Australian Government
Department of Home Affairs

# Part I – Responses to Questions on Notice – Public hearing – 10 July 2020

## Question 1: Why is 10 years an appropriate sunset period, and how would the Parliament review the laws within this 10-year period?

**Senator KENEALLY:** But several of those reviews also made recommendations that the detention power be repealed, that the questioning power be reformed, and that seemed to take some time. As we know, we've had multiple extensions to that sunset. I'm trying to understand, given that we are fundamentally changing the compulsory questioning power, if there would be an objection to a five-year sunset period as opposed to 10, which just seems extraordinarily long.

**Mr Warnes:** In terms of the sunset period, as Mr Coles has said, it was set to try and reflect the fact that this has been extended since 2003 and there's an expectation that this is going to continue to be needed—given what you heard in the previous session about the security threat environment—unfortunately, for some time to come. That doesn't mean there's an absence of a review mechanism, and a number of bodies have the ability to review this, including the INSLM, who's done two reviews of this legislation in the past and could possibly review that on their own motion, going into the future, as well.

**Senator KENEALLY:** Short of the PJCIS taking the rather extraordinary step, which I don't believe it has ever taken, of having an own-motion review referred to it by parliament, there is no other way for parliament to review these laws, is there?

**Mr Warnes:** I would perhaps have to take that on notice, because the INSLM can, I think, do an own-motion investigation. Does the INSLM report to parliament or to the minister?

**Senator KENEALLY**: The committee could refer something to the INSLM, but that's not the parliament doing a review.

**Mr Warnes:** That's right, but the INSLM could do the review, and his reports have to be tabled to parliament.

**Senator KENEALLY:** Yes. Nonetheless, there's not much parliament could do with that for 10 years if it chose not to.

**Mr Warnes:** Parliament can also—

**Senator KENEALLY:** If the government of the day chose not to, the parliament is essentially powerless to do anything. My point is that a five-year sunset clause would at least give some certainty that, within a shorter time frame, these extraordinary interventionist and intrusive powers, which are being expanded, could be reviewed by the parliament. I think we are having an academic argument now. I take your point that it's your position. I just haven't really quite heard the rationale for why it needs to be 10 and not five.

**Mr Coles:** I think we understand what you're putting to us, Senator, but I don't think we can provide more helpful evidence on why we have adopted the position we have.

### Answer

The Australian Security Intelligence Organisation Bill 2020 (the **Bill**) provides that the powers will cease to have effect on 7 September 2030. Given the nature of the proposed powers, it is appropriate that the Australian Security Intelligence Organisation's (**ASIO**) new compulsory questioning powers include an appropriate sunset clause. Given successive reviews have continued to recommend that ASIO retain a compulsory questioning power, the Department is of the view that 10 years is an appropriate sunset period.

At that time, it would be appropriate for the Parliamentary Joint Committee on Intelligence and Security (the **Committee**) to review the operation, effectiveness and continued need for the powers. This is consistent with other national security legislation, including the Continuing Detention Orders (CDO) regime, which permits the continued detention of high risk terrorist offenders beyond the expiry of their custodial sentence (see s 105A.25 of the Criminal Code).

If the Committee were minded to do so, section 29(2) of the *Intelligence Services Act 2001* provides that the Committee may, by resolution, request the responsible Minister or the Attorney-General to refer a matter in relation to the activities of ASIO (amongst other agencies) to the Committee, and the Minister or the Attorney-General may refer that matter to the Committee for review.

## Question 2: What evidence was provided by the Director-General in relation to other Commonwealth agencies with compulsory or coercive questioning powers?

**Mr Coles:** There was also some useful evidence about the comparison with other Commonwealth agencies and regimes of a similar kind—I won't say the same kind, but compulsory regimes of a similar kind. The final point to make—

**Mr DREYFUS:** Stop there. That's another reason. I'd like you to take that on notice and come back to us in writing about the evidence that you're referring to. I don't want to take up any time now. I want you to reflect on the answer you've just given and come back to us in writing about the other evidence concerning comparable regimes and comparable powers, because I don't recall hearing any such evidence.

**Answer**

In evidence to the Committee on Friday 10 July 2020, the Director-General of Security, Mr Mike Burgess, and Deputy Director-General, Ms Heather Cook, said in relation to other Commonwealth bodies that have compulsory or coercive questioning powers:

> ***Senator FAWCETT****: Fantastic. Mr Burgess, as I was trying to say before, thank you for your evidence and your submission, but, more importantly, thank you to you and your organisation for the job they do in Australia. Could you just tell us what other Commonwealth bodies have compulsory or coercive questioning powers? I'm assuming ACIC and ASIC.*
>
> ***Mr Burgess****: I'm aware of ACIC, yes. I know others do—integrity commissions, I believe.*
>
> ***Ms Cook****: Yes, the office of the IGIS, ACIC, the Australian Securities and Investments Commission, the Australian Building and Construction Commission, the Australian Taxation Office, and the Commonwealth Ombudsman. Those are the ones that we're aware of that have compulsory questioning powers.*
>
> ***Senator FAWCETT****: So we have a number of Commonwealth agencies who can order somebody to appear for questioning at a given location, at a given time and, as necessary, bring documents with them. My question is: how many of those require what has been termed a double-lock approval, and how many can authorise the coercive questioning within their own organisation?*
>
> ***Mr Burgess****: You're correct. I understand, and I'm not the expert here, that most of them are actually more internal, and their oversight and authorisation is less than what we are asking for in this bill.*

## Question 3: Is it the policy intention that a minor may be questioned about other matters of politically motivated violence that are not the matter that was the basis on which the warrant was issued?

## Should questioning, and the production and seizure of records or other things, be limited to the questioning matter specified in the warrant?

## Should there also be a requirement that the minor intentionally engaged in the activities related to politically motivated violence?

**Senator McALLISTER:** I apologise, Mr Warnes; we are running short on time. I appreciate there are very difficult circumstances relevant to national security that the agencies seek to deal with and this legislation seeks to engage with, and that children are relevant. You don't need to convince me that that is true. I am just trying to understand a gap between what the government is saying is the effect of the legislation and the actual practical effect. The government is saying the warrant will only be available where the subject is a target, and that's one of the safeguards around the questioning of minors. But now you're saying that once the minor is subject to a warrant they can effectively be questioned about anything—even matters where they are not the target of an investigation.

**Mr Warnes:** Sorry; that's what I was trying to clarify, but I think you might've gone broader than what I was trying to say. It's still got to be in connection, but it might be that there is other information relevant to their matter. The questioning warrant still confines it, and the IGIS is there with the oversight. We've heard evidence from the IGIS today that, they say, it's too broad and outside the scope, and it will be limited back.

**Senator McALLISTER:** What the Law Council is saying to you—and can I ask you to please go and check this—is that there is a problem with the drafting, and that the minor may be questioned on another matter of politically motivated violence that is not the matter that was the basis on which the warrant was issued. Is that the policy intent or is that—

**Mr Warnes:** I'm happy to take that on notice and look at it further.

**Answer**

The Bill provides that the Attorney-General may issue a minor questioning warrant if satisfied, among other things, that:

- there are reasonable grounds for believing that the person has likely engaged in, is likely engaged in, or is likely to engage in activities prejudicial to the protection of, and of the people of, the Commonwealth and the States and Territories from politically motivated violence, whether directed from or committed within, Australia or not, and
- there are reasonable grounds for believing that the warrant will substantially assist in the collection of intelligence that is important in relation to a minor questioning matter.

The effect of this threshold is that a questioning warrant may only be issued in relation to a minor where the minor is the target of an investigation in relation to politically motivated violence (the Explanatory Memorandum refers). The existing questioning threshold would not enable a questioning warrant to be issued in relation to a minor who is an innocent ‘third-party’, who is not suspected of themselves having likely engaged in, being likely engaged in, or being likely to engage in activities in relation to politically motivated violence at the time of seeking the warrant.

Like adult questioning warrants, the drafting is intended to ensure that ASIO may act on intelligence where the minor is questioned in relation to the questioning matter specified in the warrant and incidentally provides critical intelligence in relation to another matter of politically motivated violence.

It is not intended that a minor must be intentionally engaging in activities prejudicial to security in order for the warrant to be issued. This power will be used to collect vital intelligence in relation to activities of politically motivated violence – not to generate evidence against the minor. Regardless of whether the minor is aware of whether they are engaging in the activities or not, the intelligence ASIO is able to solicit from the minor may be critical in relation to that particular investigation and the protection of Australians from acts of politically motivated violence.

If questioning was restricted to the particular matter in relation to which the warrant was sought, this may prevent ASIO from gathering information that may assist to identify terrorism-related activities, and predict or disrupt terrorist acts. For example, a situation where ASIO seeks a questioning warrant for a minor about a planned knife attack only to discover, in the course of questioning, that there was an improvised explosive device (IED) attack also being planned and consequently ASIO was unable to pursue lines of questioning in relation to the IED intelligence in a timely way (i.e. without needing to seek a second questioning warrant for the second matter).

Limiting the production of records or other things to *the* politically motivated violence that the minor is believed to have likely engaged in, is likely engaged in, or is likely to engage in may prevent ASIO from obtaining critical intelligence that may be instrumental in anticipating or disrupting other serious terrorism-related activities.

As an example of how this might work in practice, ASIO raised a relevant case study in its Submission to the PJCIS:

> ‘A network of associates, a number of whom are under 16 years of age, support overseas Islamist extremist groups and terrorism. ASIO assesses that the (adult-age) leader of the group has expressed his intent to conduct a suicide attack—and that other group members (all minors) separately expressed support for a terrorist attack. ASIO assesses an unidentified number of group members may be involved in an imminent onshore terrorist attack. All members of the group—including those under 16 years of age—are subjects of ASIO investigation in relation to politically motivated violence. However, law enforcement agencies have advised that activities of individuals in the group do not reach the threshold for counter-terrorism offences.
>
> The updated compulsory questioning framework would allow ASIO to interview one or more of the under 16 year olds and seek insights into the minors’ intent and capability…’

## Question 4: Should the framework include an Independent Child Advocate to ensure that the best interests of the minor are appropriately protected?

**Senator McALLISTER:** The Law Council makes the suggestion that a children's advocate system could be used, as it is in the Family Court jurisdiction, and that that advocate may have a set of skills that go specifically to children's psychological and cognitive requirements and physical health requirements. That's different to what a lawyer brings to the table. I don't ask for a response today, but I ask that the department consider that proposal and provide on notice some response to the proposal that a children's advocate system be contemplated.

**Mr Coles:** We can take that on notice, Senator.

**Senator McALLISTER:** Thank you very much. That's all.

### Answer

The Bill provides robust safeguards to protect minors in addition to ASIO's existing considerations in relation to operational planning for activities involving minors. This includes the presence of the minor's lawyer and a minor's representative to represent the minor's best interests during questioning. In addition, the independent prescribed authority's role is to ensure that the questioning is conducted within the confines of the law and appropriately in the circumstances.

The Bill also provides that the Inspector-General of Intelligence and Security (**IGIS**) may be present at any point throughout the exercise of power under the warrant and that the prescribed authority may suspend questioning should the IGIS raise any concerns to the prescribed authority.

In evidence to the Committee on 10 July 2020, the IGIS advised that she expects that the historical practice of the IGIS, or a senior staff member of the IGIS, attending and closely reviewing the questioning process will continue under the new framework – particularly in relation to minors.

The Statement of Procedures made pursuant to section 34AF of the Bill will provide additional safeguards in relation to the minimum requirements and conduct of those exercising authority under the warrant – particularly in relation to minors.

It is important to note that, in its consideration of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015, the Committee recommended that the Bill be amended to remove the role of the court appointed advocate. The Committee considered that given the existing safeguards in the control order regime, a more effective and appropriate safeguard is to ensure the right of a young person to legal representation.

The Government would need to carefully consider any recommendation to introduce an Independent Child Advocate into the proposed framework to ensure that there are no unintended consequences or operational risks.

## Question 5: Were any previous questioning warrants hampered by the current two-step authorisation process to the extent that public safety was threatened by the delay or inefficiency?

**Senator KENEALLY:** Thank you very much; I appreciate it. If I can go to the issuing authority—and I know that Mr Dreyfus has asked some questions about this already—and the two-step process of warrant authorisation. I recognise that this was a finding, not a recommendation, of the committee in 2018. However, it is a significant change to the way that these warrants are authorised. Are you aware whether any of the 16 questioning warrants that have been issued to date were in any way hampered by the two-step process of warrant authorisation to the extent that public safety was threatened by delays or inefficiencies?

**Mr Coles:** It's an operational matter, Senator, so we'd have to take that on notice.

**Senator KENEALLY:** I will put that on notice to you. So if I can ask the question this way: espionage and foreign interference, I can imagine, in comparison to terrorism are a far slower moving target set, so why the need to remove that authorisation to have a more efficient or streamlined process? Where is the inefficiency in getting a judicial authorisation for a warrant relating to espionage or foreign interference?

**Answer**

While the multi-step issuing process has not caused definite operational risk in past cases involving questioning warrants, the current two-step authorisation process may cause problems in the future if there is an imminent threat to public safety. Although this would arise in exceptional circumstances, the gravity of harm may be severe.

## Question 6: Is there a reason beyond efficiency and consistency with other powers that the role of the issuing authority should be removed? How many ASIO warrants per year are issued by the Attorney-General?

**Senator KENEALLY:** I understand the argument that there are other warrants that the Attorney-General signs off on, but this is a rather extraordinary warrant power. It doesn't particularly answer my question. Just because it's done in other areas doesn't mean it should be done in this one because this is a particularly intrusive power. I would note that the INSLM's report which has come out in relation to the access and assistance act, the encryption laws, recommends having a judicial authorisation over those powers. We, as a committee, have to consider this question of what is an appropriate authorisation process. So, again, to the extent that you can, can you provide the committee on notice whether previous warrants have been hampered by a lack of a so-called efficiency, or if there is a reason beyond efficiency and consistency with other powers that we should not have a judicial authorisation?

This is a significant issue that's been raised by submitters to this inquiry.

**Mr Warnes:** Absolutely, and we're happy to look at that further, but I think Mr Coles gave evidence earlier about the fact that the committee considered all of that evidence in 2017 and made a finding—agreed, it wasn't a recommendation, but it was a finding which we took as very persuasive when developing the laws, and government made the decision to put that into effect in the legislation.

**Senator KENEALLY:** In relation to this question, do you know how many ASIO warrants per year the Attorney-General signs off on?

**Mr Warnes:** I would have to take that on notice. There are a range of warrants, and I don't know the figures off the top of my head. Indeed, some of those aren't publicly releasable figures. Some of them are classified, and those figures don't generally make it into the public annual reports. So I'd have to be a little bit careful about what I can say in relation to that.

**Senator KENEALLY:** Could you consider what you could provide to the committee in confidence, then, because one of the things we would need to consider is the increasing number of warrants that can only be approved by one individual and whether or not any of them have a double-lock or independent authorisation process. So to the extent that you can answer that question for the committee, even if only in confidence, that would be useful.

