercive powers will be available) ; see ACC Act , s 7C.

<sup>44</sup> ACC Act, s 7C(1).

4.6 The current special investigations and operations authorised by the Board under subsections 7C(2) and 7C(3) cover a diverse range of serious and organised criminal activities, including:

- drug manufacture, importation and supply
- money laundering and other types of financial fraud
- outlaw motorcycle gang related offences
- cyber-enabled crime such as serious and organised investment fraud
- corruption
- firearm crime
- visa and migration fraud, and
- the nexus between serious and organised crime and terrorism.

4.7 The breadth of subject matter ACIC investigations can apply to is notable, and should be borne in mind in any consideration of adopting an ACIC-like model for ASIO.

4.8 Once a special operation or special investigation has been approved by the ACIC Board, the ACC CEO arranges for one or more ACIC examiners<sup>45</sup> to have a standing authority to conduct examinations of witnesses for the purposes of the special operation or investigation.

4.9 To commence an examination, the examiner can summon a person (the examinee) to appear before the examiner to either give evidence, or produce any documents or other things referred to in the summons.<sup>46</sup> A person may be summoned to appear for an examination even if they have been charged with an offence (a post-charge examination), or a confiscation proceeding has commenced against them (a post-confiscation examination), and the offence or proceeding is related to the subject matter of an examination.

4.10 To issue a summons for an examination, the examiner must be satisfied that issuing the summons is reasonable in all the circumstances.<sup>47</sup> In the case of a post-charge or post-confiscation examination, the examiner must also be satisfied that it is reasonably necessary for the purposes of the special operation or special investigation for the person to be summonsed despite the pending charge or confiscation proceeding against the person.<sup>48</sup> It is important to note that this feature is particularly relevant to ASIO's functions, which must be able to be fulfilled notwithstanding criminal proceedings.

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<sup>45</sup> An examiner is an independent statutory officer with mandatory legal practice qualifications appointed by the Governor-General; see ACC Act, s 46B.

<sup>46</sup> ACC Act, s 28(1).

<sup>47</sup> Ibid.

<sup>48</sup> ACC Act, s 28(1).

## *Streamlining ASIO's current authorisation process - removing issuing authorities*

4.11 AGD considers that the current process for requesting and issuing ASIO QWs could be streamlined, and aligned with the processes for issuing other ASIO warrants.

4.12 AGD recommends the removal of the issuing authority role, enabling the Attorney-General to issue QWs. The Attorney-General is the lead Minister in Government for national security and the First Law Officer, a guarantor of both security and the rule of law. As Justice Hope observed in 1976 '... in respect of matters such as issuing warrants, the minister will obviously be required to adopt an entirely non-partisan approach, an approach which, as the Attorney-General, he has to adopt in many of his other ministerial functions'.<sup>49</sup>

4.13 This would bring QWs in line with other ASIO special power warrants under Division 2 of Part III of the ASIO Act and the powers under the *Intelligence Services Act 2001*, requiring Ministerial Authorisation. ASIO's functions are overseen by the Attorney-General and currently all special powers warrants such as search, surveillance devices, and computer access warrants are issued by the Attorney-General at the request of the Director-General. ASIO's targeted questioning approach ensures that each application brought to the Attorney-General is carefully considered on an individual basis rather than for a more broadly defined special operation. Further, it would more closely align ASIO with other Commonwealth bodies that have the ability to conduct compulsory questioning, such as ASIC, the ACCC and the Commonwealth Ombudsman.

4.14 This streamlined approach would maintain independent ministerial authorisation, providing more oversight than that of other Commonwealth bodies that have the ability to conduct compulsory questioning, such as ASIC, the ACCC and the ACIC, all of which do not require judicial authorisation of compulsory questioning. It would also remove a time consuming step in the process for obtaining a warrant and enable ASIO investigations to proceed more quickly where appropriate.

4.15 AGD recommends that any amendments to the QW framework also incorporate an emergency authorisation framework, to allow questioning powers to be authorised in urgent circumstances. There are a range of precedents for such emergency authorisation frameworks. The ASIO Act contains two different forms of emergency authorisation. Under section 29, the Director-General of Security may issue an emergency warrant, lasting no more than 48 hours, authorising the use of ASIO's special powers in limited circumstances where the Attorney-General is not available. Under section 35C, the Attorney-General may give oral, rather than written, authorisation for a special intelligence operation, in urgent circumstances. The *Intelligence Services Act 2001* contains a more detailed framework for emergency authorisations in relation to the Australian Signals Directorate, Australian Secret Intelligence Service and Australian Geospatial-Intelligence Organisation, allowing authorisation to be given by a range of different ministers and agency heads, in different circumstances. However, as the PJCIS is aware, there are various practical challenges with each of these existing emergency authorisation frameworks. These challenges, and potential solutions, are under active consideration by the Government, and by the Independent Review of the Australian Intelligence Community. Accordingly, pending the outcomes of these reviews, AGD does not recommend a particular form of emergency authorisation process.

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<sup>49</sup> Justice Robert Hope, *Royal Commission on Intelligence and Security, Fourth Report*, 1976.

4.16 If ASIO QDWs are retained, AGD considers that it would be appropriate for such warrants to continue to be issued by an issuing authority, with the Attorney-General's consent, consistent with other legal frameworks that authorise the detention of a person.

### *Threshold test for authorisation*

4.17 The core threshold test for summoning a person to an examination under the ACC Act is that the examiner must be satisfied that issuing a summons is reasonable in the circumstances, and also, in the case of post change or post-confiscation examination, reasonably necessary for the purpose of the special operation or special investigation despite the pending charge or confiscation procedure against the person.

4.18 At present, one of the elements in the threshold test for ministerial authorisation of a QW or a QDW under the ASIO Act requires the Attorney-General to be satisfied that there are reasonable grounds for believing that issuing the warrant **will substantially assist the collection of intelligence that is important in relation to a terrorism offence**.<sup>50</sup>

4.19 If the scope of these warrants was expanded beyond terrorism to encompass all of ASIO's functions relating to 'security' (as discussed above in Chapter 3), AGD suggests that the appropriate threshold test should be that there are reasonable grounds for believing that issuing a warrant **would substantially assist the collection of intelligence that is important to security** (within the definition of 'security' in the ASIO Act).

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

4.21 In relation to the questioning of young people under the age of 18, AGD considers it may be appropriate to lower the age in which a young person may be questioned to 14 years of age. The seriousness of threats posed by persons as young as 14 was recently recognised by the Parliament when it enacted amendments to the control order regime in the Criminal Code reducing the minimum age for those who can be subject to control orders from 16 to 14.<sup>51</sup> In its current form s 34ZE of the ASIO Act provides for a number of safeguards in circumstances where minors are being questioned. For example, ASIO may only question a minor in the presence of a parent or guardian of that minor, and if this is not acceptable to the person, another person who is acceptable to the minor, and that questioning can only occur for continuous period of 2 hours or less, separated by breaks directed by the prescribed authority.

4.22 At present, questioning of a minor will only be authorised if an issuing authority believes that it is likely that the person will commit, is committing or has committed a terrorism offence.<sup>52</sup> An analogous threshold, limiting the questioning power to circumstances where the minor is the targeted individual, should be adopted if the questioning warrant scope is broadened to encompass all heads of security under the ASIO Act. This strikes an

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<sup>50</sup> ASIO Act, s 34D(4).

<sup>51</sup> *Counter-Terrorism Legislation Amendment Act (No 1) 2016*.

<sup>52</sup> ASIO Act, s 34ZE(4)(a).

appropriate balance between the objects of the protection of security and the protection of minors. For example, an appropriate threshold may be to allow the questioning of minors in circumstances where the subject of the warrant is **reasonably believed to be engaged in activities prejudicial to security**.

### *Post-charge questioning by ASIO*

4.23 At present the ASIO Act is silent on the issue of post-charge questioning. This is due to the purpose of ASIO questioning being to gather intelligence in relation to the protection of national security rather than to build evidence against a person. However due to the uncertainty derived from recent High Court decisions it may be beneficial for the ASIO model to adopt provisions which provide clarity in relation to post-charge questioning, similar to that provided in the ACC Act.

4.24 It is important to note that the use immunity in subsection 34L(9) of the ASIO Act ensures that information given, or records or things produced, by a person cannot be used in evidence in a criminal prosecution against the person. The current ACIC model expressly incorporates pre and post-charge (and pre- and post-confiscation) questioning and provides use immunity.<sup>53</sup>

4.25 To date, no QWs or QDWs have been issued in relation to a person who had, at the time the warrant was issued, been charged with a terrorism offence.

4.26 Nevertheless, it is foreseeable that a person charged with an offence could be in a position to provide important intelligence in relation to a security matter. For example, in relation to a terrorist plot involving a person charged with an offence, the person is likely to have valuable intelligence information about other persons associated with terrorist activity or about capabilities and methodologies of terrorist groups. This is particularly so in the current environment, where plans are carried out quickly and law enforcement agencies are forced to act, potentially including by laying charges, at an earlier stage in order to disrupt or prevent an attack.

4.27 In some cases, the targets of ASIO investigations will practice sophisticated tradecraft, such as targets of counter-espionage investigations or some counter-terrorism investigations. In such circumstances, taking any overt action against one or more targets, or their associates, will often result in other targets taking steps to frustrate any further investigation (for example, by fleeing the jurisdiction, destroying inculpatory material, or ceasing any overt involvement with other members of their group). As a result, for reasons of operational security, it will often be the case that ASIO can only contemplate questioning at the latter stages of an investigation, after police action has commenced.