**Mr Warnes:** Not a problem.

**Answer**

In its 2018 report, the Committee found it appropriate that the Attorney-General issue questioning warrants and separately authorise apprehension when this may be required (at [3.123] – [3.124]). The Committee noted this would be a higher level of authorisation than is required for some other domestic compulsory questioning regimes, some of which provide for internal authorisations (at [3.122] – [3.123]). The Bill is designed consistent with the Committee's views in this regard.

As noted in the Department's submission, streamlining the authorisation process for issuing a questioning warrant will ensure that the powers are suitably tailored to the current operational environment. Significant changes in Australia's security environment have seen a rise in low complexity attacks by lone actors or small groups involving the use of weapons that are easy to acquire, such as knives or vehicles. This has significantly changed the pace of ASIO's investigations, as opportunities to identify and intervene are limited. Removing the multi-step authorisation process will ensure that ASIO's compulsory questioning powers are operationally effective in a fast-paced, high-threat environment.

Please refer to ASIO's response to the Committee in relation to the number of ASIO warrants issued by the Attorney-General per year.

## Question 7: Would a similar definition of 'emergency' as contained in the TOLA Act be appropriate for the questioning framework?

**Senator KENEALLY:** Yes, I've had that sentence read out to me. I think I may even have read it out earlier today. But, nonetheless, that's fairly broad—'prejudicial to national security' and 'would unreasonably delay'. You could, I would have thought, force most scenarios into that definition. The INSLM pointed to a definition of 'emergency' in the TOLA act. I would ask you to consider whether or not that would be an appropriate definition to further outline when these powers could be sought under an oral application. You can take that on notice if you like.

**Mr Warnes:** I would be happy to look at it further, but I just note that TOLA is a very different regime, and what's contemplated under TOLA is very different to what is contemplated here with a questioning warrant, so we'd have to give further consideration to whether it's the most appropriate.

**Answer**

The Bill introduces a new ability for the Director-General to make a request to the Attorney-General to issue or vary a questioning warrant orally in person, or by telephone or other means of communication, where the Director-General reasonably believes that the delay caused by making a written request may be prejudicial to security (ss 34B(2)(b) and 34BG(2)(b)). The Bill provides a corresponding ability to the Attorney-General to issue or vary a warrant orally in such circumstances (ss 34BF(1)(b) and 34BG(6)(b)). This threshold is consistent with the existing oral authorisation threshold in the *Australian Security Intelligence Organisation Act 1979* (**ASIO Act**) for ASIO's special intelligence operations (s 35B(2)(b)).

The intention is to provide the Director-General and Attorney-General with sufficient flexibility to determine circumstances where a delay caused by making a written application may lead to acts which are prejudicial to security. This is particular significant for questioning warrants concerning espionage and foreign interference, where a delay could seriously prejudice security without resulting in imminent risk of harm to an individual. For example, an Australian clearance holder working for a foreign government may have removed highly classified documents from the workplace. The clearance holder may seek to destroy the classified material or disclose it to someone to the detriment of Australia's national security. Obtaining a warrant orally would allow law enforcement partners to immediately apprehend the clearance holder for questioning under a warrant.

The *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (TOLA Act) does not include a definition of 'emergency'.

The TOLA Act provides that certain requests or notices may be given orally where there is either an imminent risk of serious harm to a person, or substantial damage to property exists (*Telecommunications Act 1997* ss 317H(2) and 317M(2)). This is not suitable in the ASIO questioning warrant context as the heads of security the Bill applies to the questioning powers – politically motivated violence, espionage and acts of foreign interference – have broader operation than risk of harm to a person or damage to property. Adopting such an approach for the proposed questioning powers in the Bill would prevent ASIO from seeking warrants in urgent circumstances that would prejudice security, but which would not involve harm to individuals or property damage.

# Part II – Responses to Written Question on Notice – Senator Kristina Keneally

**1. Have any other countries in the FVEY (Canada, UK, US and NZ) equipped their intelligence agencies with compulsory questioning powers akin to those you currently have and those proposed under the ASIO Amendment Bill?**

**a. If yes, please provide detail (including countries, legislation, key provisions and examples of use in the last 5 years).**

**b. For those countries without comparative powers, is there similar legislation that they use in circumstances where they want to compulsorily question people in relation to terrorism/political violence/espionage/foreign interference? For example, please note if law enforcement agencies have compulsory questioning powers.**

The Canadian Secret Intelligence Service (CSIS) had investigative hearing provisions in relation to terrorism offences between 2001 and 2007, and separately between 2013 and 2018. The provisions gave a judge the power, on application from a police officer, to order a person to appear before the judge and to answer questions about a terrorism offence that has been or will be committed and to bring along anything in his or her possession relevant to the issue. The judge also had the authority to issue an arrest warrant for a person who refused to attend such a hearing. The use of an investigative hearing was invoked once, but the hearing was not held. The investigative hearing provisions sunsetted on 25 October 2018.

The United Kingdom MI5 intelligence gathering powers are set out in the *Intelligence Services Act 1994* (UK) (ISA) and *Regulation of Investigatory Powers Act 2000* (UK) (RIPA) and the *Investigatory Powers Act 2016* (UK). MI5 has a range of powers to gather intelligence through covert human intelligence sources, surveillance, interception of communications, data analysis, and equipment interference. The *Investigatory Powers Act 2016* also includes some disruption powers, for example through warrants for equipment interference.

The United States Federal Bureau of Investigation's (FBI) powers to engage in intelligence gathering are outlined in the *2008 Attorney-General's Guidelines for Domestic FBI Operations*. The FBI may use intrusive methods of surveillance, such as recruiting and tasking informants, and engaging in indefinite physical surveillance of homes, offices and individuals. The FBI does not have the direct power to coercively question or detain citizens. However, the FBI may benefit from information that has been obtained from a person who has been coerced—possibly after being detained—to answer questions before a grand jury. Section 203 of the PATRIOT Act made it permissible to disclose information given before a grand jury. It is now permissible to disclose matters that "involve foreign intelligence or counterintelligence … or foreign intelligence information" to "any Federal law enforcement, intelligence, protective, immigration, national defence, or national security official in order to assist the official receiving that information in the performance of his official duties".

The *Intelligence and Security Act 2017* (NZ) sets out the purpose and shared objectives and functions of the Government Communications Security Bureau and New Zealand Security and Intelligence Service (NZSIS). Activities that may be authorised and conducted by the NZSIS under a warrant include surveillance, interception, searches of places or things, seizure of physical things or non-physical things,

requests to foreign partners to carry out activities under an NZSIS warrant, any action required to protect secret collection capabilities, and collecting intelligence through human intelligence sources.

## 2. Are there any other countries (outside the FVEY) where comparable questioning powers have been legislated/used?

The Department and ASIO are not aware of comparable international domestic intelligence agencies that have a similar ability to ASIO to utilise compulsory questioning powers in order to gather critical intelligence. However the role and functions of these agencies and their ability to partner with law enforcement and other intelligence gathering agencies are different in different countries. It is not a direct comparison. It is important to consider the utility of ASIO's questioning powers in gathering critical intelligence in order to achieve ASIO's objectives as a domestic intelligence agency, and how those powers compare to Commonwealth and State agencies that hold compulsory questioning powers within Australia.

## 3. How many different warrant approval mechanisms now exist for ASIO?

## a. Please list each type of warrant, the activities in question and the relevant approval authorities.

The table below sets out ASIO's existing warrant approval mechanisms, and similar non-warrant mechanisms.

| Legislation | Warrant | Activities | Authorisation |
|---|---|---|---|
| *Australian Security Intelligence Organisation Act 1979* | Search Warrant – s 25 | Enter and search a premises | Attorney-General |
| | Computer Access Warrant – s 25A | Enter premises and use target computer for the purposes of gaining access to data | Attorney-General |
| | Surveillance Device Warrant – s 26 | Installation and use of a surveillance devices to listen, record, observe or monitor words sounds or signals, or track a person | Attorney-General |
| | Inspection of Postal Articles Warrant – s 27 | Access to postal articles to inspect and make copies of those articles | Attorney-General |
| | Inspection of Delivery Service Articles Warrant – s 27AA | Access to articles delivered by a delivery service provider for the purposes of inspecting and making copies of those articles | Attorney-General |
| | Foreign Intelligence Warrant – s 27A | Warrant for the performance of ASIO's functions under paragraph 17(1)(e) – to obtain within Australia, foreign intelligence<br>Authorises search, computer access, surveillance device and postal article inspection. | Attorney-General |
| | Identified Person Warrant – s 27C | Warrant in relation to a particular person – providing conditional approval for ASIO to search a premises or a person, computer access, use surveillance devices, access postal articles in the course of post and access articles being delivered by a delivery service. | Attorney-General |
| | Assistance to Access to Data – s 34AAA | Order to require a person with knowledge of a device to provide assistance to ASIO to gain access to that device. | Attorney-General may make an *order* |

| | | | |
|---|---|---|---|
| | Questioning and Questioning and Detention Warrants – Division 3 of Part III | Allows ASIO to compulsorily question or detain and question a person for the purposes of collecting intelligence in relation to a terrorism offence. | Attorney-General provides consent to an application to an issuing authority (judge acting in personal capacity) who may authorise the warrant |
| | Special Intelligence Operations – Division 4 of Part III | Allows ASIO to engage in unlawful conduct to assist the Organisation in the performance of one or more special intelligence functions. | Attorney-General provides *authority* |
| *Telecommunications (Interception and Access) Act 1979* | Telecommunications Service Warrant – s 9 | Warrant to intercept telecommunications in relation to a particular telecommunications service | Attorney-General |
| | Named Person Warrant – s 9A | Warrant to intercept telecommunications in relation to a particular person | Attorney-General |
| | Emergency Warrant for ASIO to intercept telecommunications – s 10 | Authorises activities under s 9 and s 9A warrants with Director-General approval if the Director-General is satisfied that if the interception does not commence before a warrant can be issued and made available by the Attorney-General, security will be or is likely to be seriously prejudiced. | Director-General of Security |
| | Telecommunications service warrant – Foreign Intelligence – s 11A | Warrant to intercept telecommunications in relation to a particular telecommunications service for the purpose of obtaining foreign intelligence relating to a matter specified in a notice. | Attorney-General |
| | Named Person Warrant – Foreign Intelligence – s 11B | Warrant to intercept telecommunications in relation to a particular person for the purpose of obtaining foreign intelligence relating to a matter specified in a notice. | Attorney-General |
| | Foreign Communications Warrant for foreign intelligence collection – s 11C | Warrant to intercept foreign communications for the purpose of obtaining foreign intelligence. | Attorney-General |

| | | | |
|---|---|---|---|
| | Access to telecommunications interception – Division 3 of Part 4-1 | Authorise the disclosure of specified existing or prospective information or documents in relation to a person. | Director-General of Security, Deputy Director-General of Security or ASIO employee or affiliate covered by an approval by the Director-General |
| | Journalist Information Warrant – s 180J | Allows ASIO to make an authorisation to disclose specified existing or prospective information or documents in relation to a person who is a journalist. | Attorney-General |

**4. How many ASIO warrants per year does the Attorney General currently sign off on?**

**a. How does this compare to the previous five years? (please provide relevant figures)**

**b. Can you please break down the warrants by type?**

**c. On average, how long does it take the Attorney General to consider and sign off on a warrant request from ASIO? i.e. what is the average timeframe from receipt to return. If the timeframe varies for different warrant types, please provide timings for each.**

Please refer to ASIO's response to the Committee in answer to this question.

**5. For the 16 Questioning Warrants issued to date under the ASIO please outline the timings involved in obtaining authorisation, specifically; the time taken to write up the request within ASIO, the time taken for the Attorney General to sign off, time taken for the issuing authority to issue the warrant. a. Were there any concerns around delays in this process? Please provide specifics (causes, timing) in regard to any delays.**

Please refer to ASIO's response to the Committee in answer to this question.

# Part III – Responses to Written Questions on Notice – The Hon Mark Dreyfus QC MP

The Department has not responded to the questions posed on the Government's response to the recommendations made by the Law Council of Australia. This is a matter for Government.

**(1) In respect of Recommendation 1 of the Law Council's submission (the restriction of questioning to children who are targets):**

**(a) What is the Department's response to this recommendation?**

**(b) What are the likely consequences / implications of implementing this recommendation?**

Please refer to question 3 of Part I above.

**(2) In respect of Recommendation 2 of the Law Council's submission (the best interests of the child as a primary consideration):**

**(a) What is the Department's response to this recommendation?**

The Bill as it stands requires the Attorney-General to consider the minor's best interests before issuing a warrant (s 34BB(2)). As stated in the Explanatory Memorandum, this is a primary consideration in deciding whether to issue a minor questioning warrant.

**(b) What are the likely consequences / implications of implementing this recommendation?**

The Attorney-General's consideration of the best interests of a minor is a primary consideration in deciding whether to issue a minor questioning warrant.

**(3) In respect of Recommendation 3 of the Law Council's submission (factual considerations in assessing a child's best interests):**

**(a) What is the Department's response to this recommendation?**

The Bill requires the Attorney-General to consider the minor's best interests before issuing a warrant (s 34BB(2)). The Bill provides that the Attorney-General must take into account the following factors when considering whether to issue a minor questioning warrant
(s 34BB(3)):

- the age, maturity, sex and background (including lifestyle, culture and traditions) of the person;
- the physical and mental health of the person;
- the benefit to the person of having a meaningful relationship with the person's family and friends;
- the right of the person to receive an education; the right of the person to practise the person's religion;

- any other matter the Attorney-General considers relevant.

These considerations were modelled partially on Subdivision BA of Part VII of the *Family Law Act 1975* and are designed to ensure that due regard is given to the best interests of the child, in line with Article 3(1) of the *United Nations Convention on the Rights of the Child*. The Department consulted with the Attorney-General's Department, including the Office of International Law, in developing this list. These provisions are also consistent with other national security legislation, including the Counter-Terrorism (Temporary Exclusion Orders) Act 2019, which allows an order to be made that prevents a person entering Australia for a limited time (see ss 10 and 16), and the control orders regime (see s 104.4(2A) of the Criminal Code)

Whether a minor was in a situation of vulnerability, and the care, protection and safety of the child, would be considered in assessing the minor's physical and mental health. When assessed alongside the other factors included in the Bill – including age, maturity, and background (including lifestyle, culture and traditions) – the Department expects that the Attorney-General's considerations could include whether the child has a physical or intellectual, cognitive or developmental disability, their developmental status, including developmental delays in speech, literacy or other aspects of cognitive development (not only their 'maturity'), and whether they belong to a minority group.

Notably, the list included in the Bill also includes 'any other matter the Attorney-General considers relevant'. This is a broad factor that would enable the Attorney-General to take into account any of the factors referred to in the Law Council's submission as appropriate in the circumstances.

## (b) What are the likely consequences / implications of implementing this recommendation?

The best interests test contained in the Bill as it stands was designed to be consistent with Australia's international human rights obligations including with regard to the best interests of the child.

## (4) In respect of Recommendation 4 of the Law Council's submission ('sufficient information' threshold for best interests test):

## (a) What is the Department's response to this recommendation?

The Bill provides that the Attorney-General must take into account the relevant matters in assessing a minor's best interests (contained in s 34BB(3)) only to the extent that the matters are known to the Attorney-General and the matters are relevant. This provision is also consistent with other national security legislation, including the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019*, which allows an order to be made that prevents a person entering Australia for a limited time (see ss 10(5) and 16(7)). The Bill includes a mechanism to ensure the Attorney-General is appropriately informed: the Director-General is required to provide to the Attorney-General with all the information known to the Director-General in relation to the relevant matters (s 34B(4)(f)).

This approach recognises that ASIO may not always have perfect information concerning the minor available to it when seeking a warrant. The Bill ensures that the Attorney-General must be provided with all relevant information held by the Director-General, but does not preclude obtaining a warrant to collect potentially vital intelligence where perfectly complete information is not available. For example, if ASIO did not have specific information about the minor's lifestyle or education, this would not necessarily preclude the Attorney-General from granting a warrant if the warrant threshold was otherwise satisfied.

## (b) What are the likely consequences / implications of implementing this recommendation?

Requiring the 'best interests' assessment to be conducted on the basis of 'sufficient evidence' could make it difficult for ASIO to obtain a warrant to collect potentially vital intelligence, even in circumstances of extreme threats to security. The Bill currently provides the Attorney-General flexibility in conducting the

assessment having regard to the real possibility that ASIO may not know everything about the relevant minor. Removing that flexibility by including a specific threshold of information could reduce the effectiveness of the questioning regime and therefore ASIO's ability to protect against threats to security. Further detailed consideration of this proposal would be required in order to fully understand the operational implications and any unintended consequences.

## (5) In respect of Recommendation 5 of the Law Council's submission (the obligation to re-consider the best interests of the child):

## (a) What is the Department's response to this recommendation?

The Attorney-General must consider the best interests of the minor at the time of issuing a warrant (s 34BB(2)). If the Director-General is satisfied that the grounds for issuing the warrant have ceased to exist, the Director-General must inform the Attorney-General and the IGIS, and ensure that action under the warrant is discontinued (s 34J).

There are a number of safeguards built into the Bill to ensure that questioning is not conducted inappropriately. This includes the role of the prescribed authority to supervise the questioning and give directions (s 34DC(1)(d)), and to suspend questioning at the request of the IGIS if the IGIS is concerned about impropriety or illegality in connection with exercise of powers under the warrant (s 34DM).

## (b) What are the likely consequences / implications of implementing this recommendation?

Any implementation of the Law Council's recommendation would need to be carefully considered to ensure there are no unintended consequences. This could include, for example, the consequences of having to revoke a duly-authorised questioning warrant in circumstances where questioning would otherwise provide vital intelligence to ASIO in connection with a matter of politically motivated violence. This could reduce the effectiveness of the questioning regime and therefore ASIO's ability to protect against threats to security. A requirement to conduct exhaustive and regular proactive checks for changed circumstances could add considerable delay to the warrant execution and/or be impossible to demonstrate conclusively.

## (6) In respect of Recommendation 6 of the Law Council's submission (the last resort requirement for minor questioning warrants):

## (a) What is the Department's response to this recommendation?

The Bill provides that the Attorney-General must be satisfied that having regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued. This is the same threshold that exists in the current questioning framework in the ASIO Act.

Until 2014, the legislative threshold for issuing a questioning warrant required the Attorney-General to be satisfied that relying on other methods of collecting that intelligence would be ineffective. This operated, in effect, as a last resort requirement, in that consent could not be granted if there were any other intelligence collection methods available that were not ineffective.

This requirement did not consider whether any other available methods:

- may be significantly less effective than a questioning warrant,
- may take considerably longer in time critical circumstances, or
- may involve a considerably greater risk to the lives or safety of persons collecting the intelligence.

In 2012 the then Independent National Security Legislation Monitor, Bret Walker SC, concluded it would be reasonable to substitute the 'last resort' requirement in 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. The Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 implemented the Government's response to this recommendation.

### (b) What are the likely consequences / implications of implementing this recommendation?

Implementing such a recommendation could result in ASIO being required to use less or ineffective intelligence capabilities, may result in ASIO using methods that take considerably longer to obtain intelligence in time critical circumstances, involve a considerable and unnecessary risk to the lives or safety of ASIO officers, and delay ASIO's ability to obtain a questioning warrant.

## (7) In respect of both the preferred and alternative options in Recommendation 7 of the Law Council's submission (the removal of power of apprehension against children):

### (a) What is the Department's response to this recommendation?

Targets of an investigation in relation to politically motivated violence may be, or have knowledge of, a significant threat to the safety and security of Australians. In the absence of a detention power, ASIO must have an alternative mechanism to ensure the subject of a questioning warrant does not fail to attend questioning, destroy things, or alert others to ASIO's investigation. This is achieved by the apprehension power. An apprehension framework achieves the legitimate objective of ensuring the integrity of questioning and accordingly protects Australia's national security interests.

Please refer to question 6 of Part III above for the Department's views on the 'last resort' issuing threshold.

### (b) What are the likely consequences / implications of implementing this recommendation?

Removing the apprehension power for minors could enable a minor who is subject to a questioning warrant to fail to attend questioning, destroy things, or alert others to ASIO's investigation – with no mechanism for preventing this. A number of safeguards have been included in the framework to enable ASIO to appropriately question minors and, in limited circumstances, apprehend minors.

## (8) In respect of Recommendation 8 of the Law Council's submission (the prohibition on post-charge questioning of children):

### (a) What is the Department's response to this recommendation?

The provisions in the Bill relating to the use and disclosure of questioning material post-charge and post confiscation application closely mirror equivalent provisions in the *Australian Crime Commission Act 2002* and the *Law Enforcement Integrity Commissioner Act 2006*. The provisions in the Bill apply to both minors and adults. Under Australian law, a 14 year old is considered to be criminally responsible for an offence, and may be charged and interrogated by police.

The Bill:

- introduces provisions to authorise questioning following the laying of charges or after confiscation application proceedings have commenced against a person who is the subject of questioning, or

where charges or a confiscation proceeding are imminent against that person, and allows questioning to cover matters that are the subject of those charges or proceedings,

- requires the prescribed authority to give directions to limit the use or disclosure of questioning material in order to protect the subject's fair trial, and
- otherwise regulates the use and disclosure of questioning material and derivative material.

Any information obtained during questioning is not admissible in evidence against the subject in a criminal proceeding, except in limited circumstances – for example, for an offence for providing misleading or false information, which is a core backstop of the compulsory questioning framework.

This mechanism has been included to ensure that ASIO is not precluded from questioning a subject because charges are imminent or have been laid, noting the significant difference in ASIO's functions – intelligence collection – compared to the evidence collection functions of law enforcement.

## (b) What are the likely consequences / implications of implementing this recommendation?

Amending the Bill to preclude post-charge questioning of minors would prevent ASIO from questioning minors on a politically motivated violence matter where charges had been laid or were imminent, regardless of the gravity of the threat to Australia's security. There are clear risks that ASIO would be unable to collect necessary intelligence in respect the relevant politically motivated violence matter, and therefore be limited in its ability to protect the Australian community.

## (9) In respect of Recommendation 9 of the Law Council's submission (the deferral of the commencement of questioning of minors):

## (a) What is the Department's response to this recommendation?

Under the Bill, there are no circumstances in which a minor may be questioned in the absence of a lawyer (s 34FA(1)).

Where a minor is not subject to an immediate appearance requirement, the prescribed authority must give a direction deferring questioning for such time as the prescribed authority considers reasonable to enable a lawyer for the subject to be present, the minor to be given facilities to contact a lawyer (s 34FC(3)). If the prescribed authority is satisfied that such time as is reasonable to enable a lawyer for the subject to be present has passed, the prescribed authority must give a direction appointing a lawyer to be present during questioning, and that the subject may be questioned in the presence of that lawyer.

The Bill deliberately does not prescribe a time limit for what is 'reasonable'. This allows the prescribed authority to take into account all relevant circumstances at the time of questioning. As noted in paragraph 447 of the Explanatory Memorandum:

> In determining what amount of time would be 'reasonable' the prescribed authority may take into account the time the subject has already had to arrange for a lawyer to be present, for example, where the person has had several days' notice of the questioning, the prescribed authority may consider that a reasonable time has already been provided. The intention of these sections is to overcome the possibility of questioning being indefinitely deferred if the subject either refuses to contact a lawyer (but does not agree to be questioned without one), or contacts a lawyer who cannot be present in a reasonable time, for example because they are overseas. It is necessary to curtail the person's right to choose a specific lawyer in these circumstances, to prevent the possibility that the purpose of the questioning framework could be frustrated entirely simply by a person refusing to contact a lawyer, or by choosing a lawyer who is not able to arrive at questioning in a reasonable time.

### (b) What are the likely consequences / implications of implementing this recommendation?

Removing the prescribed authority's discretion to determine when a reasonable time has passed could result in the indefinite deferral of questioning. However, further detailed consideration of this proposal would be required in order to fully understand the operational implications and any unintended consequences.

## (10) In respect of Recommendation 10 of the Law Council's submission (the rights of non-lawyer representatives to raise concerns):

### (a) What is the Department's response to this recommendation?

There is no prohibition on a non-lawyer minor's representative raising concerns during questioning. There are no restrictions on a non-lawyer minor's representative's ability to intervene in questioning. If the prescribed authority considers that the minor's representative's conduct is unduly disrupting questioning of the subject, the prescribed authority may direct the removal of the minor's representative from the place of questioning

The Bill includes significant other safeguards to protect the welfare of minors during questioning. These include that:

- The prescribed authority must ensure that the subject is aware of their rights and responsibilities under a questioning warrant.
- A minor may have a parent, guardian or other support person present during questioning.
- A lawyer must be present before questioning can commence.
- Minors must be provided with a break in questioning every two hours.
- The IGIS may be present at questioning, and if they choose to raise a concern with the prescribed authority, questioning may be suspended until the concern is addressed.

### (b) What are the likely consequences / implications of implementing this recommendation?

The Bill does not prohibit a non-lawyer minor's representative raising concerns during questioning.

## (11) In respect of Recommendation 11 of the Law Council's submission (the Independent Child Advocate):

### (a) What is the Department's response to this recommendation?

Please refer to question 4 of Part I above.

### (b) What are the likely consequences / implications of implementing this recommendation?

Please refer to question 4 of Part I above.

## (12) In respect of Recommendation 12 of the Law Council's submission (the annual reporting on minor questioning warrant statistics):

## (a) What is the Department's response to this recommendation?

The Bill retains the requirement for ASIO to provide the following details in its annual report:

- the number of requests made during the period;
- the number of warrants issued during the period; and
- the number of times persons were apprehended during the period.

It is generally accepted that the level of detail given to the public regarding ASIO's activities is limited in order to protect the classified nature of ASIO's operations. As such, ASIO's annual reporting requirements do not currently include any specific details about the kinds of person in relation to whom warrants are sought and issued.

## (b) What are the likely consequences / implications of implementing this recommendation?

Consistent with ASIO's reporting requirements, ASIO would provide the number of questioning warrants in its unclassified annual report; but a breakdown of those involving minors could only be provided in a classified annex, as it reveals ASIO capability and targeting.

## (13) In respect of Recommendation 13 of the Law Council's submission (the integration of further protections for the rights of the child):

## (a) What is the Department's response to this recommendation?

The Bill includes numerous safeguards to protect the rights of the child. The proposed threshold for issuing a questioning warrant in relation to a minor is considerably higher than the proposed threshold for issuing an adult questioning warrant. To be the subject of a questioning warrant, a minor must be the target of an investigation in relation to politically motivated violence.

Further, in deciding whether to issue a warrant in relation to a minor, the Attorney-General must always consider the minor's best interests, including the following matters (if the matters are known to him and relevant):

- the age, maturity, sex and background (including lifestyle, culture and traditions) of the person,
- the physical and mental health of the person,
- the benefit to the person of having meaningful relationships with the person's family and friends,
- the right of the person to receive an education,
- the right of the person to practise the person's religion, or
- any other matter the Attorney-General considers relevant.

These considerations were modelled partially on Subdivision BA of Part VII of the *Family Law Act 1975* and are designed to ensure that due regard is given to the best interest of the child, in line with Article 3(1) of the *United Nations Convention on the Rights of the Child*. Additional safeguards in relation to the questioning of minors include the requirement that a lawyer be present at all times during questioning, and a mechanism for a parent or other appropriate representative to also be present

## (b) What are the likely consequences / implications of implementing this recommendation?

The best interests test contained in the Bill is consistent with Australia's international human rights obligations under Article 3(1) of the *United Nations Convention on the Rights of the Child*.

## (14) In respect of Recommendation 14 of the Law Council's submission (safeguards for persons with disabilities):

## (a) What is the Department's response to this recommendation?

ASIO has policies and procedures governing how compulsory questioning is conducted under the existing framework. These are currently being updated in line with the measures proposed in the Bill. These updated policies and procedures will continue to address ASIO's engagement with vulnerable subjects, including people with disabilities.

Section 34AG will provide that a subject must be treated with humanity and with respect for human dignity, and must not be subjected to torture or to cruel, inhuman or degrading treatment, by any person exercising authority under the warrant or implementing or enforcing a direction of the prescribed authority. The obligation to treat subjects humanely will ensure that persons with disabilities are treated appropriately.

In addition, the prescribed authority supervises questioning to ensure that the warrant is executed within the confines of the law and may make a number of directions in relation to the conduct of all people involved in the execution of a questioning warrant.

The IGIS may also be present at any search or screening of an individual, and the subject of a questioning warrant may make a complaint to the IGIS.

Collectively, these provisions provide robust safeguards to protect the rights of persons with disabilities.

Additional safeguards will be included in the statement of procedures to be made under section 34AF. For example, the existing statement of procedures issued under section 34C of Division 3 of Part III of the ASIO Act provides that:

- the subject must not be transported in a vehicle with inadequate ventilation or light, or in a way which would expose the subject to unnecessary physical hardship
- all persons present during questioning or any period of detention under a warrant must interact with the subject in a manner that is both humane and courteous, and must not speak to the subject in a demeaning manner, and
- the subject must not be questioned in a manner that is unfair or oppressive in the circumstances.

## (b) What are the likely consequences / implications of implementing this recommendation?

The Bill has been developed to balance safeguards to protect civil liberties against the need for ASIO to obtain potentially critical intelligence necessary to prevent acts of politically motivated violence (including terrorism).

## (15) In respect of Recommendation 15 of the Law Council's submission (judicial oversight of issuing: 'double lock' requirement):

## (a) What is the Department's response to this recommendation?

The authorisation process in the Bill is consistent with the findings of the Committee in its 2018 report.

As the First Law Officer of the Commonwealth with responsibility for the rule of law and oversight of intelligence agencies, the Attorney-General currently issues all other ASIO special power warrants in the ASIO Act. This includes search, surveillance device and computer access warrants. This provides ministerial oversight of the intended use of intrusive powers for national security purposes, and establishes ministerial accountability, a central principle of Australia's parliamentary system. In his Third Report of the Royal Commission on Intelligence and Security, Justice Hope highlighted that Ministers are required to accept clear responsibility for the agencies of the intelligence community and are accountable to Parliament for the agencies within it.