4.28 As previously mentioned, ASIO's role is to investigate threats to security, to enable the Australian Government to maintain an awareness of the security environment and anticipate security threats. As a result, ASIO will often utilise intelligence gathering techniques, such as compulsory questioning, to further develop its (and, thereby, the Australian Government's) understanding of threats to security. This means that information gathered during compulsory questioning may not be relevant to a particular charge at that stage. For example, where a person has been arrested and charged with a specific offence (for example, committing acts in preparation

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<sup>53</sup> See Annexure C, 47.

of a terrorist act), ASIO may seek to question the person to gather intelligence about broader threats, including the plans, intentions and activities of the person's associates.

4.29 In his 2016 report the former INSLM, the Hon Roger Gyles AO QC, briefly considered the issue of post-charge questioning and concluded that cooperation with law enforcement is a legitimate by-product of the intelligence gathered by ASIO and the ACIC, and that current oversight mechanisms such as the IGIS will ensure that this cooperation is appropriate.<sup>54</sup> However it should be noted that, in 2012, the former INSLM, Bret Walker SC, considered post-charge questioning in detail and recommended that the ASIO Act be amended to make it explicit that QWs or QDWs are not available to question a person in relation to an offence for which they have already been charged.

4.30 Since the INSLM's 2012 report, the High Court has handed down decisions in *X7 v Australian Crime Commission* (2013) 248 CLR 92 (*X7*), *Lee v NSW Crime Commission* (2013) 251 CLR 196 (*Lee No 1*) and *Lee v R* (2014) 88 ALJR 656 (*Lee No 2*).

4.31 In *X7*, the High Court held that the ACC Act did not permit an examiner to conduct an examination of a person charged with a Commonwealth indictable offence where that examination concerned the subject matter of the charged offence. The defendant in this case also sought a declaration that post-charge examinations contravened Chapter III of the Constitution but the Court held that it was unnecessary to explore this argument.

4.32 This legal conclusion, however, was challenged by the subsequent High Court ruling in *Lee No 1*. This case involved a different membership of the High Court and was concerned with whether the *Criminal Assets Recovery Act 1990* (NSW) (CAR Act) allowed the Supreme Court to order a post-charge examination, notwithstanding that the examination may prejudice the trial of criminal charges on foot. The Court held that the CAR Act did permit a compulsory examination of an accused on subject matter common to their pending charges, and held that the mere fact of those charges was no reason to refuse or delay an examination order.

4.33 In *Lee No 1*, the issue of post-charge questioning was a matter of statutory interpretation. In *Lee No 2*, the Court unanimously held that the *New South Wales Crime Commission Act 1985* (NSW) did not permit the dissemination of examination material to the prosecution for the purposes of anticipating possible defences.

4.34 The legal implications of these decisions for Part III of the ASIO Act are uncertain. However, uncertainty in this area could be addressed by adopting provisions similar to those inserted into the ACC Act.<sup>55</sup>

4.35 Further, it is important to note that ASIO should not be prevented from using information obtained under compulsory questioning in performing its essential function of furnishing security assessments to Australian agencies.

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<sup>54</sup> Independent National Security Legislation Monitor, *Declassified Annual Report 2012*, 53.

<sup>55</sup> ACC Act, s 25B-25F.



### *Authorisation of coercive questioning under an ASIO Identified Person Warrant*

4.36 An identified person warrant provides conditional approval for the Director-General to approve the use of a suite of special powers in relation to a person, if (and only if) the Director-General is satisfied that the particular criterion for each power is met at the time each power is to be used.<sup>56</sup> The Attorney-General may only issue an identified person warrant if he or she is satisfied that the person is engaged in or is reasonably suspected of being engaged in, or being likely to engage in activities prejudicial to security; and the issuing of the warrant will, or is likely to, substantially assist the collection of intelligence relevant to security.

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

4.38 If ASIO's QDW powers are retained, AGD does not recommend that those powers be able to be pre-authorised under an identified person warrant. As noted above, QDWs are a power of last-resort that should only be exercised when all other options would be ineffective. As such, it would likely be inappropriate to 'pre-authorise' the use of such powers. Additionally, the power of detention under a QDW would appropriately be authorised by an issuing authority, consistent with other powers of detention.

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<sup>56</sup> ASIO Act, s 27C(3).

## 5. Conduct of questioning by ASIO

### *Control of questioning*

5.1 Under the current ASIO Act model, questioning is controlled by a 'prescribed authority'.<sup>57</sup> A prescribed authority must be a former superior court judge with at least five years' experience, who has consented to and is appointed by the Attorney-General.<sup>58</sup> Where there are not a sufficient number of former superior court judges, the Act allows for alternative appointees.

5.2 A prescribed authority has a number of responsibilities such as explaining the warrant,<sup>59</sup> providing directions as to the detention of the subject,<sup>60</sup> and providing direction to the person exercising authority under the warrant as to the use of an interpreter.<sup>61</sup>

5.3 Under the ACC Act model, the conduct of an examination is controlled by an 'examiner',<sup>62</sup> generally supported by one or more legal counsel for the ACIC. Under the ACC Act, a person is eligible to be appointed as an examiner if they are enrolled as a legal practitioner, and have been so for at least five years.<sup>63</sup> The examiner is empowered to regulate conduct in relation to the questioning process and to make enforceable directions as to who may be present throughout questioning (including legal representatives, although the witness is entitled in principle to legal representation).

5.4 Under the NSW Crime Commission model, the examiner role is carried out by an 'executive officer', who must be the Commissioner or an Assistant Commissioner, who is enrolled as legal practitioner.<sup>64</sup> The executive officer has similar roles and responsibilities to that of an ACIC examiner.

5.5 AGD considers that the ACIC examiner roles is one which could be adapted should ASIO adopt a model based on that of the ACIC. The ability to appoint legal practitioners has allowed the ACIC to develop a cadre of examiners who have developed considerable experience at controlling examinations. As the former INSLM, Mr Gyles, noted in his Report, the ACIC examination process functioned well, and with few complaints. Comparatively, although the current ASIO Act model encourages the appointment of pre-eminently experienced legal practitioners (former superior court judges) as prescribed authorities, it is AGD's experience that a significant number of appointees are unwilling or unable to serve in this capacity for an extended period of time, representing a significant barrier to the development of institutional expertise in controlling compulsory questioning.

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<sup>57</sup> ASIO Act, s 34B.

<sup>58</sup> ASIO Act, s 34B.

<sup>59</sup> ASIO Act, s 34J.

<sup>60</sup> ASIO Act, s 34K.

<sup>61</sup> ASIO Act, s 34M(1).

<sup>62</sup> Independent National Security Legislation Monitor, *Declassified Annual Report 2012*, 53.

<sup>63</sup> ACC Act, s 46B(1).

<sup>64</sup> *Crime Commission Act 2012 Act (NSW)*, s 19.

### *Notice to attend questioning*

5.6 Under the ASIO Act, if an issuing authority is satisfied that the threshold has been met, he or she will issue a QW which compels the subject to appear before a prescribed authority for questioning under the warrant immediately after the person is notified of the issue of the warrant, or at a time specified in the warrant.<sup>65</sup>

5.7 Under the ACC Act, an examiner will summon a person to appear before the examiner to either give oral evidence, or produce any documents or other things referred to in the summons.<sup>66</sup> The examiner must record in writing the reason for issuing the summons either before or at the time of the issue of the summons.<sup>67</sup> The summons must be accompanied by a copy of the 'special operation' or 'special investigation' determination of the Board.<sup>68</sup> The summons should also set out the general nature of the matters in relation to which the person is going to be questioned, unless the examiner is satisfied that to do so would prejudice the effectiveness of the special operation or investigation.<sup>69</sup>

5.8 Despite the notion that a summons issued by an examiner in the ACC Act model may contain a notation prohibiting disclosure of information about the summons or its existence,<sup>70</sup> in the ASIO context notifying the subject of the nature of the matters in relation to which the person is going to be questioned would be likely to significantly undermine the utility of ASIO's compulsory questioning power. At present the nature of the questioning is not included on a QW and QDW. Given the sensitive nature of the information which is gathered by ASIO, it would be inappropriate to include this information on the warrant which is provided to the subject immediately prior to attending for questioning. This could cause the subject of the warrant to consider absconding, tipping off others, or damaging or destroying prejudicial documents or things.

5.9 AGD acknowledges that it is necessary for such reasons to be recorded, however similar to that of the ACC Act there should be no requirement under the ASIO Act to disclose these reasons to the person being questioned.

5.10 AGD recommends that ASIO continue to be required to serve the subject with a copy of the warrant, and that in order to remain consistent with other ASIO warrants, and in reflecting the sensitivity of ASIO investigations, that the QW continue to not be required to specify the matters in relation to which the person is going to be questioned.

### *Failure to attend*

5.11 Under the ASIO Act, should the subject fail to attend for questioning in accordance with the warrant, the subject commits an offence. The offence is punishable by five years' imprisonment.<sup>71</sup>

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<sup>65</sup> ASIO Act, s 34E(2).

<sup>66</sup> ACC Act, s 28(1).

<sup>67</sup> ACC Act, s 28(1A).

<sup>68</sup> ACC Act, s 28(2).

<sup>69</sup> ACC Act, s 28(3).

<sup>70</sup> ACC Act, s 29A.

<sup>71</sup> ASIO Act, s 34L(1).

5.12 The ability to detain a person subject to a warrant under Division 3 of Part III of the ASIO Act ensures the cooperation of the subject of the warrant, and the mitigation of any potential harm associated with that person not attending and answering questions.