### (b) What are the likely consequences / implications of implementing this recommendation?

This would result in the same delays in applying for and executing a compulsory questioning warrant as the existing framework. In some cases, the delay may be operationally significant. It would maintain the departure from the existing authorisation process for a majority of ASIO's powers and be inconsistent with the findings of the 2018 Committee Report in relation to ASIO's existing questioning and detention warrant framework.

## (16) In respect of Recommendation 16 of the Law Council's submission (judicial authorisation of apprehension):

### (a) What is the Department's response to this recommendation?

Please refer to the response to question 15, above.

### (b) What are the likely consequences / implications of implementing this recommendation?

Implementing this recommendation could restrict ASIO's ability to efficiently execute warrants in time-sensitive circumstances, particularly where there is an imminent threat to public safety. This risk is particularly acute in relation to warrants authorising apprehension, where efficiency will be important in ensuring the subject of a questioning warrant does not fail to attend for questioning, destroy things, or alert others to ASIO's investigation. This would also result in two separate authorisation processes for questioning warrants based on whether apprehension is being sought by ASIO.

## (17) In respect of Recommendation 17 of the Law Council's submission (an issuing criterion of necessity):

### (a) What is the Department's response to this recommendation?

Before issuing a warrant, the Attorney-General must be satisfied that, amongst other things:

- there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to an adult (or minor) questioning matter; and
- having regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued (see sections 34BA and 34BB).

The Department considers that any assessment of 'reasonableness' inherently involves an assessment of necessity.

In addition, the Guidelines issued under section 8A of the ASIO Act apply broadly to all ASIO operations. In accordance with the Guidelines, ASIO would not request a questioning warrant in a situation where the

assessed threat does not justify the intrusion of executing a compulsory questioning warrant, or the intelligence can be obtained by other means.

ASIO ensures that its internal procedures, including those that relate to questioning warrants, are consistent with the Guidelines. In accordance with these principles, where possible, ASIO would seek to conduct a voluntary interview in preference to requesting a questioning warrant – compulsory questioning would almost never be the first option for obtaining intelligence.

### (b) What are the likely consequences / implications of implementing this recommendation?

The impact of altering the threshold to include a 'necessity' requirement could have unintended consequences. In particular, care would need to be taken to ensure that it did not result in a de facto 'last resort' test, entailing the issues noted above.

## (18) In respect of Recommendation 18 of the Law Council's submission (an explicit issuing criterion of proportionality):

### (a) What is the Department's response to this recommendation?

ASIO is bound by Guidelines made under section 8A of the ASIO Act. The current Guidelines stipulate that ASIO must operate in accordance with the principle that any means used for obtaining information must be proportionate to the gravity of the threat posed and the probability of its occurrence. Consistent with the Guidelines, ASIO would not seek a questioning warrant without first considering the proportionality of doing so.

As a result of the Guidelines and the high threshold for issuing a questioning warrant in the Bill, a questioning warrant would almost never be the first option for obtaining intelligence. ASIO would not request a questioning warrant in a situation where the assessed threat does not justify the intrusion of executing a compulsory questioning warrant, or the intelligence can be obtained by other means.

### (b) What are the likely consequences / implications of implementing this recommendation?

This would result in further inconsistencies across ASIO's powers, and potentially have the same effect as implementing another last resort criterion.

## (19) In respect of Recommendation 19 of the Law Council's submission (a potential exposure to multiple coercive powers):

### (a) What is the Department's response to this recommendation?

The fact that a person has been questioned under another compulsory questioning regime should not necessarily preclude ASIO from questioning them to gather relevant intelligence. In order to issue a warrant, the Attorney-General 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 an adult (or minor) questioning matter. It is unlikely that this threshold could be satisfied if the necessary intelligence had already been collected through a different compulsory questioning regime.

Of all comparable compulsory questioning regimes, only ASIO's is designed to enable the collection of intelligence in relation to politically motivated violence, espionage, and acts of foreign interference.

### (b) What are the likely consequences / implications of implementing this recommendation?

ASIO could consider whether the subject has been the subject of other coercive questioning powers; however this could introduce significant delays into the process through the need to conduct exhaustive checking with all agencies across multiple jurisdictions that have coercive powers as to whether the individual has been subject to these powers – which would have been undertaken for a different purpose. (i.e. not for security intelligence collection).

## (20) In respect of Recommendation 20 of the Law Council's submission (the issuing threshold for emergency oral questioning warrants):

### (a) What is the Department's response to this recommendation?

The Bill introduces a new ability for the Director-General to make a request to the Attorney-General to issue or vary a questioning warrant orally in person, or by telephone or other means of communication, where the Director-General reasonably believes that the delay caused by making a written request may be prejudicial to security. The Bill provides a corresponding ability to the Attorney-General to issue or vary a warrant in such circumstances. This threshold is consistent with the existing oral authorisation threshold for ASIO's special intelligence operations.

The intention is to provide the Director-General and Attorney-General with sufficient flexibility to determine circumstances where a delay caused by making a written application may lead to acts which are prejudicial to security (e.g. espionage and foreign interference) but do not risk immediate harm to an individual. For example, an Australian clearance holder working for a foreign government may have removed highly classified documents from the workplace. The clearance holder may seek to imminently destroy the classified material or disclose it to someone to the detriment of Australia's national security. Obtaining a warrant orally would allow law enforcement partners to immediately apprehend the clearance holder for questioning under a warrant.

There are also a number of additional oversight/reporting provisions in ss 34B(5)-(6) and ss 34BF(3) to ensure that this power is used appropriately.

### (b) What are the likely consequences / implications of implementing this recommendation?

A more restrictive definition of urgency would impede ASIO's ability to conduct compulsory questioning where the collection opportunity is short but the threat is related to long-term capability development by hostile actors. The proposed threshold in the Bill is consistent with the threshold for the oral applications for special intelligence operations in the ASIO Act.

## (21) In respect of Recommendation 21 of the Law Council's submission (the maximum period of effect for oral warrants):

### (a) What is the Department's response to this recommendation?

The Department does not consider there to be any functional difference between a warrant requested and authorised in writing at the outset, and a warrant initially requested and/or authorised orally and subsequently documented. On that basis, the Department considers that the approach taken by the Bill – that warrants authorised orally are valid for 28 days, in the same manner as warrants authorised in writing – is appropriate.

The maximum 48 hours timeframe for ASIO to make records provides accountability. A shorter timeframe would not be practical, noting that emergency warrants are likely to be issued in urgent circumstances that

could preclude the relevant individuals from making an immediate record of the request and/or authorisation.

## (b) What are the likely consequences / implications of implementing this recommendation?

This could present logistical issues if the 48 hours commences from when the warrant is signed – for example, the subject of the warrant may be due to return to Australia and may experience a significant flight delay. There may also be delays in ASIO and/or law enforcement agencies locating the subject of the warrant, or in the individual travelling to the place of questioning (especially if they are in a rural location).

## (22) In respect of Recommendation 22 of the Law Council's submission (the removal of post-charge questioning powers):

## (a) What is the Department's response to this recommendation?

In 2018 the Committee considered it beyond the scope of the review to make a definitive finding on whether post-charge questioning should be allowed under the questioning warrant framework. However, it did consider that if the Government were to bring forward such a power it must be introduced with adequate safeguards.

The Bill contains the following conditions and restrictions:

- The Attorney-General may authorise the questioning of a person where charges are imminent against him/her.
- The prescribed authority must give directions to limit the use or disclosure of questioning material in order to protect the subject's fair trial.
- A court may require the Director-General to make questioning material available to the court if the court considers it is in the interests of justice for the material to be made available to the subject or lawyer representing the subject.

The provisions closely mirror equivalent provisions in the *Australian Crime Commission Act 2002* and the *Law Enforcement Integrity Commissioner Act 2006*. The Bill contains a number of safeguards on use and disclosure to ensure that the subject of a post-charge questioning warrant is ensured a fair trial. Furthermore, the Bill imposes a higher legislative threshold for obtaining a questioning warrant, where the warrant is a post-charge or post-confiscation application.

Accordingly, the Department considers that the post-charge questioning provisions included in the Bill are appropriate, and largely reflect the Committee's commentary in its 2018 report.

## (b) What are the likely consequences / implications of implementing this recommendation?

This would mean that ASIO would not be able to compulsorily question either adults or minors post-charge. The operational impact of this restriction would be dependent upon the particular case – in some cases, it would mean that ASIO would not have the opportunity to obtain valuable intelligence.

## (23) In respect of Recommendation 23 of the Law Council's submission (quarantining information from prosecution agencies):

### (a) What is the Department's response to this recommendation?

As previously stated, the post-charge and post-confiscation application provisions ensure that questioning material is not used in a way that would prejudice a subject's fair trial. Section 34EC would specifically preserve a court's power to make any orders necessary to ensure the fair trial of a subject for questioning material or derivative material is not prejudiced by the possession or use of the material by a prosecutor of the subject.

Section 34E of the Bill would specifically authorise the use and disclosure of questioning material to obtain other material (derivative material). Consistent with the equivalent provisions in the *Australian Crime Commission Act 2002* and the *Law Enforcement Integrity Commissioner Act 2006*, derivative material will be admissible in a prosecution of the subject, but may only be provided to a prosecutor if the disclosure is:

- a pre charge disclosure of the material
- a post charge disclosure of derivative material obtained from pre charge questioning material, or
- a post charge disclosure of derivative material obtained from post charge questioning material made under a court order, the court having been satisfied that the disclosure is required in in the interests of justice.

### (b) What are the likely consequences / implications of implementing this recommendation?

This would have an operational impact if it prevented ASIO from sharing information for intelligence purposes.

## (24) In respect of Recommendation 24 of the Law Council's submission (judicial authorisation of post-charge questioning):

### (a) What is the Department's response to this recommendation?

Please refer to the response to question 15, above.

### (b) What are the likely consequences / implications of implementing this recommendation?

Implementing this recommendation could restrict ASIO's ability to efficiently execute warrants in time-sensitive circumstances, particularly where there is an imminent threat to public safety. This risk is particularly acute in relation to warrants authorising apprehension, where efficiency will be important in ensuring the subject of a questioning warrant does not fail to attend for questioning, destroy things, or alert others to ASIO's investigation.

## (25) In respect of Recommendation 25 of the Law Council's submission (the definition of 'questioning material' to cover things seized):

### (a) What is the Department's response to this recommendation?

The definition of 'questioning material' in section 34AB of the Bill does not expressly include things seized. The definition is modelled on the corresponding provisions contained in the *Australian Crime Commission Act 2002* and the *Law Enforcement Integrity Commissioner Act 2006*.

### (b) What are the likely consequences / implications of implementing this recommendation?

Implementing this recommendation would result in 'seized material' being included in the post-charge questioning framework. Consequently, such material could would be covered by a 'use immunity' and not be used in direct criminal prosecutions against the subject, except in limited circumstances, and the use of any derivative material would be regulated by the post-charge questioning framework. This could limit the deterrent effect the questioning framework has on criminal offences. The specific implications of the recommendation would need to be carefully considered to ensure there are no unintended consequences.

## (26) In respect of Recommendation 26 of the Law Council's submission (an extension of use immunity to seized items):

### (a) What is the Department's response to this recommendation?

Seized items are not expressly included in the direct use immunity. The post-charge questioning framework contained in the Bill is modelled on the corresponding provisions contained in the *Australian Crime Commission Act 2002* and the *Law Enforcement Integrity Commissioner Act 2006*.

### (b) What are the likely consequences / implications of implementing this recommendation?

Please refer to the response to question 25, above.

## (27) In respect of both the preferred and alternative options in Recommendation 27 of the Law Council's submission (persons eligible to be appointed as prescribed authorities):

### (a) What is the Department's response to this recommendation?

The current prescribed authority model has presented difficulties, as a number of appointees are unwilling or unable to serve in this capacity for an extended period of time, representing a barrier to the development of institutional expertise. For this reason, the pool of potential candidates has been broadened and the cascading requirement removed. In its 2018 report, the PJCIS accepted that a model reliant on retired judges may lead to a shortage of persons willing and able to perform the role of the prescribed authority.

Section 2.2.11 of the Department's first submission to this Review provides further information about the Government's decision to include existing legal practitioners with 10 years of experience and adequate knowledge and understanding within the eligibility criteria for prescribed authorities.

The Bill includes a number of other mechanisms to ensure the independence and propriety of prescribed authorities:

- There mechanisms to address conflicts of interest (s 34AD)
- There are restrictions on who may be appointed as a prescribed authority - ASIO employees or affiliates, the Director-General, AGS lawyers, IGIS officials, or staff members of a law enforcement or intelligence or security agencies are all ineligible (s 34AD(2))
- Prescribed authorities generally cannot be overruled (s 34BE(5); s 34DF(3)(b))
- Prescribed authorities generally cannot be removed, except in limited circumstances (s 34AD(9))

### (b) What are the likely consequences / implications of implementing this recommendation?

Removing the eligibility of lawyers for appointment as prescribed authorities would significantly limit the pool of suitable candidates for this role and potentially hamper ASIO's ability to efficiently execute a questioning warrant.

## (28) In respect of Recommendation 28 of the Law Council's submission (alternative amendments if lawyers are eligible to be appointed as prescribed authorities):

### (a) What is the Department's response to this recommendation?

Please refer to the response to question 27 above.

### (b) What are the likely consequences / implications of implementing this recommendation?

Please refer to the response to question 27 above.

## (29) In respect of Recommendation 29 of the Law Council's submission (the Governor-General as the appointing authority):

### (a) What is the Department's response to this recommendation?

As first law officer of the Commonwealth and with responsibility for oversight of the courts, the Department considers the Attorney-General is the appropriate person to appoint prescribed authorities.

### (b) What are the likely consequences / implications of implementing this recommendation?

Please refer to the response provided at question (a) above.

## (30) In respect of Recommendation 30 of the Law Council's submission (the Governor-General's mandatory powers of termination):

### (a) What is the Department's response to this recommendation?

The Bill reinforces the independence of prescribed authorities by the limited circumstances in which they can be removed. The Attorney-General may only terminate the appointment of a prescribed authority due to (a 34AD(9)):

- misbehaviour
- an inability to perform the duties of a prescribed authority due to physical or mental incapacity
- bankruptcy
- failure, without reasonable excuse, to comply with the obligation to disclose interests, or
- paid or unpaid work, or an interest, pecuniary or otherwise, that, in the Attorney-General's opinion, conflicts or could conflict with the proper performance of the prescribed authority's duties.

### (b) What are the likely consequences / implications of implementing this recommendation?

Implementing this recommendation would remove the Attorney-General's discretion as to whether a prescribed authority should be terminated in all the circumstances. This could be, for example, due to a conflict that arose during the prescribed authority's tenure without their knowledge – and which did not affect their performance – or a bankruptcy that might not otherwise affect their ability to perform their role. In extreme circumstances, this could result in the removal of a prescribed authority during questioning, which could affect ASIO's ability to collect intelligence in time sensitive circumstances.

## (31) In respect of Recommendation 31 of the Law Council's submission (thresholds for the appointment of interpreters):

### (a) What is the Department's response to this recommendation?

The Bill provides that an interpreter must be provided for the subject of a questioning warrant at the request of the prescribed authority where the prescribed authority believes on reasonable grounds that the subject is unable, because of inadequate knowledge of the English language or a physical disability, to communicate with reasonable fluency in that language. Similarly, the Bill provides that an interpreter must be provided at the subject's request unless the prescribed authority believes on reasonable grounds that the subject has an adequate knowledge of the English language to communicate with reasonable fluency in that language, or is physically able to communicate with reasonable fluency in that language.

This threshold is consistent with section 23N of the *Crimes Act 1914*. The concept of communicating with 'reasonable fluency' in a given language is used consistently throughout Commonwealth legislation, including in the *Migration Act 1958* (ss 258B, 261AC), the *Criminal Code Act 1995* (ss 105.5A, 105.31, 105.37), and the *Evidence Act 1995* (s 139).

### (b) What are the likely consequences / implications of implementing this recommendation?

The effect of the Law Council of Australia's proposal is that a subject will only be able to refuse to have an interpreter present where the prescribed authority is satisfied on reasonable grounds that the subject is competent in speaking and understanding English. Should the prescribed authority and the subject have differing views on the subject's competence in English, the subject would be forced to have an interpreter present. This would increase the maximum time that the subject may be questioned from 24 hours to 40 hours.

Additionally, this proposal would introduce the threshold of 'competent' or 'highly competent' in relation to the subject's ability to speak and understand English. These are not readily understood legal thresholds in relation to a person's fluency in English.

## (32) In respect of each option canvassed in Recommendation 32 of the Law Council's submission (timing for the exercise of immediate apprehension powers):

### (a) What is the Department's response to this recommendation?

For the reasons set out in response to question 15 above, it is appropriate for the Attorney-General, not a judicial officer, to authorise apprehension.

As to the alternative option, it is also not appropriate to impose a further condition on a police officer's power to apprehend a subject where apprehension is authorised by a warrant. Before issuing a warrant

authorising apprehension, the Attorney-General must consider whether, if the subject is not apprehended, the subject will tip off others, not appear, or damage or destroy records or other things (s 34BE(2)). The execution of a questioning warrant gives rise to a number of issues that must be well planned to facilitate the security and effectiveness of the ASIO investigation. Under the current memorandum of understanding between ASIO and the AFP in relation to the execution of a questioning warrant planning in relation to the execution of a questioning warrant would occur at least 7 working days prior to the proposed execution of the warrant under ordinary circumstances. This planning would ensure that where it was anticipated that the warrant would authorise the apprehension of the subject, appropriate arrangements would be in place to ensure questioning commenced immediately upon the subject's arrival.

The apprehension power in the Bill does not include a general power to detain a subject for questioning under the warrant. Where a police officer apprehends the subject of a questioning warrant, the officer must bring the person immediately before the prescribed authority for questioning. While interpretation of the term immediately may vary according to the context of the circumstances, it could not be construed to enable a person to be held for a prolonged period of time before being brought before the prescribed authority for questioning.

## (b) What are the likely consequences / implications of implementing this recommendation?

As to the preferred option, please refer to question 15 above.

As to the alternative option – inserting a further condition before a police officer could apprehend a subject even where already authorised by a warrant – it could provide a subject with the opportunity to tip off others, not appear, or damage or destroy records or other things. This could not only delay ASIO's ability to gather intelligence in potentially time critical circumstances, and potentially result in acts prejudicial to security, it could also result in a decision of the Attorney-General effectively being over-ruled without consultation.

## (33) In respect of Recommendation 33 of the Law Council's submission (a limitation of seizure powers to the questioning matter):

## (a) What is the Department's response to this recommendation?

If authorised by the Attorney-General in the warrant, records or things found during the search of a subject who is apprehended may be seized where the police officer conducting the search reasonably believes the item is relevant to the collection of intelligence that is important in relation to a questioning matter. This power may be important, for example, where ASIO has intelligence to suggest that the subject of the warrant carries relevant material on their person and it is likely the subject will destroy this material when notified of the questioning warrant. ASIO would have to put this intelligence to the Attorney-General to satisfy the threshold that it is reasonable and necessary in the circumstances to authorise the seizure of these items.

It would not be desirable to limit the seizure of items found during a person search to the particular questioning matter on which the warrant was sought. This could prevent ASIO from obtaining critical intelligence that may be instrumental in the investigation of politically motivated violence, espionage, or foreign interference.

## (b) What are the likely consequences / implications of implementing this recommendation?

Implementing this recommendation could prevent ASIO from collecting critical intelligence in relation to politically motivated violence, espionage, or foreign interference. This recommendation would require that ASIO ignore any item found on the subject that is relevant to the collection of intelligence in relation to

either politically motivated violence, espionage or foreign interference, if it does not align with the questioning matter specified in the warrant. This may prevent ASIO from collecting vital intelligence in relation to the most serious threats to Australia's security.

## (34) In respect of Recommendation 34 of the Law Council's submission (the basis for retaining seized items):

## (a) What is the Department's response to this recommendation?

The provisions concerning seizure and retention distinguish between 'seizable items' and communication devices. A 'seizable item' (defined in the ASIO Act to mean anything that could present a danger to a person or that could be used to assist a person to escape from lawful custody) may be retained for such time as is reasonable. There is no provision for these items to be retained for reasons of prejudice to security. As such, the Department understands the Law Council's comments do not apply to 'seizable items'.

Under the Bill, a communication device seized by a police officer may be retained:

- if returning the item would be prejudicial to security, until returning the item would no longer be prejudicial to security, or
- if returning the item would not be prejudicial to security, only for such time as the prescribed authority considers reasonable.

This would enable retention of a seized communications device that could be used for both prejudicial and non-prejudicial purposes until such time as returning the item would no longer be prejudicial to security. It would frustrate the operation of the questioning framework, and potentially result in ASIO being unable to prevent threats to security, if it were required to return a device merely because it could also be used for an innocuous purpose.

## (b) What are the likely consequences / implications of implementing this recommendation?

If ASIO could not retain a communications device where it believed it would be prejudicial to security, this could have significant impacts on often complex, long running investigations into matters of national security, and could have a consequent impact on ASIO's ability to protect Australia and Australians from threats to security.

## (35) In respect of Recommendation 35 of the Law Council's submission (the procedural requirements regarding seized items):

## (a) What is the Department's response to this recommendation?

Section 34HA of the Bill provides that, within 3 months of the day on which a questioning warrant ceases to be in force, the Director-General must give a report to the Attorney-General including, among other things, details of the seizure of any thing found during a search of a person. Similarly, section 34HB provides that, as soon as practicable, the Director-General must give the IGIS a statement containing details of any seizure under the Division. In order to comply with these provisions, it will be necessary for ASIO to prepare, keep and provide to the IGIS and the Attorney, records containing all relevant details of seizure. These requirements supplement ASIO's existing internal record-keeping policies.

At the point at which retention of a seizable item is not reasonable, it will no longer be lawful to retain the item. Similarly, it will no longer be lawful to retain a communication device at the point at which:

- the prescribed authority considers return of the device would be reasonable, or
- return of the device would no longer be prejudicial to security,

To comply with these requirements, it will be necessary to regularly review whether the threshold for retention of an item is met. IGIS will be able to independently consider the legality and propriety of ASIO's retention of such items.

Further to this, a person may also complain to the IGIS if they have a concern about ASIO's seizure of an item under proposed section 34BE (or the subsequent retention of the item by ASIO).

## (b) What are the likely consequences / implications of implementing this recommendation?

The practical effect of the provisions in the Bill will ensure that the seizure of items is appropriately documented and items returned when appropriate, in circumstances where ASIO is subject to IGIS oversight. Introducing further requirements would be unnecessarily administratively burdensome.

## (36) In respect of Recommendation 36 of the Law Council's submission (the removal of prescribed role of lawyers at questioning):

## (a) What is the Department's response to this recommendation?

Subsection 34FF(3) provides that a lawyer for the subject must not intervene in the questioning of the subject or address the prescribed authority before whom the subject is being questioned except to:

- request clarification of an ambiguous question, or
- request a break in questioning to provide advice to the subject.

The prescribed authority must provide a reasonable opportunity for the lawyer to advise the subject during breaks in the questioning.

The restrictions on a lawyer's role in questioning in subsection 34FF(3) reflect the fact that the questioning powers are designed to elicit information rather than bring criminal proceedings against the person. These limitations are reasonable, necessary and proportionate to ensure the effectiveness of questioning under a questioning warrant. These provisions are designed to prevent a lawyer from frustrating or delaying the questioning process and thereby jeopardising the timely gathering of information and prevent ASIO from collecting relevant information on serious national security matters.

## (b) What are the likely consequences / implications of implementing this recommendation?

Questioning is not intended to be an adversarial process where the prescribed authority hears arguments from both sides during questioning. It is instead intended to be an intelligence collection capability for ASIO. If the lawyer were to have an active role in the questioning, this would interrupt the flow of questioning and the elicitation of vital intelligence. It would also take away from the questioning time available to ASIO which is strictly limited under the Bill.

## (37) In respect of Recommendation 37 of the Law Council's submission (the removal of discretionary power to remove lawyers):

### (a) What is the Department's response to this recommendation?

The Bill enables the prescribed authority to address the disruption of questioning by directing that the lawyer be removed from questioning, if the prescribed authority considers the lawyer's conduct is unduly disrupting the questioning of the subject (s 34FF(6)).

This power is necessary as undue disruption of questioning could jeopardise the timely gathering of information and prevent ASIO from collecting relevant information on serious national security matters. These limitations are reasonable, necessary and proportionate to ensure the effectiveness of questioning under a questioning warrant.

### (b) What are the likely consequences / implications of implementing this recommendation?

Implementation of this recommendation could frustrate the questioning process and therefore have serious consequences for ASIO's ability to gather information in a timely way and collect relevant information on serious national security matters.

## (38) In respect of Recommendation 38 of the Law Council's submission (the legal framework for the pool of 'appointed lawyers'):

### (a) What is the Department's response to this recommendation?

Where an adult questioning warrant contains an immediate appearance requirement the prescribed authority must appoint a lawyer for the subject where a lawyer is not present at questioning, and the subject requests that a lawyer be present during questioning (s 34FB). Equivalent appointment provisions apply where a minor questioning warrant contains an immediate appearance requirement (s 34FC). The prescribed authority may also appoint a lawyer for the subject of a minor questioning warrant in certain circumstances where the warrant does not contain an immediate appearance requirement to enable questioning to commence (s 34FC(3)).

It is important that the prescribed authority has enough flexibility to appoint the most appropriate lawyer for the client in that circumstance. This includes in States or Territories where a limited number of qualified lawyers may be available.

### (b) What are the likely consequences / implications of implementing this recommendation?

Including a prescriptive procedures for the appointment of lawyers could result in limited availability of lawyers and lead to unreasonable delays in questioning. This could prejudice ASIO's ability to collect intelligence and therefore prevent threats to security.

## (39) In respect of Recommendation 39 of the Law Council's submission (the right of subject to access the lawyer of their choice and legal assistance funding):

### (a) What is the Department's response to this recommendation?

The provisions in the Bill relating to legal representation are largely consistent with similar provisions in the *Australian Crime Commission Act 2002* (**ACC Act**) in that they:

- provide for access to a lawyer
- provide for the ability of the subject to apply for the provision of assistance in respect of their appearance, and
- remove existing provisions enabling a person exercising authority under a warrant to monitor the subject's contact with a lawyer.

Both frameworks also provide for mechanisms to address the disruption of questioning. However, variations in this area were necessary in the context of ASIO's powers to ensure the powers are effective in the context of ASIO's security intelligence function. While the ACC Act addresses this issue by providing for an offence, the Bill retains the current ability of the prescribed authority to remove a lawyer where the prescribed authority considers they are unduly disruptive during questioning.

The proposed restrictions on lawyers in the Bill reflect that the questioning powers are designed to elicit information rather than bring criminal proceedings against the person. Undue disruption of questioning could jeopardise the timely gathering of information and prevent ASIO from collecting relevant information on serious national security matters. These limitations are reasonable, necessary and proportionate to ensure the effectiveness of questioning under a questioning warrant.

Under the existing questioning and detention warrant framework the Attorney-General (or their delegate) can consider applications for legal financial assistance regarding a person's appearance before a prescribed authority. Under the proposed revisions the ability to consider applications will continue.

The current process for applying for financial assistance is as follows:

- Current applications for financial assistance are assessed under the Commonwealth Guidelines for Legal Financial Assistance under S34ZX of the Australian Security Intelligence Organisation Act 1979 (2014) ('the Guidelines').
- The Guidelines are available on the Attorney-General's Department website at https://www.ag.gov.au/legal-system/legal-assistance/commonwealth-legal-financial-assistance/australian-security-intelligence-organisation-scheme as well as via GrantConnect (GO356).
- The Guidelines detail the application process and the criteria for making a decision.
- A primary consideration in a potential grant of legal financial assistance is the 'applicant considerations' – an assessment of whether the applicant has the financial means to meet the cost of the legal representation.
- The amount of any grant is calculated using the Commonwealth Legal Financial Assistance Schemes Assessment of Costs (July 2012).

## (b) What are the likely consequences / implications of implementing this recommendation?

In some cases, giving certain lawyers knowledge of an ASIO investigation could risk the effectiveness of the investigation and potentially the safety of those involved. Removing the ability to involve a particular lawyer in certain circumstances ensures the subject cannot use the lawyer to tip off others about a security investigation or cause the destruction of security relevant records or other things. For example, there may be circumstances where the subject of the questioning has associates which are involved in the same security relevant activities. If those associates are made aware of the questioning and ASIO's investigation via the lawyer, they may accelerate, alter or obfuscate their security relevant activities, including by destroying records or other things identifying particulars of the plans.

## (40) In respect of Recommendation 40 of the Law Council's submission (the duty to give sufficient information to subject's lawyer):

### (a) What is the Department's response to this recommendation?

The Bill provides that, if requested by the lawyer, the lawyer must be provided with a copy of the warrant or the written record if the warrant was made orally – including any variations to the warrant (ss 34FE(2)-(3)). The Bill does provide the Director-General with the ability to make deletions from these documents if he/she considers necessary in order to avoid prejudice to security, the defence of the Commonwealth, the conduct of the Commonwealth's international affairs or the privacy of individuals (ss 34FE(4)). This safeguard is important as it ensures that information in relation to ASIO's operations and capabilities are protected.

### (b) What are the likely consequences / implications of implementing this recommendation?

The Department considers that provision of the warrant, and any variations to the warrant, should be sufficient to enable a subject's legal adviser to consider the consistency of the warrant with the framework proposed in the Bill. A general right for a lawyer to be provided with 'sufficient information' – an ambiguous expression at best – could establish an open ended right to information that could jeopardise ASIO's operations and the safety of its officers.