5.13 Under the ACC Act model, a Judge from the Federal Court or a Supreme Court of a State or Territory has the ability to issue a warrant for the apprehension of a person who has failed to attend, or answer questions in, an examination, as well as if satisfied that there are reasonable grounds to believe that the person is likely to leave Australia, has absconded or is likely to abscond, or is otherwise avoiding service of a summons.<sup>72</sup> If a warrant for apprehension is issued, a member of the AFP or a state or territory police force may then execute the warrant for arrest, and use reasonable force as is necessary for the execution.<sup>73</sup>

5.14 In the ASIO context, a similar power to arrest and apprehend an individual for failing to attend and answer questions would mitigate the risk of a person absconding or inflicting harm. However, there is the potential to jeopardise the covert nature of ASIO's operations, if, for example, a Judge was required to issue a warrant for arrest making it discoverable that a particular person, activity or offence is being investigated by ASIO. The possibility of keeping such determinations private and not open to the public would therefore be an aspect worth considering in adapting the ACC Act model to ASIO.

5.15 An alternative could be that a police officer is given the power to arrest a person if the police officer believed that the person was not likely to comply with the warrant, and transport them immediately to ASIO officers to be questioned. The former INSLM, Bret Walker SC, made a similar recommendation in his 2012 Annual Report.<sup>74</sup>

5.16 If the PJICIS recommends repealing the QDW framework, AGD considers that it would remain necessary to allow for the apprehension and detention of a person who fails to comply with a QW, consistent with s 30 of the ACC Act.

### *Access to legal representation*

5.17 The *ASIO Legislation Amendment Act 2006* introduced an amendment to the ASIO Act in order to implement the PJICIS' recommendation that previous subsection 34U(4) be amended to entitle individuals to make representations through their lawyer to the prescribed authority. The amendments provide for breaks during the questioning of the subject and permit a legal adviser to approach the prescribed authority to seek an opportunity to address the prescribed authority on a matter.

5.18 The ASIO Act currently allows the subject of a QW to make contact with a lawyer before or at any time during questioning, however it does not require a lawyer to be present during questioning proceedings.<sup>75</sup> It is important to note that if a legal adviser is present, the prescribed authority must provide a reasonable opportunity

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<sup>72</sup> ACC Act, s 31(1).

<sup>73</sup> ACC Act, s 31(2) and (3).

<sup>74</sup> Independent National Security Legislation Monitor, *Declassified Annual Report 2012*, 103.

<sup>75</sup> ASIO Act, s 34ZP(1).

for the legal adviser to advise the subject and consider requests by the legal adviser to address the prescribed authority during breaks in questioning.<sup>76</sup>

5.19 In practice this ensures that the lawyer has an opportunity to raise issues as they arise, for example, breaks in recording the questioning are generally occur every 35 minutes or so. As such, the subject may seek advice from their legal adviser almost every half an hour if need be. However, a lawyer is not permitted to intervene to make a request during questioning except where the prescribed authority has made an appropriate direction.<sup>77</sup>

5.20 Under the ASIO Act, the prescribed authority has the ability to prevent the person subject to questioning from contacting a particular lawyer of their choice, if the person is at that point being detained under the warrant or a direction by the prescribed authority. The prescribed authority may only make such a direction if satisfied that contact with that lawyer may result in a person involved in a terrorism offence being alerted of the investigation, or that a record or thing requested under the warrant may be destroyed, damaged or altered.<sup>78</sup> This does not prevent the person from contact another lawyer of their choice. This is an important power which is only to be used in extreme circumstances where preventative steps are needed to avoid the commission of a terrorism offence or destruction of relevant material.

5.21 Under the ACC Act model, a person subject to examination may be represented by a legal practitioner, and if by reason of the existence of special circumstances, the examiner consents to a person who is not giving evidence being represented by a legal practitioner – the person may be so represented.<sup>79</sup> However, the ability of the examinee's lawyer to examine or cross-examine any other witness participating in the examination is subject to the examiner's discretion (as is the case for counsel assisting the examiner, and any other person authorised by the examiner to appear at the examination).<sup>80</sup>

5.22 It is important to note that both the ACC Act model and ASIO Act model provides for a subject of questioning to make an application to the Minister for financial assistance to fund a lawyer.<sup>81</sup>

5.23 AGD is of the view that the model under the ACC Act is transferrable to the ASIO context.

### *Offences in relation to false and misleading evidence, obstruction and contempt*

5.24 It is an offence under the ACC Act to provide false or misleading evidence at an examination,<sup>82</sup> to threaten any person at an examination, or to obstruct or hinder either the ACIC or an examiner in the performance of their functions.<sup>83</sup> These offences are punishable by five years of imprisonment.<sup>84</sup>

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<sup>76</sup> ASIO Act, s 34ZQ(7).

<sup>77</sup> ASIO Act, s 34K(1)(d).

<sup>78</sup> ASIO Act, s 34ZO.

<sup>79</sup> ACC Act, s 25A(2).

<sup>80</sup> ACC Act, s 25A(6).

<sup>81</sup> ACC Act, s 27(1) and ASIO Act, s 34ZX.

<sup>82</sup> ACC Act, s 33.

<sup>83</sup> ACC Act, s 35.

<sup>84</sup> ACC Act, s 33(2) and 35.

5.25 Division 3 of Part III of the ASIO Act provides for similar offences for failing to answer questions or produce records or things before a prescribed authority, as well as for providing false and misleading statements.<sup>85</sup> It is also an offence under the ASIO Act to tamper with a record or thing that the person is required to produce so that it is not in wholly legible or useable form, or otherwise cause the record or thing to be unable to be produced.<sup>86</sup> The penalties for such offences under the ASIO Act are imprisonment for 5 years.<sup>87</sup> This is proportionate as it reflects the impact obstruction of questioning may have on an operation, and subsequently the protection of security.

5.26 Maintaining such offences is important for the effectiveness of an ASIO compulsory questioning power.

5.27 Under the ACC Act, if a person appears as a witness at an examination and refuses or fails to take an oath or affirmation, to answer a question he or she is required to answer, or to produce a document or thing that he or she is required to produce, or if any person obstructs, hinders an examiner in performing his or her functions, disrupts and examiner or threatens anyone present at an examination, that person is in contempt of the ACIC.<sup>88</sup> If the examiner is of the opinion that during an examination a person is in contempt of the ACIC, the examiner may apply to the Federal Court or Supreme Court of the State or Territory in order to deal with the contempt.<sup>89</sup>

5.28 Some aspects of these contempt provisions may be adaptable in the ASIO context, and would provide a further deterrent for those subjects who do not wish to cooperate with the terms of the warrant. However some aspects of these provisions would not be necessary given ASIO's functions. For example, the ability for the examiner to apply for contempt proceedings where the subject fails to take an oath or affirmation.

### *Time limits for questioning*

5.29 Under the ACC Act, there is no set time limit for examinations. Rather, subsection 25A(1) provides that an examiner may regulate the conduct of proceedings as he or she thinks fit. In contrast, section 34R of the ASIO Act provides that questioning under a QW or QDW must not exceed eight hours, unless the prescribed authority supervising proceedings agrees to extend that time, in eight hour blocks, up to a maximum of 24 hours. The prescribed authority can only agree to an extension of questioning time after each eight hour block if they are satisfied that:

- there are reasonable grounds for believing that continued questioning will substantially assist the collection of intelligence that is important in relation to a terrorism offence, and
- persons exercising authority under the warrant conducted the questioning properly and without delay.

5.30 As a result, moving to the ACC Act model would result in the removal of the safeguards currently contained in the ASIO Act, in relation to the maximum period of questioning. AGD considers that maintaining the current maximum period for questioning is an appropriate safeguard that should continue to apply to an amended

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<sup>85</sup> ASIO Act, s 34L.

<sup>86</sup> ASIO Act, s 34L(10).

<sup>87</sup> ASIO Act, s 34(L).

<sup>88</sup> ACC Act, s 34A.

<sup>89</sup> ACC Act, s 34B(1).

questioning regime, and that the existing maximum periods of 8 hours, up to a total of 24 hours, are appropriate. However, time that is taken to allow for administrative and other matters (as set out in subsection 34R(13)) should not count towards this total, and these time periods should be capable of further extension decided by the prescribed authority, in order to accommodate the use of interpreters (in accordance with existing subsections 34R(8)-(12)).

### *Overlap of agencies questioning powers*

5.31 In its submission to the former INSLM's 2016 Review of Certain Questioning and Detention Powers in Relation to Terrorism, the Law Council of Australia raised concerns about the overlap of agencies' compulsory questioning powers and the consequences of a series of compulsory questioning examinations. In particular, the Law Council of Australia was concerned about resulting uncertainty, duplication and limitations placed on individual rights.

5.32 In his Review, the Hon Roger Gyles AO QC acknowledged these concerns, and agreed that oppression from multiple questioning could occur without any deliberate plan. He also touched on the issue of the police's use of answers obtained from prior compulsory questioning by other bodies, however reasoned that intelligence agencies do not collect intelligence for their own sake and that cooperation with law enforcement is a legitimate by-product of this intelligence function. Ultimately, the INSLM recommended the introduction of a protocol, developed between ASIO, ACIC, and relevant state bodies, to avoid oppression by successive examination. He suggested that the INSLM, IGIS and Commonwealth Ombudsman could provide oversight of the protocol.

5.33 AGD recognises that there are adverse consequences associated with the overlap of agencies' compulsory powers, and acknowledges the former INSLM's recommendation for the introduction of a protocol. The department considers that a protocol would be particularly useful if the scope of ASIO's compulsory questioning power is expanded. It is reasonable that any protocol should be developed through extensive consultation with relevant stakeholders to ensure that the framework does not limit operational effectiveness or prevent effective investigation of criminal activity and gathering of intelligence.