## (41) In respect of Recommendation 41 of the Law Council's submission (the references to functions of IGIS and Ombudsman):

### (a) What is the Department's response to this recommendation?

The relevant provisions in the Bill are modelled on existing similar provisions in the ASIO Act.

### (b) What are the likely consequences / implications of implementing this recommendation?

Implementing such a recommendation would result in inconsistencies with existing provisions in the ASIO Act and the *Intelligence Services Act 2001*.

## (42) In respect of Recommendation 42 of the Law Council's submission (the recognition of PIDs as "permitted disclosures"):

### (a) What is the Department's response to this recommendation?

The proposed secrecy offences do not contain exceptions for disclosures made in the public interest. The *Public Interest Disclosure Act* 2013 provides that disclosures in relation to intelligence agencies are allocated to the IGIS, and handled in line with the *Inspector-General of Intelligence and Security Act 1986*. The Bill provides for permitted disclosures in relation to the exercising of powers (including a power to make a complaint or to give information), or performing a function or duty, under the *Inspector-General of Intelligence and Security Act 1986*, the *Ombudsman Act 1976* or Part V of the *Australian Federal Police Act 1979*.

This is consistent with other secrecy offences in the ASIO Act and *Intelligence Services Act 2001*. Individuals using a public interest disclosure exception may not be able to assess the possible harm that disclosure may cause to national security. This was recognised by the former Independent National

Security Legislation Monitor, the Hon Roger Gyles AO QC, in his consideration of section 35P of the ASIO Act.

In its consideration of the Espionage and Foreign Interference Bill 2017, the Committee considered that a public interest disclosure exception would undermine the role of the *Public Interest Disclosure Act 2013* as the primary mechanism for Commonwealth officers to disclose information about wrongdoing.[1]

### (b) What are the likely consequences / implications of implementing this recommendation?

Including the *Public Interest Disclosure Act 2013* would be redundant. Information obtained during the execution of a questioning warrant is in inherently sensitive and would be considered intelligence information under that Act and therefore handled through the IGIS, under the *Inspector-General of Intelligence and Security Act 1986.*

## (43) In respect of Recommendation 43 of the Law Council's submission (the exemption of IGIS officials from seizure powers):

### (a) What is the Department's response to this recommendation?

### (b) What are the likely consequences / implications of implementing this recommendation?

There are exceptions to the screening of persons provisions contained at s 34D of the Bill. The provisions do not apply in relation to communication devices that are in the possession of or being used lawfully by an ASIO employee or affiliate or police officer.

## (44) In respect of Recommendation 44 of the Law Council's submission (the statutory basis for IGIS officials to attend s 34AAA orders):

### (a) What is the Department's response to this recommendation?

The IGIS's general oversight function will allow it to oversee the execution of these powers at any point and conduct inquiries and subsequently report to the Minister should the IGIS wish to do so. Therefore, it is not necessary to specifically provide for this in the Bill, as the IGIS's existing oversight powers would enable it to closely monitor any interaction between these powers.

### (b) What are the likely consequences / implications of implementing this recommendation?

There would be no significant operational impacts – on the assumption that this relates to 34AAA orders in the context of questioning warrants. Extending this right to IGIS officials for all warrants where a 34AAA order might be used would need further consideration not only in relation to the operational impact, but also

[1] Parliamentary Joint Committee on Intelligence and Security, Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, paragraph 5.97.

in relation to the practical considerations of IGIS officials potentially personally attending all ASIO operational activity – for example, training and safety requirements.

## (45) In respect of Recommendation 45 of the Law Council's submission (the removal of power to exclude complaints agencies):

## (a) What is the Department's response to this recommendation?

The *ASIO Legislation Amendment Act 2006* introduced the term 'complaints agency' to section 4 of the ASIO Act. The definition included a capacity to specify in the regulations bodies that do not fall within the definition of a complaints agency. This was and is still considered necessary to ensure there is no unintended coverage of bodies flowing from the non-prescriptive definition – for example, a Royal Commission that is intended to inquire into police matters that are not directly relevant to this framework.

## (b) What are the likely consequences / implications of implementing this recommendation?

The regulation making power is necessary to ensure that agencies that are *not* complaints agencies are not inadvertently included as complaints agencies under the framework. This could provide the subject with a right to complain to an agency that does not, and should not, have a relevant function under the questioning framework.

## (46) In respect of Recommendation 46 of the Law Council's submission (the coverage of subparagraph (d)(ii) of the definition of 'politically motivated violence' in the compulsory questioning regime):

## (a) What is the Department's response to this recommendation?

Sub-paragraph (d)(ii) of the definition of politically motivated violence in the ASIO Act refers to acts that threaten or endanger any person or class of persons specified by the Minister… by notice in writing given to the Director-General. The Guidelines issued under section 8A of the ASIO Act note that this category will vary from time to time, but could include:

- Ministers of the Commonwealth Government;
- the Leader of the Opposition in the Commonwealth Parliament;
- Members of the Commonwealth Parliament when travelling as a Parliamentary delegation; and
- the Premiers or Chief Ministers of the States and Territories.

As far as the Department and ASIO are aware, the Minister's notification power under subparagraph (d)(ii) has not been used. However, the flexibility it provides is important as threat environment shifts, and new serious threats to Australians emerge. The Department understands that it would only be used in exceptional circumstances.

## (b) What are the likely consequences / implications of implementing this recommendation?

Limiting the Minister's scope to extend the definition of politically motivated violence could inhibit ASIO's ability to collect intelligence on threats of politically motivated violence to those persons.

## (47) In respect of Recommendation 47 of the Law Council's submission (the removal of savings provisions for s 34ZT regulations):

### (a) What is the Department's response to this recommendation?

The Bill, and the regulations to be made under it, will maintain the interaction between the Regulation, secrecy provisions, and access to security information by a lawyer for a subject of a questioning warrant, in relation to remedy proceedings in court, that exist in the current Division 3 of Part III questioning framework. The regulations will, however, be updated to reflect the repeal of the detention power, and changes in terminology and legislative references. The saving provision is necessary in the event that, at the time of commencement, updated regulations have not yet been made.

### (b) What are the likely consequences / implications of implementing this recommendation?

The regulations form a critical component of the framework's information access provisions. If the savings provision was removed and new regulations were not in place by the Bill's commencement, it could jeopardise the protection of important classified information.

## (48) In respect of Recommendation 48 of the Law Council's submission (the regulation-making power regarding access to information):

### (a) What is the Department's response to this recommendation?

Section 8 of the current Regulation, made under section 34ZT of the ASIO Act (renumbered as 34FH in the Bill), regulates access to security information by a lawyer acting for a person in connection with proceedings for a remedy relating to:

- a warrant issued under Division 3 of Part III of the Act in relation to the person, or
- the treatment of the person in connection with such a warrant.

It provides that access to security information may be given to the lawyer only if:

- the lawyer has been given a security clearance in relation to the information at the level considered appropriate by the Secretary of the Department, or
- the Secretary of the Department is satisfied that giving the lawyer access to the information would not be prejudicial to the interests of security.

Even if the Secretary considers a lawyer's security clearance is not appropriate, information may still be disclosed to the person if the Secretary is satisfied that giving the lawyer access to the information would not be prejudicial to security. The note to section 8(2) of the Regulation states that 'security clearances are given in accordance with the Australian Government Protective Security Policy Framework'.

### (b) What are the likely consequences / implications of implementing this recommendation?

Introducing a proportionality requirement could risk requiring the Secretary to grant access to classified information because the access was *proportionate*, as distinct from the Secretary making an assessment purely on the basis of whether a certain level of security clearance was required due to the classification of the relevant information. This could risk unnecessary and prejudicial disclosure of information that would harm Australia's national security interests. As noted above, the Regulations already assume that security clearances would be given in accordance with the Protective Security Policy Framework.

## (49) In respect of Recommendation 49 of the Law Council's submission (the periodic review of questioning material held by ASIO):

### (a) What is the Department's response to this recommendation?

The retention and destruction requirements for information obtained under a questioning warrant are consistent with the requirements for information obtained under other ASIO warrants (see ASIO Act, s 31). Under proposed section 34HC, the Director-General must cause a record or copy to be destroyed if satisfied that the record or copy is not required for the purposes of the performance of functions or exercise of powers under the Act. This provides a safeguard against the unnecessary retention of information.

Additional measures are in place to protect the information ASIO collects. Under the Guidelines issued under section 8A of the ASIO Act, the Director-General must take all reasonable steps to ensure that personal information is not collected, used, handled or disclosed by ASIO unless that collection, use, handling or disclosure is reasonably necessary for the performance of its statutory functions (or as otherwise authorised, or required, by law). The Director-General must also ensure that all personal information collected or held by ASIO is protected by security measures.

### (b) What are the likely consequences / implications of implementing this recommendation?

Mandating specific periodic review would be administratively burdensome. It is also unnecessary given the existing destruction requirement in the ASIO Act and ASIO's obligations under the Guidelines.

## (50) In respect of Recommendation 50 of the Law Council's submission (the parity of maximum penalties in proposed ss 34GE & 34GD):

### (a) What is the Department's response to this recommendation?

The penalty for breaching the safeguard provisions is a maximum term of imprisonment of two years. The penalty aims to promote strong compliance among Commonwealth officers and prescribed authorities who hold significant responsibilities executing questioning warrants. The offences complement other mechanisms to ensure compliance, including:

- The ability for the subject to make complaints to the IGIS
- The ability for the IGIS to be present at questioning, and
- The ability for the IGIS to raise concerns with the prescribed authority

The penalties for failing to appear and give information is a maximum term of imprisonment of five years. The penalties aim to encourage compliance with a questioning warrant. The offences capture serious conduct which would be detrimental to ASIO's ability to collect intelligence relevant to security. Failing to appear or give information would defeat the purpose of the questioning warrant and in extreme circumstances could cause significant harm to security or the loss of life.

The different penalties are proportionate to the harm the offences may cause. The penalties are consistent with the corresponding penalties in the existing framework.

### (b) What are the likely consequences / implications of implementing this recommendation?

Increasing the offences for breaching a safeguard provision to five years, and equating them with the offences of failing to appear or give information – acts which could have serious consequences for Australia's national security – would result in disproportionate punishments for those responsible for administering and implementing the questioning framework.

## (51) In respect of Recommendation 51 of the Law Council's submission (the exception to the disclosure offence in s 34GD(4)):

## (a) What is the Department's response to this recommendation?

Subsection 34GD(3) of Schedule 1 of the Bill provides that the subject of a questioning warrant commits an offence if the subject is appearing before a prescribed authority and fails to comply with a request to give any information or produce any record or thing. Section 34GD(4) provides an exemption to the offence if the subject does not have the information. These provisions are substantially similar to existing subsections 34L(2) and (3) of the ASIO Act.

In accordance with subsection 13.3(3) of the Criminal Code, it is the defendant who must adduce evidence that suggests a reasonable possibility that he or she does not have the information requested. If the defendant discharges an evidential burden, the prosecution must disprove those matters beyond reasonable doubt.

The Department considered the Guide to Framing Commonwealth Offences in developing the offence. The Guide states that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant, and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

In accordance with these principles, the Bill places the evidential burden on the defendant because the matter is peculiarly within the defendant's knowledge. This is because the subject would know whether he or she did not have the information ASIO requested. The matter would be significantly more difficult for the prosecution to disprove. In order for the prosecution to disprove the matter, the prosecution would need to understand all the information held by the defendant, and show that the defendant had the piece of information requested. This would be significantly more difficult and costly, if not impossible, for the prosecution to disprove.

## (b) What are the likely consequences / implications of implementing this recommendation?

As noted above, it would be significantly more difficult for the prosecution to establish the offence.

## (52) In respect of Recommendation 52 of the Law Council's submission (breach reporting on questioning warrants):

## (a) What is the Department's response to this recommendation?

The exercise of ASIO's powers under a questioning warrant is subject to extensive real time oversight by the IGIS. The IGIS may, of their own motion, inquire into any matter that relates to the compliance by ASIO with the laws of the Commonwealth and of the States and Territories.

Once the IGIS completes an inquiry into a matter, the IGIS must prepare a report setting out conclusions and recommendations as a result of the inquiry, and give a copy of the report to the head of the Commonwealth agency to which it relates (*Inspector-General of Intelligence and Security Act 1986*, s 22). Where, in the opinion of the IGIS, the head of a Commonwealth agency does not, as a result of the conclusions and recommendations set out in a report, take adequate and appropriate action within a reasonable period, the IGIS may discuss the matter with the Minister for Home Affairs and prepare a report

relating to that matter, and give a copy of the report to the Attorney-General and Prime Minister (*Inspector-General of Intelligence and Security Act 1986*, s 24).

### (b) What are the likely consequences / implications of implementing this recommendation?

The inclusion of an additional breach reporting requirement may not provide an additional safeguard or assurance, compared to the existing safeguards in the Bill.

## (53) In respect of Recommendation 53 of the Law Council's submission (requirements for public annual reports):

### (a) What is the Department's response to this recommendation?

The Bill retains the requirement for ASIO to publish the number of warrant requests made, the number of warrants issued and the number of times persons were apprehended. This requirement achieves the objectives of transparency and accountability.

### (b) What are the likely consequences / implications of implementing this recommendation?

More detailed statistical information regarding the use of questioning warrants may not be appropriate for release to the general public. By its nature, ASIO must remain conservative in terms of the type of information it reports publicly. It is generally accepted that the level of detail given to the public regarding ASIO's activities is limited in order to protect the classified nature of ASIO's operations. The ASIO Act provides that references which might prejudice Australia's security, the defence of the Commonwealth, the conduct of international affairs or the privacy of individuals should be deleted from the declassified version of the annual report.

## (54) In respect of Recommendation 54 of the Law Council's submission (mandatory contents of the Statement of Procedures):

### (a) What is the Department's response to this recommendation?

The Statement of Procedures is a legislative instrument, which provides the procedural rules which agencies must abide by when exercising authority under a questioning warrant. The Statement of Procedures supplements the provisions in the ASIO Act with the same legal force. The Bill provides the primary safeguards to ensure that the exercise of ASIO's questioning powers is appropriate and subject to oversight.

In not prescribing the detail that must be contained in the Statement of Procedures, the Bill ensures that ASIO will retain the flexibility to update the Statement as necessary to reflect changing operational requirements.

### (b) What are the likely consequences / implications of implementing this recommendation?

Prescribing the contents of the Statement of Procedures could limit ASIO's operational flexibility and therefore the utility of the questioning framework. This is a particularly an issue given the rapidly evolving threat environment which could necessity rapid changes.

## (55) In respect of Recommendation 55 of the Law Council's submission (periodic review requirement for Statement of Procedures):

### (a) What is the Department's response to this recommendation?

The content of the Statement of Procedures will reflect ASIO's specific security needs and operational procedures in relation to the execution of a questioning warrant at any given point in time. The Statement will be updated as required to address changes to those specific security needs and operational procedures.