## 6. Operational security and secrecy

### *Non-disclosure provisions*

6.1 Division 3 currently contains two secrecy provisions. Subsection 34ZS(1) operates while a warrant is in force, and prevents a person from disclosing information without authorisation where the information is operational information or relates to the warrant or the questioning or detention of a person under the warrant. Subsection 34ZS(2), on the other hand, operates for two years after the warrant ceases to be in force, and prevents a person from disclosing operational information without authorisation where that information has been obtained as a direct or indirect result of a warrant being issued or executed. Operational information is defined as information that ASIO has or had a source of information or an operational capability, method or plan of ASIO.<sup>90</sup> These offences are punishable by a maximum penalty of 5 years imprisonment and will apply whether or not the relevant conduct, or result of the conduct, occurred in Australia.<sup>91</sup>

6.2 The intention of the provisions is to prevent the disclosure of information that could have significant implications for the integrity of the questioning process under the warrant and the effectiveness of related investigations. The additional protections provided under subsection 34ZS(2) operate to protect ASIO's sources, holdings of intelligence and its method of operations, as the release of this information could seriously affect ongoing and related investigations. Subsection 34ZS(2) therefore restricts the disclosure of this information for a period of two years, which is no longer than what is needed to meet the objectives of an adequately protected terrorism related investigation. In addition, these offences are given extensive geographical coverage in order to address unauthorised disclosures outside Australia, which have the potential of leading to further communications that may compromise terrorist investigations or ASIO's operational information.

6.3 These secrecy laws also contain a number of safeguards which allow them to function in a reasonable and proportionate manner. Persons who are subject to a warrant may disclose information which would ordinarily be subject to secrecy laws if authorised to do so by the Director-General of Security or the Attorney-General.<sup>92</sup> A person may also disclose information to a lawyer for the purpose of seeking legal advice, to a court for the purpose of seeking a remedy in connection with a warrant or to the IGIS or the Commonwealth Ombudsman in relation to a warrant under Division 3.<sup>93</sup> These permitted disclosures ensure that the rights of the subject of a warrant are maintained while appropriately protecting sensitive information.

6.4 Additional protections exist to protect third parties who are subject to secrecy laws. In order to prove that a third party has committed an offence against the abovementioned secrecy provisions a prosecutor must prove that this third party was reckless as to the nature of the information (specifically whether this information was

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<sup>90</sup> ASIO Act, s 34ZS(5).

<sup>91</sup> ASIO Act, s 34ZS(4); Criminal Code, s 15.4.

<sup>92</sup> ASIO Act, ss 34ZS(6) and 34ZS(7).

<sup>93</sup> ASIO Act, ss 34ZS(5)(c) and 34ZS(5)(d) and s 34ZS(5)(f)(vi) and 34ZS(5)(f)(vii).



operational information and/or whether it was related to a Division 3 warrant and whether its disclosure was not a 'permitted disclosure' under Division 3).<sup>94</sup> This will require the prosecution to prove that the third party was aware of a substantial risk that the information was of a particular nature and, having regard to the circumstances known to the person, it is unjustifiable to take risk and disclose the information.<sup>95</sup>

6.5 Division 3 also recognises that a person, who is the subject of a warrant under this Division, and their lawyer, are informed of their obligations not to disclose relevant information and the serious implications of doing so. A person who is subject to a warrant must be informed of these obligations by a prescribed authority.<sup>96</sup> Accordingly, in order to protect information associated with the questioning and detention process, Division 3 provides that strict liability applies to warrant subjects and their lawyers as to whether the information they receive during the questioning or detention process is operational or warrant-related information.<sup>97</sup> Should a prescribed authority neglect to inform a person of their rights, it remains open to a court to apply a sentence below the maximum of 5 years imprisonment, which may include a non-conviction with no additional conditions.

6.6 The former INSLM, the Hon Roger Gyles AO QC, in his 2016 Review, touched on the differences between aspects of the secrecy framework relating to questioning warrants under the ASIO Act and examinations under the ACC Act.<sup>98</sup> In particular, he considered how the ACC Act contains a positive provision whereby the examiner issuing the summons makes a decision regarding the application of the statutory disclosure criteria and has discretion as to the circumstances of any disclosure.<sup>99</sup>

6.7 The inherent sensitivity of nearly every aspect of ASIO questioning means that in order to avoid undermining an ongoing investigation, it would not be appropriate to adopt the ACIC model which requires an examiner to make exhaustive orders about every aspect of the questioning that must be kept confidential. It is sufficient that a prescribed authority inform a person who is subject to a warrant about the breadth of the obligations.

6.8 At present, offences for the unauthorised disclosure of information pertaining to warrants and questioning under the ASIO Act are punishable by a maximum penalty of five years imprisonment.<sup>100</sup> Under the ACC Act, offences for the unauthorised disclosure of information pertaining to a summons are punishable by a maximum penalty of two years imprisonment.<sup>101</sup> If the scope of QWs is broadened, the PJCS would need to consider whether it is appropriate to expand the two year restriction on disclosure, as investigations in relation to other matters of security can last up to decades, for example counter espionage activity.

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<sup>94</sup> ASIO Act, ss 34ZS(1)(c) and 34ZS(2)(d).

<sup>95</sup> Criminal Code, s 5.4(1).

<sup>96</sup> ASIO Act, s 34J.

<sup>97</sup> ASIO Act, s 34ZS(3).

<sup>98</sup> Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism*, 2016, 47 [9.30].

<sup>99</sup> ACC Act, s 29A.

<sup>100</sup> ASIO Act, ss 34ZS(1)-(2).

<sup>101</sup> ACC Act, ss 29B(1)-(2).

6.9 It is AGD's view that the non-disclosure offences and higher penalties that currently exist in the ASIO Act are appropriate for ASIO's operations given the potential harm associated with an unauthorised disclosure. AGD considers that the non-disclosure regime currently contained in the ASIO Act should be maintained.

### *Standard ASIO identity protections*

6.10 In addition to the above secrecy framework, section 92 of the ASIO Act provides a prohibition of the unauthorised release of information from which it could reasonably be inferred, that a person having a particular name or otherwise identified, or a person residing at a particular address, is an officer (not including the Director-General), employee or agent of the Organisation or is in any way connected with such an officer, employee or agent or, former officer (not including a former Director-General), employee or agent of the Organisation or is in any way connected with such a former officer, employee or agent. The maximum penalty for such an unauthorised disclosure is ten years imprisonment.

6.11 The unauthorised disclosure of this information could potentially jeopardise an investigation or, more significantly, result in harm or risk to the life of an ASIO officer. It is essential that the identity of, and information in relation to ASIO officers remains protected. These provisions are essential insofar that they respond to the potential harm associated with the unauthorised disclosure of information pertaining to an ASIO officer and to deter those who obtain such information from disclosing this information.

### *Protection of witnesses*

6.12 Under the ACC Act, an examiner may make arrangements with the Minister, AFP or relevant State police force as necessary to avoid prejudice to the safety of a person. The examiner may do this if he or she believes that the safety of a person who appears (or is to appear) at an examination or furnishes (or proposes to furnish) information to the ACIC may be prejudiced or the person may be subjected to intimidation or harassment.<sup>102</sup>

6.13 At present there is no equivalent provision under the ASIO Act, however this is an additional safeguard which would provide ASIO with the ability to take steps to protect a person who may be harmed by reason of the potential for cooperation, even if under compulsion. This may also prove an incentive for those who have information which is useful to ASIO to cooperate during questioning.

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<sup>102</sup> ACC Act, s 34.

## 7. Oversight

7.1 ASIO is subject to significant oversight in all of its activities, and the issuing and execution of QWs and QDWs are subject to even more scrutiny than its other activities.

7.2 Oversight of ASIO's activities includes scrutiny by the PJCIS, ministerial reporting and IGIS complaints mechanisms. This is in addition to the IGIS's oversight powers of ASIO's activities generally and QWs and QDWs specifically.

### *Inspector-General of Intelligence and Security*

7.3 The IGIS conducts rigorous oversight of all of ASIO's powers and activities, and particularly the special powers under Division 3. The Director-General of ASIO must consult with the IGIS and the Commissioner of Police when preparing a written statement of procedures to be followed in the exercise of authority under either a QW or a QDW.<sup>103</sup>

7.4 The IGIS must be provided with a copy of any requests made for a QW or QDW, any warrant if issued, as well as any recordings made of questioning, and details of actions undertaken pursuant to a warrant.<sup>104</sup> The IGIS may be present when a subject is taken into custody under a QDW, and during the course of questioning under either a QW or QDW.<sup>105</sup> Questioning and processes under a QW or QDW must be suspended if the IGIS raises a concern about impropriety or illegality in connection with the exercise, or purported exercise, of powers under a QW or QDW.<sup>106</sup>

7.5 The subject is entitled to make a complaint orally or in writing to the IGIS,<sup>107</sup> and, as outlined above, this must be explained to the subject by the prescribed authority at the start of the questioning.<sup>108</sup> Anyone holding the person in custody or detention must give the person facilities for contacting the IGIS.<sup>109</sup> The IGIS must inspect and report on any warrants obtained.<sup>110</sup>

7.6 AGD understands that the IGIS has taken a keen interest in all previous proceedings under a QW and the IGIS or a member of the IGIS's staff has attended at least part of the questioning conducted under each warrant. The IGIS's submission to the 2016 INSLM review noted that 'there have been no significant concerns with the use of the powers' and that, where technical or procedural matters did arise, they were resolved satisfactorily.<sup>111</sup>

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<sup>103</sup> ASIO Act, s 34C(2).

<sup>104</sup> ASIO Act, s 34ZI.

<sup>105</sup> ASIO Act, s 34P.

<sup>106</sup> ASIO Act, s 34Q.

<sup>107</sup> ASIO Act, s 10.

<sup>108</sup> ASIO Act, s 34J(e).

<sup>109</sup> ASIO Act, s 34K(11).

<sup>110</sup> ASIO Act, s 34ZJ.