### (b) What are the likely consequences / implications of implementing this recommendation?

ASIO reviews the Statement of Procedures as required to reflect its operational needs. Requiring reviews at specific intervals would burden ASIO's resources without achieving any specific benefit.

## (56) In respect of Recommendation 56 of the Law Council's submission (consultation requirements for Statement of Procedures):

### (a) What is the Department's response to this recommendation?

The Bill provides that the Director-General is required to consult with the IGIS and Commissioner of the Australian Federal Police in relation to the Statement of Procedures. The primary role of the IGIS is to assist Ministers in overseeing and reviewing the activities of Commonwealth intelligence agencies for legality and propriety and for consistency with human rights. This means:

- Legality: intelligence agencies operate within and comply with the legislation governing their activities, and with ministerial guidelines and directives.
- Propriety: the use of powers by intelligence agencies is appropriate and acceptable in the circumstances.
- Human rights: the activities of intelligence agencies are consistent with and respect human rights

### (b) What are the likely consequences / implications of implementing this recommendation?

Wider public consultation may not be appropriate. The Statement of Procedures is an internal management tool of government, which provides detailed procedures to ensure compliance with the requirements of the Act and addresses specific security needs. Consultation requirements under proposed section 34F of the Bill will ensure that ASIO's consultation on the Statement of Procedures address issues concerning legality, propriety and human rights.

## (57) In respect of Recommendation 57 of the Law Council's submission (Parliamentary disallowance of Statement of Procedures):

### (a) What is the Department's response to this recommendation?

The *Legislation Act 2003* allows for non-disallowability of legislative instruments in certain circumstances e.g. where this is specifically legislated (paragraph 44(2)(a)). If the Statement of Procedures is disallowable, and is in fact disallowed, the Attorney-General could not proceed with issuing a questioning warrant. Section 34BA(1) requires that the Statement of Procedures be in force for the Attorney-General to issue a questioning warrant. Disallowance would prevent another statement (substantially the same) being

made for 6 months from the time of disallowance. Consequently, disallowance may present a barrier to the questioning regime, as questioning matters are likely to be time critical.

It is also appropriate to exclude the Statement of Procedures from the disallowance provisions because the Statement is an internal management tool of government. The Statement provides detailed procedures to ensure compliance with the requirements of the ASIO Act and addresses specific security needs.

### (b) What are the likely consequences / implications of implementing this recommendation?

If the statement of procedures is disallowable, and is in fact disallowed, the Attorney-General could not proceed with issuing a questioning warrant which may prevent ASIO from collecting vital intelligence necessary to protect the Australian community.

## (58) In respect of Recommendation 58 of the Law Council's submission (the revision of ASIO Guidelines):

### (a) What is the Department's response to this recommendation?

In line with section 8A of the ASIO Act, the issue of the ASIO Guidelines is a matter for the Minister for Home Affairs.

### (b) What are the likely consequences / implications of implementing this recommendation?

Any delay to the Bill's commencement pending revisions to the Guidelines, including widespread public consultation, could result in the current questioning framework sunsetting before the Guidelines were complete and therefore generate a critical capability gap for ASIO.

## (59) In respect of Recommendation 59 of the Law Council's submission (statutory periodic review of ASIO Guidelines):

### (a) What is the Department's response to this recommendation?

The Department agrees that more regular review of the Guidelines is required, but does not agree that periodic review requirements should be specified in legislation.

The Government has discretion to undertake consultation on the Guidelines that it considers appropriate and reasonably practicable.

### (b) What are the likely consequences / implications of implementing this recommendation?

Too prescriptive a requirement for regular review may result in a disconnect between the timing of amendments required to reflect operational requirements and the legislative review timetable.

Similarly, mandating in legislation broad public consultation requirements could limit the Government's ability to make necessary amendments to the Guidelines to reflect ASIO's operating environment and organisational requirements.

## (60) In respect of Recommendation 60 of the Law Council's submission (protocol on multiple powers):

### (a) What is the Department's response to this recommendation?

Refer to the response to question 19 as to why the questioning of a subject under other frameworks is not necessarily relevant to whether ASIO needs to question them to gather intelligence.

As to whether a protocol is required – ASIO has strong relationships with other Commonwealth, state and territory agencies. In situations where agencies are conducting joint operations, agencies will discuss the most appropriate powers to use in the circumstances.

### (b) What are the likely consequences / implications of implementing this recommendation?

Refer to the response to question 19.

## (61) In respect of Recommendation 61 of the Law Council's submission (sunset period for the re-designed questioning scheme):

### (a) What is the Department's response to this recommendation?

Please refer to the response to question 1 of Part I, above.

### (b) What are the likely consequences / implications of implementing this recommendation?

Please refer to the response to question 1 of Part I, above.

## (62) In respect of Recommendation 62 of the Law Council's submission (PJCIS and INSLM statutory pre-sunsetting reviews):

### (a) What is the Department's response to this recommendation?

Successive reviews in relation to the existing powers have continued to recommend that ASIO retain a compulsory questioning power. The proposed 10 year sunset period is also consistent with other national security legislation, including the Continuing Detention Orders (CDO) regime, which permits the continued detention of high risk terrorist offenders beyond the expiry of their custodial sentence (see s 105A.25A of the Criminal Code).

### (b) What are the likely consequences / implications of implementing this recommendation?

Please refer to the response in paragraph (a) above.

## (63) In respect of Recommendation 63 of the Law Council's submission (the non-extension of questioning-and-detention warrants):

## (a) What is the Department's response to this recommendation?

As a consequence of the COVID-19 pandemic's effect on parliamentary sittings, parliament passed legislation to enable Ministers to extend sunset provisions in existing legislation by up to six months.

Should Parliament not pass the Bill before the existing questioning and detention warrant framework sunsets on 7 September 2020, the Minister for Home Affairs may extend the sunset date accordingly. This would be a contingency measure to ensure that ASIO does not lose a vital intelligence collection tool while the Parliament is considering the Bill.

## (b) What are the likely consequences / implications of implementing this recommendation?

If the Government implements the recommendation not to extend questioning and detention warrants, this may create a capability gap for ASIO. In extreme circumstances, this could lead to a loss of intelligence relating to a serious security threat. Before the new apprehension framework is introduced, there would be no method of ensuring the subject's immediate attendance at questioning.

## (64) In accordance with Recommendation 64 of the Law Council's submission, could the Department please provide further information about the operational need for the proposed internal authorisation framework and, in particular:

ASIO's existing surveillance device warrant framework does not facilitate the expeditious deployment of tracking capabilities. As highlighted by the Director-General of Security when giving evidence to the Committee on 10 July 2020, the inability to efficiently deploy tracking devices places ASIO officers under a heightened level of risk due to the need to maintain constant physical surveillance on potentially dangerous subjects where the warrant threshold is not met. While ASIO is not a law enforcement agency, the counter-terrorism environment and ASIO's contribution to counter-terrorism operations has changed to require a greater need for tracking capabilities to be deployed more quickly.

In evidence given to the Committee on 10 July 2020, both the Director-General of Security and Deputy Commissioner, Ian McCartney highlighted that the discrepancy in authorisation arrangements is particularly noticeable in terms of ASIO's reduced operational agility in cases when ASIO and police are jointly responding to time-critical threats or progressing Joint Counter-Terrorism Team (JCTT) operations.

ASIO has also highlighted the need for this power in order to support security intelligence investigations across Australia that sit outside of the JCTT framework – for example, espionage or foreign interference related investigations. ASIO requires this tracking device amendment because surveillance operations in relation to these investigations are often not conducted in concert with police partners.

Further, as noted within the Director-General's evidence to the Committee, although the examples provided are emergency in circumstance, the ability to internally authorise a tracking device would be useful in many other surveillance circumstances. Increasing the available distance between a target and ASIO's surveillance officers via tracking, whilst maintaining effective surveillance, increases officer safety and decreases the likelihood a valuable surveillance officer will be 'burnt'.

## (a) Why the stated need for urgency in obtaining approval to use tracking devices could not be met from the existing emergency warrant provisions in the ASIO Act;

The emergency warrant provisions in the ASIO Act require that a warrant request be prepared and sent to the Attorney-General before the Director-General can exercise the power to issue an emergency warrant.

This prevents ASIO from responding expeditiously in urgent circumstances. It could even require ASIO to deliver a warrant application to the Attorney-General's office despite knowing that the Attorney-General is not there. This is not well-adapted to the time-sensitive situations in which these powers may be necessary.

**(b) Why the stated need for urgency in obtaining approval to use tracking devices could not be met from making use of Identified Person Warrants concerning persons who are believed to be engaging in prejudicial activities, which give conditional approval to use tracking devices;**

In some cases ASIO would not be able to obtain an Identified Person Warrant to use a tracking device. The threshold for obtaining an Identified Person Warrant against a person is that a person is reasonably suspected of being engaged in activities prejudicial to security. Consequently, it would not be possible for ASIO to obtain a tracking device on a person, under the Identified Person Warrant framework, if the person is not themselves assessed to be engaged in activities prejudicial to security. For example, case study 6 in ASIO's submission to the Committee relates to two individuals who were considered to be peripheral to a group assessed to be planning a terrorist attack. In comparison, the proposed threshold for tracking devices is that the tracking device would substantially assist the collection of intelligence in respect of a security matter.

**(c) How, if at all, the proposed internal authorisation framework would have been likely to have made a difference in the scenarios outlined in Case Studies 5 and 6 of ASIO's submission (the Department should consult with ASIO in respect of this aspect of the question); and**

With respect to case study 5 in ASIO's submission, ASIO advises that it would not have been feasible in the circumstances to obtain an identified person warrant or an emergency warrant. ASIO has also advised that these individuals were considered to be peripheral to a group assessed to be planning a terrorist attack and so the threshold for an identified person warrant would likely not be met.

**(d) Why – given the stated need for the proposed framework relates to urgency – the internal authorisation framework should extend beyond emergency situations?**

The need for the proposed framework is threefold: operational agility, cooperation with law enforcement agencies, and the protection of officer safety. For these reasons, it is appropriate to extend the framework beyond emergency situations (such as where there is an imminent risk to life or security).

**(65) In respect of Recommendation 65 of the Law Council's submission (clear explanation of basis for desired efficiency gains):**

**(a) What is the Department's response to this recommendation?**

The rationale for the internal authorisation of tracking devices is to provide operational agility where it is not possible to obtain a warrant from the Attorney-General, including to protect the wellbeing and safety to ASIO officers. Efficiency is not a goal in and of itself. For this reason, there are rigorous reporting requirements and other safeguards in place for the use of tracking devices.

Proportionality is set out in the Ministerial Guidelines, which ASIO is required to abide by, and is central to all of ASIO's domestic security work.

**(b) What are the likely consequences / implications of implementing this recommendation?**

Please refer to the response at question (a) above.

**(66) In accordance with Recommendation 66 of the Law Council's submission, could the Department please provide an explanation of why it is considered appropriate to create a significant misalignment in:**

**(a) the proposed internal authorisation levels required for ASIO under the ASIO Act; and**

**(b) the existing Ministerial authorisation levels required for ASIS, ASD and AGO under the Intelligence Services Act 2001 (Cth)**

**in relation to the use of a tracking device on an Australian person, which does not involve entry to private premises or interference with the interior of a vehicle.**

ASIO has different functions and operational requirements to ASIS, ASD and AGO. ASIO is a security intelligence agency and operates primarily in Australia. Security is defined in the ASIO Act and includes the protection of Australia from espionage, foreign interference and politically motivated violence. ASIS, ASD and AGO are foreign intelligence agencies and operate primarily outside Australia. Foreign intelligence is broader than security intelligence and means intelligence about the capabilities, intentions or activities of people or organisations outside Australia. Each intelligence agency has intrusive powers and are subject to authorisation processes which have similarities. However, the authorisation processes are not the same. It is appropriate for the legal frameworks to differ according to the agencies' different purposes and operating environments.

**(67) In respect of Recommendation 67 of the Law Council's submission (the meaning of meaning of 'particular persons'):**

**(a) What is the Department's response to this recommendation?**

An authorisation may be given in relation to one or both of a particular person or an object or class of object. The reference to 'particular person' is not intended to capture a legal entity such as a body corporate.

It is not clear how this regime could practically apply to, for example, a body corporate. The Department does not accept that the ability to seek an internal authorisation in relation to a particular person could be read in a way that would permit the use of a tracking device on all officers of a body corporate.

**(b) What are the likely consequences / implications of implementing this recommendation?**

As noted above, the Department's view is that the meaning of 'particular person' does not include a body corporate.

**(68) In respect of Recommendation 68 of the Law Council's submission (the appointment of persons who may exercise authority):**

**(a) What is the Department's response to this recommendation?**

The Bill provides that the authority conferred by an internal authorisation may be exercised by an ASIO employee or ASIO affiliate. This is intended to enhance ASIO's operational agility. ASIO maintains detailed internal policies for the use of its intrusive powers, and is oversighted by the IGIS to ensure that employees and affiliates act with legality and propriety.

## (b) What are the likely consequences / implications of implementing this recommendation?

The recommendation would limit the operational agility for any officer to use a tracking device where it is authorised. This would be administratively burdensome for ASIO and would create legal risk that ASIO employees/affiliates would not be authorised to deploy a tracking device. Section 24 of the ASIO Act raises a number of problems, including:

- issues with the description of individual officers. As noted in the EM to NSLAB (No 1) 2014, listing the names of persons who may be involved in executing a warrant can be administratively inefficient, particularly where the execution of a warrant needs to occur in an unpredictable and volatile environment; and
- issues with the description of 'classes', including:
    - the need for a class to be sufficiently precise for membership to be ascertained with a reasonable degree of ease and certainty;
    - expanding classes (i.e. if a branch is identified and then a new position is created in that branch, there is a legal risk that the new position would not be captured in the class).

## (69) In respect of Recommendation 69 of the Law Council's submission (the appointment of authorising officers):

## (a) What is the Department's response to this recommendation?

The Bill defines an authorising officer as the Director-General or an SES employee or equivalent. SES employees are significant appointments and hold significant responsibilities, including to ensure compliance with the law and ASIO policies and procedures.

## (b) What are the likely consequences / implications of implementing this recommendation?

The recommendation would limit the operational agility for any SES to authorise a tracking device where the statutory requirements are met and raise the same issues as mentioned in question 68(b).

## (70) In respect of Recommendation 70 of the Law Council's submission (the maximum period of effect of internal authorisation):

## (a) What is the Department's response to this recommendation?

The maximum period of effect of an internal authorisation is 90 days. This is consistent with provisions which apply to law enforcement agencies under the Surveillance Devices Act 2004. The Bill also requires the authorising officer to take such steps as are necessary to ensure action under the internal authorisation is discontinued where that person is satisfied that the grounds for the internal authorisation have ceased to exist. This applies even when the authorisation has not expired.

## (b) What are the likely consequences / implications of implementing this recommendation?

48 hours is not operationally feasible. In some cases, a suitable window for installation may not present itself within the 48 hour period immediately post internal authorisation, or there may be delays in ASIO's ability to locate the subject of the authorisation. The period proposed is consistent with the *Surveillance Device Act 2004* provisions available to other Australian agencies.