<sup>111</sup> IGIS submission to INSLM *Certain Questioning and Detention Powers in Relation to Terrorism*, 2016, 8.

## 8. Other jurisdictions/legislative models

8.1 AGD has reviewed a number of international, Commonwealth and State and Territory criminal intelligence and intelligence agency special power frameworks, with a focus on questioning powers, in order to provide an overview of the landscape of existing legislative processes, thresholds, safeguards and oversight mechanisms.

8.2 While compulsory questioning powers are considered special powers under the ASIO Act, these powers must be assessed in the context of the matters for which a number of Commonwealth law enforcement and regulatory agencies are able to utilise compulsory questioning. The Australian Securities and Investment Commission (ASIC) has the ability to require someone to attend for examination and answer questions in a similar fashion to that of the ACIC for the purposes of providing assistance with the investigation of an alleged or suspected contravention of corporation's law, or even the gathering information on the affairs of a corporation.<sup>112</sup> In contrast, the Australian Prudential and Regulatory Authority (APRA) has the ability to require a person to attend for examination and answer questions to assist in the gathering of information in relation to the regulation of a superannuation fund.

8.3 The Queensland Crime and Corruption Commission also adopt a similar examination regime to that of the ACIC and NSW Crime Commission. However under this regime, the criteria to qualify for the role of the examiner differs from the ACIC and NSW models. The Chair of the Crime Reference Committee (the body which authorises the commission to undertake a specific intelligence operation) must conduct a public hearing. The Chair may delegate this responsibility to a sessional commission or senior executive officer should he or she consider it necessary.<sup>113</sup> The Chair may also decide whether the hearing should be conducted in private.<sup>114</sup>

8.4 Internationally, the UK and Canada have taken varying approaches to the increased threat of terrorism. Both jurisdictions have expanded the availability of investigatory powers, including questioning and detention.

8.5 In Canada, a peace officer may apply to a judge who may order a person to appear for questioning in relation to a past, present or future terrorist attack. The judge may issue a warrant for their arrest and order their detention to ensure compliance with the questioning order. There are offences for non-compliance and immunity is provided in the absence of the privilege against self-incrimination. Questioning is conducted by the Attorney-General or his delegate.<sup>115</sup>

8.6 In the UK, a constable, or immigration officer has the power to stop, question and detain a person who has been or is concerned in the commission, preparation or instigation of acts of terrorism.<sup>116</sup> A member of

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<sup>112</sup> *Australian Security and Investments Commission Act 2001* (Cth), Part III, Division 2.

<sup>113</sup> *Crime and Corruption Act 2001* (QLD), s 178.

<sup>114</sup> *Crime and Corruption Act 2001* (QLD), s 179.

<sup>115</sup> *Canadian Criminal Code*, s 83.28.

<sup>116</sup> *Terrorism Act 2000* (UK), schedule 7.

Her Majesty's forces on duty or a constable may also stop a person for as long as necessary to question him to ascertain identity and movements, knowledge about a recent explosion or other recent incidents.<sup>117</sup>

8.7 Ultimately, after the consideration of a number of regimes, AGD consider it is most appropriate for ASIO to adopt a compulsory questioning model closely modelled on the ACIC examination model.

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<sup>117</sup> *Terrorism Act 2000 (UK)*, s 89.

## 9. Conclusion

9.1 AGD welcomes the opportunity to assist the PJCIS in its review of ASIO's questioning and detention powers pursuant to Division 3 of Part III of the ASIO Act. More specifically, AGD hopes that this submission assists the PJCIS in understanding the current legislative and operational landscape in the context of ASIO's role in protecting Australia from national security threats.

9.2 AGD maintains that the current national security and counter-terrorism environment requires ASIO to have effective, appropriate tools available to it to perform its functions. However, AGD understands that it is fundamental that these are balanced with the protection of individual rights and freedoms.

9.3 AGD has consulted with ASIO and has considered comments and recommendations made by previous reviewers of Division 3 of Part III of the ASIO Act. In particular, AGD has duly noted the most recent INSLM's recommendation that ASIO's QW regime should be repealed and a new regime be established based on the ACC Act model.

9.4 AGD agrees that the current QW regime should be amended to provide a more efficient and effective process. AGD agrees in principle that a new compulsory questioning regime, closely modelled on the current ACC Act model, but suited to the role, functions and structure of ASIO, would be appropriate.

9.5 AGD believes that broadening the scope of the QW power to provide ASIO with the ability to utilise compulsory questioning in circumstances where it would substantially assist the collection of intelligence that is important to security, would assist ASIO to better perform its functions, and be appropriate and consistent with powers held by other Commonwealth intelligence gathering, and law enforcement bodies such as the ACIC, ASIC and Commonwealth Ombudsman.

9.6 While AGD acknowledges the recent INSLM's recommendation to repeal the QDW regime, due to a number of explained reasons such as its lack of use, AGD considers that the QDW regime offers a number of important safeguards, which when combined with the judicious use by ASIO, provide ASIO with an additional operational tool which balances the rights of individuals. Further, simply because the warrant has not been used does not mean there are no grounds for it to be kept. QDWs are expressed to be used a last resort and it is important to retain a last resort in an evolving security environment, particularly one where a terrorist act in Australia is 'probable'.

## Annexure A Explanation of Division 3, Part III, ASIO Act

### Obtaining a warrant

To obtain either a QW or a QDW, the Director-General of ASIO must first seek the consent of the Attorney-General to make an application to an issuing authority for the issuance of such a warrant.<sup>118</sup>

The Attorney-General may consent to the request if satisfied that:

- there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence;<sup>119</sup>
- having regard to other methods (if any) of collecting intelligence that are likely to be effective, it is reasonable in the circumstances for the warrant to be issued; and
- there is in force a written statement of procedures to be followed in the exercise of authority under QWs and QDWs.<sup>120</sup>

In relation to a QDW, the Attorney-General must also be satisfied that there are reasonable grounds for believing that, if the subject is not immediately taken into custody and detained, he or she may alert others involved in a terrorism offence that the offence is being investigated, fail to appear before the prescribed authority for questioning or destroy, damage or alter a record or thing that the subject may be requested to produce.<sup>121</sup>

If the Attorney-General consents to the Director-General's request, the Director-General may then apply to an issuing authority for the issuance of the QW or QDW.<sup>122</sup>

The issuing authority plays a distinct role in authorising the execution of a warrant. An issuing authority is a current judge who has given consent and been appointed to that role by the Attorney-General.<sup>123</sup>

An issuing authority may issue a QW or a QDW if satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.<sup>124</sup> If issuing a QDW, not only does the issuing authority need to be satisfied by the above, but he or she must also take into account any previous detention warrant issued under Division 3 of Part III of the ASIO Act experienced by the subject and, in deciding whether to issue a new warrant, be satisfied that a

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<sup>118</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) ('ASIO Act'), s 34D(6), 34F(7).

<sup>119</sup> 'Terrorism offence' for the purposes of the ASIO Act is defined in section 4 of the ASIO Act, and is distinct from the definition of 'terrorism offence' contained in the *Crimes Act 1914* (Cth).

<sup>120</sup> ASIO Act, ss 34D(4) and 34F(4).

<sup>121</sup> ASIO Act, s 34F(4)(d).

<sup>122</sup> ASIO Act, ss 34E(1) and 34G(1).

<sup>123</sup> ASIO Act, s 34AB.

<sup>124</sup> ASIO Act, ss 34E(1)(b) and 34G(1)(b).

warrant is justified by additional or materially different information than what was previously known by ASIO at the time an earlier warrant was requested, and that the subject is not being detained in connection with an earlier warrant.<sup>125</sup>

### **Executing a warrant**

If a QW is issued by an issuing authority, the subject named on the warrant is required to appear before the prescribed authority for questioning either immediately, or at a time specified in the warrant.<sup>126</sup>

If a QDW is issued, the subject is taken into custody by a police officer who must make arrangements for the subject to be brought before the prescribed authority immediately for questioning.<sup>127</sup> The subject of a QDW can be detained until either the questioning ceases, or 168 hours from the time the person is brought before the prescribed authority, whichever is earliest.<sup>128</sup>

The prescribed authority plays an active role in the execution of a QW or QDW. A prescribed authority is a person appointed by the Attorney-General who:

- has served as a judge for at least 5 years in one or more superior courts and no longer holds a commission as a judge; or
- if there are insufficient numbers of persons meeting this criteria, is currently serving as a judge in the Supreme Court of a state or territory; or
- if there are insufficient number of persons meeting both the above criteria, is enrolled (for at least 5 years) as a legal practitioner of a Federal Court or the Supreme Court of a state or territory.<sup>129</sup>

At the start of questioning under either a QW or a QDW, the prescribed authority must explain the warrant, including what is authorised by the warrant, and the rights of complaint available to the subject being questioned.<sup>130</sup> During the course of questioning, the prescribed authority can make a number of directions, including directions to detain the subject, or to defer questioning.<sup>131</sup>

Generally the subject being questioned is not permitted to contact, and may be prevented from contacting, anyone at any time other than those persons specified in the warrant (such as a legal representative), and other parties specified in the ASIO Act.<sup>132</sup>

Additionally, the Director-General must ensure that questioning under a QW or a QDW is video recorded.<sup>133</sup>

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<sup>125</sup> ASIO Act, s 34G(2).

<sup>126</sup> ASIO Act, s 34E(2).

<sup>127</sup> ASIO Act, s 34H.

<sup>128</sup> ASIO Act, s 34S.

<sup>129</sup> ASIO Act, s 34B.

<sup>130</sup> ASIO Act, s 34J.

<sup>131</sup> ASIO Act, s 34K.

<sup>132</sup> ASIO Act, ss 34K(10) and (11).

<sup>133</sup> ASIO Act, s 34ZA.



## Access to legal representation

QWs must specify that the subject is permitted to contact a single lawyer of their choice before answering for questioning under the warrant, or at any time once questioning has commenced.<sup>134</sup>

QDWs may identify someone the subject is permitted to contact, and the times they may contact that person, by reason of that person being a lawyer of the subject's choice, or having a particular legal or familial relationship with the subject.<sup>135</sup>

In the case of either a QW or QDW, the prescribed authority may prevent the subject from contacting a particular lawyer of their choice if satisfied that in doing so would mean:

- a person involved in a terrorism offence may be alerted that the offence is being investigated; or
- a record or thing that the person may be requested to produce in accordance with the warrant may be destroyed, damaged or altered.

If denied contact with a particular lawyer, the subject may choose another lawyer to contact.<sup>136</sup>

Legal professional privilege is upheld by the regime, although contact with a lawyer must be conducted in a way that can be monitored by an ASIO officer exercising authority under a QW or a QDW.<sup>137</sup> Reasonable opportunities must be provided for the lawyer to provide advice to the subject but the lawyer cannot intervene in the questioning of the subject or address the prescribed authority, except to request clarification of an ambiguous question. If the lawyer fails to comply with these restrictions, and is considered by the prescribed authority to be unduly disruptive of the questioning, the lawyer may be removed from where the questioning is taking place. If a lawyer is removed, the prescribed authority must permit the subject to contact another lawyer (subject to the restrictions previously discussed).<sup>138</sup>

## Secrecy

It is an offence punishable by up to five years imprisonment for a person (including the subject questioned) to disclose information (where disclosure is not permitted by the warrant) during the time the warrant is in force which indicates:

- that a QW or QDW has been issued;
- a fact relating to the content of a QW or QDW; or
- the detention of a person in connection with a QW or QDW,

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<sup>134</sup> ASIO Act, s 34E(3).

<sup>135</sup> ASIO Act, s 34G(5).

<sup>136</sup> ASIO Act, s 34ZO.

<sup>137</sup> ASIO Act, s 34ZV.

<sup>138</sup> ASIO Act, s 34ZQ.

where that information is either operational information, or information obtained as a direct or indirect result of the issuance of the warrant, or of doing anything authorised by the warrant.<sup>139</sup>

It is also an offence for a person to release operational information that they have as a direct or indirect result of the issuance of a warrant, or as a result of doing anything authorised by the warrant, within two years of the expiry of the warrant, if that disclosure is not permitted.<sup>140</sup>

### **Immunity from self-incrimination**

Any answers to questions or information provided by a subject under warrant while before a prescribed authority is not admissible in evidence against the subject in criminal proceedings,<sup>141</sup> other than proceedings for an offence related to the QW and QDW regime.<sup>142</sup>

### **Oversight by the Inspector-General of Intelligence and Security**

In addition to the independent oversight offered by the prescribed authority, the IGIS provides an additional layer of oversight to the QW and QDW regime.

The Director-General of ASIO must consult with the IGIS and the Commissioner of Police when preparing a written statement of procedures to be followed in the exercise of authority under either a QW or a QDW.<sup>143</sup>

The IGIS must be provided with a copy of any requests made for a QW or QDW, any warrant if issued, as well as any recordings made of questioning, and details of actions undertaken pursuant to a warrant.<sup>144</sup>

The IGIS may be present when a subject is taken into custody under a QDW, and during the course of questioning under either a QW or QDW.<sup>145</sup> Questioning and processes under a QW or QDW must be suspended if the IGIS raises a concern about impropriety or illegality in connection with the exercise, or purported exercise, of powers under a QW or QDW.<sup>146</sup>

The subject is entitled to make a complaint orally or in writing to the IGIS,<sup>147</sup> and, as outlined above, this must be explained to the subject by the prescribed authority at the start of the questioning.<sup>148</sup> Anyone holding the person in custody or detention must give the person facilities for contacting the IGIS.<sup>149</sup>

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<sup>139</sup> ASIO Act, s 34ZS(1).

<sup>140</sup> ASIO Act, s 34ZS(2).

<sup>141</sup> ASIO Act, s 34L(9).

<sup>142</sup> That is, offences contained in section 34L of the ASIO Act.

<sup>143</sup> ASIO Act, s 34C(2).

<sup>144</sup> ASIO Act, s 34ZI.

<sup>145</sup> ASIO Act, s 34P.

<sup>146</sup> ASIO Act, s 34Q.

<sup>147</sup> ASIO Act, s 10.

<sup>148</sup> ASIO Act, s 34J(e).

<sup>149</sup> ASIO Act, s 34K(11).

Finally, the IGIS must inspect and report on any warrants obtained.<sup>150</sup>

### **Humane treatment of person specified in a warrant**

A person specified in a QW or QDW warrant must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment, by anyone exercising authorising under the warrant or implementing or enforcing a direction.<sup>151</sup>

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<sup>150</sup> ASIO Act, s 34ZJ.

<sup>151</sup> ASIO Act, s 34T.

## Annexure B Explanation of Division 2, Part II, ACC Act

The ACIC has the power to undertake coercive questioning in the form of 'examinations' under Part II Division 2 of the ACC Act. Examinations may only take place in the context of an ACIC 'special operation', or 'special investigation', which are ACIC intelligence operations or investigations that have been determined to be 'special' by the ACIC Board<sup>152</sup> in a written instrument.<sup>153</sup> In making such a determination the ACC Board must consider whether other methods of collecting the criminal information and intelligence *have been* effective (for a special operation) or whether ordinary police methods of investigation *are likely to be* effective (for a special investigation).

The ACIC may only be authorised to conduct an intelligence operation or investigation, and hence may only exercise its coercive powers, in relation to 'relevant criminal activity' as defined in section 4 of the ACC Act. With limited exceptions, this means the coercive powers may only be used to gather information relating to 'serious and organised crime' as defined in that section. The definition of 'serious and organised crime' includes, among other limiting factors, the element that it involve two or more offenders and substantial planning and organisation.

The ACC Act specifically allows for compulsory questioning after charges have been laid, or confiscation proceedings initiated, against the examinee in connection with a related offence. In these cases the Act includes safeguards to ensure that a person's right to a fair trial is not prejudiced by compulsory questioning. For example, derivative material may only be disclosed to prosecutors after an application to a Court under section 25E of the ACC Act. However, examinees may be individuals who are not implicated in criminality, but who are able to provide information relevant to a special investigation or operation.

If an examinee fails to attend an examination, or otherwise comply with the requirements of a summons, including the non-disclosure notation, he or she commits an offence.<sup>154</sup> An examinee also commits an offence if he or she refuses or fails to answer a question the examiner requires them to answer.<sup>155</sup> Accordingly, even if answering a question would incriminate an examinee, or otherwise be contrary to their interests, the examinee must answer the question or otherwise commit an offence.

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<sup>152</sup> The Board of the ACIC is established by s7B of the ACC Act, consisting of the Commissioner of the Australian Federal Police, the Secretary of the Department, the Comptroller-General of Customs, the Chairperson of the Australian Securities and Investments Commission, the Director-General of Security, the Commissioner or head of the police force of each state and territory, the CEO of the Australian Crime Commission and the Commissioner of Taxation. The Board is responsible for providing strategic direction to the ACIC, authorising it to conduct intelligence operations and investigations, and determining whether these are to be 'special operations' or 'special investigations' (in which case the coercive powers will be available); see ACC Act, s 7C.

<sup>153</sup> ACC Act, s 7C(1).

<sup>154</sup> ACC Act, ss 30(1) and (6).

<sup>155</sup> ACC Act, ss 30(2)(b) and (6).

## Examinations procedure

For an examination to commence, an examiner will summon the examinee to appear before the examiner to either give evidence, or produce any documents or other things referred to in the summons.<sup>156</sup> In practice, this is usually instigated by a request from the ACIC to an examiner. An examiner can only issue a summons if it is for the purpose of a special investigation or special operation, and the Examiner is satisfied that issuing the summons is reasonable in the circumstances.<sup>157</sup>

Examiners are statutory appointees appointed by the Governor-General,<sup>158</sup> following the Minister for Justice's consultation with the Inter-Governmental Committee on the appointment.<sup>159</sup> A person is eligible to be appointed as an examiner if they are enrolled as a legal practitioner, and have been so for at least five years. Examiners may be appointed on a full-time or part-time basis, and in the past have included barristers and judges of various jurisdictions.

In the case of a prospective examination after the examinee has been charged with an offence which is related to the subject of the examination or a related confiscation proceeding has commenced against the examinee, the examiner must be satisfied before issuing the summons that it is reasonable in all the circumstances to do so, but also that it is reasonably necessary to do so for the purposes of the special operation or special investigation despite the pending charge or confiscation proceedings.<sup>160</sup>

An examiner may generally regulate the conduct of an examination as he or she thinks fit.<sup>161</sup> Past examinations have generally taken place with an examiner taking a passive, monitoring role, with legal counsel for the ACIC asking questions of the examinee, similar to the manner in which courts and royal commissions proceed.<sup>162</sup> Examinations must, however, be held in private, and an examiner may give directions about who may be present at any part of the examination.<sup>163</sup>

## Access to legal representation

During the course of an examination, an examinee may have a lawyer present.<sup>164</sup> However, the ability of the examinee's lawyer to examine or cross-examine any other witness participating in the examination is subject to the examiner's discretion (as is the case for counsel assisting the examiner, and any other person authorised by the examiner to appear at the examination).<sup>165</sup>

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<sup>156</sup> ACC Act, s 28(1).

<sup>157</sup> Ibid.

<sup>158</sup> ACC Act, s 46B.

<sup>159</sup> Ibid.

<sup>160</sup> ACC Act, s 28(1).

<sup>161</sup> ACC Act, s 25A(1).

<sup>162</sup> Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism*, 2016, 13 [4.15].

<sup>163</sup> ACC Act, s 25A(3).

<sup>164</sup> ACC Act, s 25A(2)(a).

<sup>165</sup> ACC Act, s 25A(6).

## Secrecy

A summons issued by an examiner may contain a notation prohibiting disclosure of information about the summons or its existence.<sup>166</sup> In certain circumstances the inclusion of a notation is required (e.g. if failure to do so would reasonably be expected to prejudice a person's safety or fair trial or the effectiveness of an investigation/operation.) If a person makes a disclosure contrary to that prohibition, they commit an offence.<sup>167</sup> However, an examinee may make a disclosure within the scope of the prohibition in certain circumstances, including to obtain legal advice or representation in relation to the summons.<sup>168</sup> A person who is not the subject of a summons, but otherwise involved in an examination, may also obtain legal representation if the examiner consents,<sup>169</sup> and therefore make some disclosures in relation to an examination.

In addition, an examiner may direct that information obtained from the examination (e.g., answers to questions provided by the examinee) not be used or disclosed, or may only be used by, or disclosed to, specified persons in specified ways or under specified conditions.<sup>170</sup>

An examiner must give such a direction if a failure to do so would either prejudice a person's safety, or be reasonably expected to prejudice the examinee's fair trial, if the examinee has been charged with an offence related to the examination or if such a charge is imminent.<sup>171</sup>

The ACC Act allows a 'specified entity'<sup>172</sup> to disclose to prosecutors examination material or derivative material before an examinee has been charged with an offence, subject to any restrictions imposed by the examiner.<sup>173</sup> If a specified entity seeks to disclose to prosecutors examination material or derivative material which was obtained or is to be disclosed after an examinee has been charged with an offence, to which that material relates, it requires the authorisation of a court.<sup>174</sup> In determining whether to grant such an authorisation, a court must be satisfied that the post-charge disclosure is required in the interests of justice.<sup>175</sup>

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<sup>166</sup> ACC Act, s 29A.

<sup>167</sup> ACC Act, s 29B(1).

<sup>168</sup> ACC Act, s 29B(2).

<sup>169</sup> ACC Act, s 25A(2)(b).

<sup>170</sup> ACC Act, s 25A(9). This direction can, however, in effect be overruled by a court where a person has been charged with an offence, and the court considers that it may be desirable in the interests of justice that particular material from the examination be made available to the person or a legal practitioner representing the person: see, ACC Act s 25A(12).

<sup>171</sup> ACC Act, s 25(9A).

<sup>172</sup> ACC Act, ss 25B(1) and (3). 'Specified entities' are: an examiner; the Chief Executive Officer or a member of staff of the ACIC; a person or body investigating whether the examinee committed an offence against a law of the Commonwealth, or of a state or territory; a prosecutor of the examinee; a prosecuting authority; a proceeds of crime authority; or any other person or body lawfully in possession of examination material.

<sup>173</sup> ACC Act, ss 25C(1)(a) and 25D(1)(a)-(b).

<sup>174</sup> ACC Act, ss 25C(1)(b) and 25D(1)(c).

<sup>175</sup> ACC Act, s 25E(1).

The ACIC may also disclose material to prosecutors for the purposes of charges being brought in relation to the examination (for example, if the examinee fails to comply with the requirements of a summons or provides false evidence.).<sup>176</sup>

### **Immunity against the use of the compelled testimony against a witness in certain proceedings**

As explained above, an examinee must answer questions or produce documents or things during the examination, even if this would incriminate them. In such cases, a 'use immunity' is available to the examinee if, before answering the question, the examinee claims that answering the question or producing the document or thing might tend to incriminate them or make them liable to the imposition of a penalty. If the use immunity is claimed, the answer, document or thing will not be admissible in evidence against the examinee in a criminal proceeding, a proceeding for the imposition of a penalty, or a confiscation proceeding.<sup>177</sup>

This use immunity does not generally prohibit the use of either evidence directly obtained from an examination (examination material) or derivative material (e.g. evidence obtained using knowledge gained from the examinee's answers given during the course of an examination). However, the ACC Act provides a range of safeguards in relation to the use of examinations and the disclosure and use of examination material. In 2015, Parliament passed the Law Enforcement Legislation Amendment (Powers) Act 2015, which clarified and strengthened the range of safeguards, including the post-charge/post-confiscation provisions outlined above.

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<sup>176</sup> ACC Act, ss 25F(2), 30(1)–(3), 33(1) and 35(1).

<sup>177</sup> ACC Act, ss 30(4)–(5).

## Annexure C Comparison of ACIC and ASIO Compulsory Questioning Powers

	<b>QUESTIONING AND QUESTIONING DETENTION WARRANTS</b> <b>Division 3 Part 3 Australian Security Intelligence Organisation Act 1979</b>	<b>EXAMINATIONS</b> <b>Division 2 Part 2 Australian Crime Commission Act 2002</b>
<b>Type of power</b>	Questioning and detention for the purpose of gaining intelligence in limited circumstances (i.e. in relation to a terrorism offence).	Questioning and compelled production of documents or things for the purposes of a special operation or special investigation (i.e. operations or investigations approved as such by the ACIC Board in a written instrument).
<b>Threshold</b>	<p><b>(1) Threshold for a questioning warrant</b></p> <p>The Director-General of Security may seek the Minister's consent to request the issue of a questioning warrant. The Minister may consent to the making of the request but only if he is satisfied that:</p> <ul style="list-style-type: none"> <li>(i) there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence; and</li> <li>(ii) relying on other methods of collecting that intelligence would be ineffective; and</li> <li>(iii) there is a written statement of procedures in force; s 34D(4).</li> </ul> <p><b>(2) Threshold for a questioning and detention warrant</b></p> <p>The Minister may consent to the making of a request for a questioning and detention warrant if satisfied, in addition to the matters above, there are reasonable grounds for believing that, if the person is not immediately taken in to custody and detained:</p> <ul style="list-style-type: none"> <li>(a) the person may alert a person involved in a terrorism offence to the investigation of the offence; or</li> </ul>	<p>Under section 24A of the ACC Act, an examiner may only conduct an examination for the purposes of an ACIC special operation or special investigation, the subject matter of which is 'relevant criminal activity'. This term is defined in section 4 of the ACC Act as 'any circumstances implying, or any allegations, that a [federally relevant serious and organised crime] may have been, may be being, or may in future be, committed'. The provisions of subsections 7C(2) and (3) make it clear that the ACIC Board may only determine that an intelligence operation or investigation is 'special' where ordinary police methods of collecting intelligence or investigating offences have not been, or are unlikely to be, effective.</p> <p>Before issuing a summons to an examination, an examiner must be satisfied that it is reasonable in all the circumstances to do so.</p> <p>Where a person is to be examined post-charge, or post-confiscation application, on the subject matter of the charge, the examiner must additionally be satisfied that the examination is reasonably necessary for the purposes of a special investigation/operation even though the person has been charged or the relate confiscation proceedings against the person have commenced. Note: Examiners are appointed by the Governor-General pursuant to s 46B of the ACC Act, following</p>



	<b>QUESTIONING AND QUESTIONING DETENTION WARRANTS</b> <b>Division 3 Part 3 Australian Security Intelligence Organisation Act 1979</b>	<b>EXAMINATIONS</b> <b>Division 2 Part 2 Australian Crime Commission Act 2002</b>
	<p>(b) the person may not appear before the prescribed authority (for questioning); or</p> <p>(c) The person may tamper with or destroy material or things relevant to the warrant.</p> <p>If the Minister provides consent, the Director-General may request the warrant by giving an issuing authority the request and copy of the Ministers consent.</p> <p>The issuing authority may issue a warrant only if</p> <p>(a) the Director-General requested the warrant in accordance with subsection 34F(7); and</p> <p>(b) the issuing authority is satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence; s 34F(4).</p> <p><i>Note:</i> a terrorism offence means (a) an offence against Subdivision A of Division 72 of the <i>Criminal Code</i>; or (b) an offence against Part 5.3 of the <i>Criminal Code</i>. (a person can commit a terrorism offence against Part 5.3 of the <i>Criminal Code</i> even if no terrorist act (as defined in that Part) occurs).</p> <p><i>Note:</i> An issuing authority is defined in s 34A and 34AB as a Judge.</p> <p><i>Note:</i> A prescribed authority is defined in s 34B and includes past judges of superior courts, current judges of superior courts or an appointee to the AAT as President or Deputy President who is a legal practitioner.</p>	<p>the Ministers consultation with the Inter-Governmental Committee. A person is eligible to be appointed as an examiner if they are enrolled as a legal practitioner, and have been so for at least five years.</p> <p><b>Threshold for a warrant for the apprehension of an individual</b></p> <p>An examiner may apply to a judge for a warrant for the arrest of a person summoned to appear before the examiner. The judge may issue a warrant if satisfied by evidence on oath that there are reasonable grounds to believe:</p> <p>(a) that a person who has been ordered, under section 24, to deliver a travel document to the examiner, where or not that person has complied with the order, is nevertheless likely to leave Australia for the purpose of avoiding giving evidence before the examiner; or</p> <p>(b) that a person in relation to whom a summons has been issued under s 28(1)</p> <p>(i) has absconded or is likely to abscond; or</p> <p>(ii) is otherwise attempting, or is likely to attempt, to evade service of the summons; or</p> <p>(c) that person has committed an offence under s 30(1) or is likely to do so; s 31.</p> <p><i>Note:</i> a person commits an offence under s 30(1) by failing to attend an examination as required by the summons, or failing to attend from day to day unless excused by the examiner.</p> <p><i>Note:</i> the examiner must apply to a judge of the Federal Court or of the Supreme Court of a State or Territory.</p>
<b>Period of</b>	8 hours; s 34R.	A person detained under warrant shall be brought before a judge as soon as practical for order to be made (i.e. orders for bail, for

	<b>QUESTIONING AND QUESTIONING DETENTION WARRANTS</b> <b>Division 3 Part 3 Australian Security Intelligence Organisation Act 1979</b>	<b>EXAMINATIONS</b> <b>Division 2 Part 2 Australian Crime Commission Act 2002</b>
<b>detention</b>	<p>The period starts when the person is first brought before a prescribed authority; s 34G.</p> <p>ASIO must obtain permission from a prescribed authority to continue detention for up to another 8 hours each time; s 34R.</p> <p>Up to a maximum of 24 hours after the person was first detained; s 34R.</p> <p>Extra time is allowed for questioning when an interpreter is present (i.e. 48 hours instead of 24 where an interpreter is used: section 34R.)</p> <p>In very limited circumstances, a person may be detained for a maximum of 168 hours but only when this is specifically authorised by the warrant; s 34S.</p> <p>Certain time may be disregarded for the purposes of determining the time that a person has been questioned under a warrant (subsection 34R(13)):</p> <ul style="list-style-type: none"> <li>- the time taken by a prescribed authority to inform the person of the matters referred to in section 34J;</li> <li>- any time during which a prescribed authority has deferred questioning of the person under the warrant to allow: <ul style="list-style-type: none"> <li>o (i) the change of a thing in equipment being used to record the questioning of the person;</li> <li>o (ii) the person to make a complaint to the IGIS, Ombudsman or other state/territory complaint agency;</li> <li>o (iia) the person to give information under Division 2 Part V of the AFP Act;</li> <li>o (iii) the person to contact a lawyer or another person as provided by this Division;</li> </ul> </li> </ul>	<p>continued detention or for the release of the person); s 31(3).</p> <p>A person can be detained for a period of 14 days, after which time he or she must be again brought before a judge; s 31(4).</p> <p>The period starts after the person was brought, or last brought, before a judge. A shorter or longer period can be fixed by a judge; s 31(4).</p>

	<b>QUESTIONING AND QUESTIONING DETENTION WARRANTS</b> <i>Division 3 Part 3 Australian Security Intelligence Organisation Act 1979</i>	<b>EXAMINATIONS</b> <i>Division 2 Part 2 Australian Crime Commission Act 2002</i>
	<ul style="list-style-type: none"> <li>○ (iv) the person to receive medical attention;</li> <li>○ (v) the person to engage in religious practices as required by the person's religion; or</li> <li>○ (vi) the person to rest or recuperate;</li> <li>- any time during which a prescribed authority has suspended questioning of the person under the warrant in response to the concerns of the IGIS;</li> <li>- any other time determined by a prescribed authority</li> </ul>	
<b>Is questioning permitted?</b>	Yes	Yes
<b>Access to, and involvement of, legal representatives</b>	<p>A questioning warrant must specify that the person is permitted to contact a single lawyer before appearing for questioning, or at any time during questioning; s 34E(3).</p> <p>A questioning and detention warrant may identify someone that the person is permitted to contact, and the times they may contact that person, by reason of that person being a lawyer, or with whom the warrant subject has a legal or familial relationship; s 34G(5).</p> <p>The prescribed authority can prevent contact with a particular lawyer if satisfied that this would:</p> <ul style="list-style-type: none"> <li>a) alert a person involved in a terrorism offence that the offence is being investigated; or</li> <li>b) a record or thing that the person may be requested to produce may be destroyed, damaged or altered.</li> </ul> <p>In this case the person may be permitted to contact another lawyer; s 34ZO.</p> <p>The prescribed authority must allow reasonable opportunity for</p>	<p>An individual being examined may have a lawyer present during examination; paragraph 25A(2)(a).</p> <p>An examiner cannot prevent the presence of a person representing a witness when evidence is being given; s 25A(4).</p> <p>Legal practitioners may examine or cross-examine any witness participating in the examination subject to the examiners discretion; s 25A(6).</p> <p>A witness appearing before an examiner may make an application to the Attorney-General for the provision of assistance under this section in respect of his or her appearance; s 27(1).</p>

	<b>QUESTIONING AND QUESTIONING DETENTION WARRANTS</b> <b>Division 3 Part 3 <i>Australian Security Intelligence Organisation Act 1979</i></b>	<b>EXAMINATIONS</b> <b>Division 2 Part 2 <i>Australian Crime Commission Act 2002</i></b>
	<p>the lawyer to provide advice; s 34ZQ(5).</p> <p>The lawyer must not intervene in the questioning or address the prescribed authority, except to clarify ambiguous questions; s 34ZQ(6).</p> <p>Conversations with lawyers must be monitored by the ASIO officer exercising the authority under the warrant, but legal professional privilege remains; ss 34ZV and 34ZQ(2).</p> <p>If a lawyer's conduct is unduly disrupting the questioning, the prescribed authority may direct the removal of lawyer and allow subject to contact another lawyer; s 34ZQ(9)-(10).</p> <p>At any time after a person specified in a warrant issued under this Division is notified of the issue of the warrant, the person may apply to the Minister for the provision of assistance in respect of the person's appearance before a prescribed authority for questioning under the warrant; s 34ZX(1)</p>	
<b>Secrecy</b>	<p>It is an offence to disclose information during the time the warrant is in force which indicates:</p> <ul style="list-style-type: none"> <li>• that a warrant has been issued</li> <li>• a fact relating to the content of a warrant, and</li> <li>• the detention of a person in connection with a warrant.</li> </ul> <p>where that information is either operational information, or information obtained as a direct or indirect result of the issuance of a warrant, or of doing anything authorised by the warrant; s 34ZS</p> <p>It is an offence to disclose operational information obtained as a</p>	<p>A notation issued by an examiner may contain a notation prohibiting disclosure of information about the summons or its existence. In certain circumstances the inclusion of a notation is required (e.g. if failure to do so would reasonably be expected to prejudice a person's safety or fair trial or the effectiveness of an investigation/operation.); ss 29A(1) and (2). It is an offence to make a disclosure contrary to that prohibition; s 29B(1).</p> <p>Punishable by 2 years imprisonment or 120 penalty units or both; s 29B(1).</p> <p>A summons does not prevent the person from making a disclosure</p>

	<b>QUESTIONING AND QUESTIONING DETENTION WARRANTS</b> <b>Division 3 Part 3 <i>Australian Security Intelligence Organisation Act 1979</i></b>	<b>EXAMINATIONS</b> <b>Division 2 Part 2 <i>Australian Crime Commission Act 2002</i></b>
	<p>direct or indirect result of the issuance of a warrant up to two years after the expiry of the warrant; s 34ZS(2)</p> <p>Both punishable by 5 years imprisonment; s 34ZS</p>	<p>to obtain legal advice; s 29B(2).</p> <p>An examiner may direct that examination material must not be disclosed or how it is to be disclosed, and to whom; ss 25A(9). In certain circumstances the examiner is required to make such directions (e.g. if failure to do so would prejudice a person's safety or fair trial); s 25A(9A).</p> <p><b>Pre-charge disclosure of examination material to the prosecution</b></p> <p>Specified entities may disclose examination material to a prosecutor before a person under examination has been charged with an offence; s 25C(a). Specified entities may also disclose derivative material if it is pre-charge material; s 25D(a).</p> <p><b>Post-charge disclosure of examination material to the prosecution</b></p> <p>A post-charge disclosure of examination material, or post-charge disclosure of derivative material obtained from post-charge examination material to a prosecutor requires a court order, which may be given where the Court is satisfied its disclosure is in the interests of justice; s 25E.</p> <p><i>Note:</i> Specified entities are an examiner; the Chief Executive Officer or a member of staff of the ACIC; a person or body investigating whether the examinee committed an offence against a law of the Commonwealth, or of a state or territory; a prosecutor of the examinee; a prosecuting authority; a proceeds of crime authority; or any other person or body lawfully in possession of examination material; ss 25B(1) and (3).</p>
<b>Use immunity</b>	Use immunity is available to the person being questioned before	Use immunity is available to an examinee if, before answering a question, the examinee claims that answering the question or

	<b>QUESTIONING AND QUESTIONING DETENTION WARRANTS</b> <b>Division 3 Part 3 <i>Australian Security Intelligence Organisation Act 1979</i></b>	<b>EXAMINATIONS</b> <b>Division 2 Part 2 <i>Australian Crime Commission Act 2002</i></b>
	<p>a prescribed authority for:</p> <ul style="list-style-type: none"> <li>anything said by the person while before the prescribed authority, or</li> <li>the production of a record or thing while before the prescribed authority for questioning</li> </ul> <p>in response to a request made in accordance with the warrant; s 34L(9).</p>	<p>producing the document or thing might tend to incriminate them and make them liable to penalty.</p> <p>If invoked, the answer, document or thing will not be admissible in evidence against the examinee in a criminal proceeding, a proceeding for the imposition of a penalty, or a confiscation proceeding; ss 30(4)-(5).</p> <p>There are circumstances where an answer, document or thing is admissible in evidence against the person; set out in section 5A (e.g. an answer is admissible in a proceeding about the falsity of the answer).</p>

## Annexure D ASIO questioning warrant use data

At present, ASIO has obtained and used 16 QWs to question 15 people.

Year ending June 30	QWs Issued	Persons Questioned
2004	3	3
2005	11	10
2006	1	1
2007	0	0
2008	0	0
2009	0	0
2010	1	1
2011	0	0
2012	0	0
2013	0	0
2014	0	0
2015	0	0
2016	0	0