## (71) In respect of Recommendation 71 of the Law Council's submission (the mandatory power of cancellation):

## (a) What is the Department's response to this recommendation?

The Bill requires the Director-General or an SES-level authorising officer, to take such steps as are necessary to ensure action under the internal authorisation is discontinued where that person is satisfied that the grounds for the internal authorisation have ceased to exist. The Bill also allows the authorising officer to revoke the authorisation before the period specified in the authorisation has expired.

This process would ensure that no further action is taken under an internal authorisation that is no longer justified, while also ensuring that ASIO employees and affiliates do not inadvertently break the law through inadvertent reliance on a revoked internal authorisation.

## (b) What are the likely consequences / implications of implementing this recommendation?

This would present issues in the context where the grounds on which the internal authorisation was given continue to exist for one object, in a situation where an authorisation is issued in relation to more than one object or an object and a person. It may be possible that an ASIO employees or affiliate could then inadvertently break the law in reliance on a revoked internal authorisation.

## (72) In respect of Recommendation 72 of the Law Council's submission (the cancellation of internal authorisations):

## (a) What is the Department's response to this recommendation?

Please see response above to question 71.

## (b) What are the likely consequences / implications of implementing this recommendation?

Please see response above to question 71.

## (73) In respect of Recommendation 73 of the Law Council's submission (the relationship with special intelligence operations):

## (a) What is the Department's response to this recommendation?

Section 35L of the ASIO Act provides that a special intelligence operation authority does not authorise ASIO to do an act that it would not be able to do other than with a warrant under:

- the ASIO Act;
- under Part 2-2 of the *Telecommunications (Interception and Access) Act 1979*, or
- in accordance with Division 3 of Part 4 1 of the *Telecommunications (Interception and Access) Act 1979*.

Section 35L was included in the ASIO Act for the avoidance of doubt. It is intended that special intelligence operation authorities will not be able to authorise ASIO to use a tracking device other than where it is internally authorised under the proposed framework.

### (b) What are the likely consequences / implications of implementing this recommendation?

The amendment is not necessary as section 35L already would not permit special intelligence operation authorities to authorise ASIO to use a tracking device unless otherwise in accordance with the requirements of the ASIO Act.

## (74) In respect of Recommendation 74 of the Law Council's submission (the relationship with ASIO-ASIS cooperation regime):

### (a) What is the Department's response to this recommendation?

Under section 13B of the *Intelligence Services Act 2001*, ASIS may undertake an activity to support ASIO in the performance of ASIO's functions. As the activity is for ASIO's functions, it is appropriate for the ASIO authorisation process to apply. ASIS will continue to require a Ministerial Authorisation to undertake activities for its own purposes (foreign intelligence).

Please also refer to the response to question 66.

### (b) What are the likely consequences / implications of implementing this recommendation?

The recommendation would create a disparity between what ASIO can do for its own functions and what ASIS can do to assist ASIO to perform ASIO's functions. This is anomalous and defeats the purpose of the cooperation provisions in the IS Act.

## (75) In respect of first bullet point of Recommendation 75 of the Law Council's submission (the scope of recovery warrants):

### (a) What is the Department's response to this recommendation?

Recovery warrants are necessary where the recovery of the tracking device could not occur under the internal authorisation. For example, where the recovery of a device requires ASIO to enter a private premises or to interfere with the interior of a vehicle without permission. It is the intended that regardless of whether a tracking device was installed lawfully or not, a device should be retrieved where Attorney-General is satisfied that not retrieving that device would be prejudicial to security.

### (b) What are the likely consequences / implications of implementing this recommendation?

If a tracking device was not removed from a person or object then there is a significant risk that the device could be discovered – exposing ASIO's operational capabilities and that the device could continue to be used to track the person. Restriction to circumstances where ASIO acted lawfully may give rise to issues in circumstances of a technical breach which occurred in good faith (noting ASIO's purpose in recovering the device is to ensure that ASIO's operations and capabilities remain secret)

## (76) In respect of second bullet point of Recommendation 75 of the Law Council's submission, and assuming that the Committee is persuaded that there is a

**credible, evidence-based case supporting the availability of recovery warrants in relation to unlawful or unauthorised tracking devices:**

**(a) What is the Department's response to this recommendation?**

**(b) What are the likely consequences / implications of implementing this recommendation?**

See response to question 75.

**(77) In respect of first bullet point of Recommendation 76 of the Law Council's submission (comprehensive breach reporting requirements):**

**(a) What is the Department's response to this recommendation?**

**(b) What are the likely consequences / implications of implementing this recommendation?**

Proposed paragraph 34AAB(2)(f) (item 17 of Schedule 2) of the Bill requires the Director-General to include, in his reporting to the Attorney-General, information in relation to ASIO's compliance with restrictions or conditions in an internal authorisation. The list of details which must be included in the report was largely modelled on subsection 49(2) of the *Surveillance Devices Act 2004*.

Despite subsection 49(2) of the *Surveillance Devices Act 2004* not requiring details of compliance with restrictions or conditions contained in an internal authorisation to be reported to the Minister, the Department, ASIO and the IGIS were of the view that including these details were a necessary safeguard and appropriate accountability mechanism. Including further information in relation to compliance with statutory requirements and applicable requirements of the ASIO Guidelines are unnecessary as these are matters considered by the IGIS and any inquiry conducted by the IGIS is subsequently reported to relevant Ministers.

**(78) In respect of first bullet point of Recommendation 77 of the Law Council's submission (unclassified annual reporting of aggregated statistics):**

**(a) What is the Department's response to this recommendation?**

**(b) What are the likely consequences / implications of implementing this recommendation?**

By its nature, ASIO must remain conservative in terms of the type of information it reports publicly. It is generally accepted that the level of detail given to the public regarding ASIO's activities is limited in order to protect the classified nature of ASIO's operations.

The ASIO Act provides that references which might prejudice Australia's security, the defence of the Commonwealth, the conduct of international affairs or the privacy of individuals may be deleted from the declassified version of the annual report. Detailed statistical information regarding the use of internal authorisations is not appropriate for release to the general public.

**(79) In respect of first bullet point of Recommendation 78 of the Law Council's submission (updates to the ASIO Guidelines on internal authorisations):**

**(a) What is the Department's response to this recommendation?**

Any amendments that may be required as a result of a passage of the Bill will be considered by the Minister once the Bill has passed.

**(b) What are the likely consequences / implications of implementing this recommendation?**

Please refer to the response to question (a) above.

**(80) In respect of the revision to the ASIO Guidelines, please provide a detailed timeline of the drafting process to date, including key dates (e.g. the date on which the Department of Home Affairs started working on revisions to the ASIO Guidelines, the date on which the first draft of the revised Guidelines was completed by Home Affairs, the dates on which various drafts of the Guidelines were provided to each person or agency consulted by the Department and the dates on which comments were provided back to the Department by the persons or agencies consulted). Note: The Department's responses to the Questions on Notice in respect of the ASIO Guidelines in the context of the IPO Bill inquiry are not sufficiently detailed – this request is for a detailed timeline from the very beginning of the drafting process until 15 July 2020.**

In addition to the information provided to the Committee on 3 June 2020 in response to Questions on Notice from the inquiry into Telecommunications Legislation Amendment (International Production Orders) Bill 2020, the Department's most recent consultation on the ASIO Guidelines includes:

- 5 November 2019 – The Department met with ASIO and IGIS and the Guidelines were discussed.
- 19 November 2019 – The Department met with ASIO and IGIS to discuss then-current version of the Guidelines.
- 20 November 2019 – The Department circulated a revised draft of the Guidelines to ASIO and the Office of the IGIS (OIGIS) for comment (**20 November 2019 draft**).
- 22 November 2019 – The Department provided the 20 November 2019 draft to AGD for comment.
- 22 November 2019 – OIGIS provided preliminary comments concerning agreed amendments from May 2019.
- 27 November 2019 – OIGIS provided comments on the 20 November 2019 draft.
- 29 November 2019 – ASIO provided comments on the 20 November 2019 draft.
- 29 November 2019 – The Department of Home Affairs met with ASIO to discuss the Guidelines.
- 2 December 2019 – The Department of Home Affairs provided a revised draft to ASIO for comment (**2 December 2019 draft**).
- 4 December 2019 – ASIO confirmed the 2 December 2019 draft reflected discussions with Home Affairs and OIGIS.

- 4 December 2019 – The Department of Home Affairs sent the revised Guidelines to IGIS and ASIO for red line comments.
- 4 December 2019 – AGD and the Office of the Australian Information Commissioner provided comments on the 20 November 2019 draft.
- 6 December 2019 – The Department of Home Affairs circulated a revised version of the Guidelines incorporating minor amendments sent to OIGIS and ASIO for information.
- 13 January 2020 – AGD provided further comments on the 20 November 2019 draft.
- 21 January 2020 – ASIO provided further comments on the Guidelines
- 22 January 2020 – The Department provided ASIO with a revised draft of the Guidelines for review (**22 January 2020 draft**).
- 13 March 2020 – ASIO provided comments on the 22 January 2020 draft.
- 20 April 2020 – The Department provided the OIGIS with the 22 January 2020 draft for further comment.
- 15 May 2020 – OIGIS provided comments on the draft provided on 20 April 2020 (the 22 January 2020 draft).
- 19 May 2020 – ASIO provided comments on the revised Guidelines.
- 11 June 2020 – The Department provided the Minister for Home Affairs with the Guidelines for consideration. The Minister for Home Affairs commenced consultation with the Attorney-General.
- 17 July 2020 – the Attorney-General wrote to the Minister for Home Affairs concerning the Guidelines.

## (81) In respect of the Australian Security Intelligence Organisation Amendment Bill 2020:

## (a) On what date did the Department start working on the bill?

After the second tranche of machinery of government changes in 2018, the Department commenced policy development on the proposed reforms in May 2018. The Department first circulated a policy paper in relation to the proposed reforms to relevant agencies for consideration on 27 July 2018. The Department provided initial drafting instructions to the Office of Parliamentary Council in July 2019.

## (b) On what date did the Department complete the first draft of the bill?

The first version of the draft Bill was provided to the Department by the Office of Parliamentary Council on 11 October 2019.

## (c) How many drafts of the bill were there?

There were 75 draft versions of the Bill.

**(d) Please provide a list of every Commonwealth agency that the Department consulted on the drafting of the bill, including:**

**(i) the name of the agency;**

**(ii) the date of the consultation(s); and**

**(iii) whether the agency was provided with a copy of the draft bill and, if so, on what date.**

The Department consulted with a number of agencies, including the Attorney-General's Department, Australian Criminal Intelligence Commission, Australian Federal Police, ASIO, Department of the Prime Minister and Cabinet and the Inspector-General of Intelligence and Security throughout the development of the draft Bill.

- On 11 July 2018, the Department met with the Australian Criminal Intelligence Commission to discuss the Australian Criminal Intelligence Commission examination model.
- On 27 July 2018, the Department distributed a consultation paper to support discussion on the proposed amendments and identify further policy issues. The paper was sent to the following stakeholders:
    - ASIO
    - the Australian Criminal Intelligence Commission
    - the Inspector-General of Intelligence and Security
    - the Attorney-General's Department, and
    - the Department of the Prime Minister and Cabinet.
- On 23 August 2018, the Department met with ASIO to discuss outstanding policy questions.
- On 30 August 2018, the Department met with ASIO to discuss outstanding policy questions.
- In October 2018, the Department met with internal stakeholders to discuss the Government response to the Committee's 2018 Report on ASIO's existing questioning and detention powers.
- On 10 December 2018, the Department met with ASIO to discuss outstanding policy questions and a possible apprehension model.
- On 30 January 2019, the Department met with the Australian Criminal Intelligence Commission to discuss the Commission's questioning and arrest powers.
- On 7 February 2019, the Department circulated a policy paper detailing a proposed apprehension framework to ASIO.
- On 26 February 2019, the Department met with ASIO to discuss the policy paper on the proposed apprehension framework.
- On 7 March 2019, the Department circulated two policy papers detailing a proposed compulsory questioning framework, including a proposed apprehension framework, to ASIO.
- On 12 March 2019, the Department met with ASIO to discuss the two policy papers circulated on 7 March 2019.
- On 22 March 2019, the Department issued initial drafting instructions to the Office of Parliamentary Counsel. The Office of Parliamentary Counsel advised that the most appropriate way forward would be to extend the sunset date by a further 12 months to enable enough time for the reforms to be drafted and considered by Government.

- On 25 March 2019, the Department circulated two policy papers detailing a proposed compulsory questioning framework, including proposed apprehension framework to the following stakeholders:
    - the Australian Criminal Intelligence Commission
    - the Australian Federal Police
    - ASIO
    - the Department of Prime Minister and Cabinet
    - the Inspector-General of Intelligence and Security
    - the Attorney-General's Department
    - the Office of Parliamentary Counsel
- On 26 March 2019, the Department discussed drafting with the Office of Parliamentary Counsel.
- On 28 March 2019, the Department convened an interdepartmental conference with relevant stakeholders to explain the proposed policy and take questions.
- On 3 April 2019, the Government tabled its response to the Parliamentary Joint Committee on Intelligence and Security's 2018 report on ASIO's existing questioning and detention powers.
- On 20 May 2019, the Department met with the Attorney-General's Department to discuss draft legal advice on the proposed reforms.
- On 30 May 2019, the Department met with ASIO to discuss stakeholder concerns with the proposed reformed questioning model.
- On 5 June 2019, the Department received legal advice from the Office of International Law on the proposed reforms.
- On 20 June 2019, the Department met with the Inspector-General of Intelligence and Security to discuss the proposed reforms.
- On 25 June 2019, the Department held a meeting with ASIO and the Australian Federal Police to discuss concerns with proposed reforms to the questioning framework and discuss practical implications associated with the proposed amendments.
- On 3 July 2019, the Department met with the Attorney-General's Department to discuss proposed reforms to the questioning framework.
- On 9 July 2019, the Department met with the Australian Government Solicitor to discuss advice on the proposed questioning reforms.
- On 18 July 2019, the Department met with the Office of Parliamentary Counsel to discuss proposed amendments with drafters.
- On 19 July 2019, the Department met with the Australian Government Solicitor to discuss preliminary issues with the proposed new questioning framework identified in draft legal advice.
- On 22 July 2019, the Department met with the Australian Government Solicitor and ASIO to discuss preliminary issues with the proposed new questioning framework identified in draft legal advice.
- On 30 July 2019, the Department received legal advice from the Australian Government Solicitor on the proposed reforms.
- On 16 August 2019, the Department met with ASIO to discuss the draft Bill.
- On 19 August 2019, the Department met with the Australian Federal Police to discuss the draft Bill.
- On 12 September 2019, the Department met with ASIO and the Australian Federal Police to discuss the draft Bill.

- On 1 October 2019, the Department met with the Office of Parliamentary Counsel to discuss the draft Bill.
- On 15 October 2019, the Department met with the Office of Parliamentary Counsel and ASIO to discuss the draft Bill.
- On 17 October 2019, the Department met with the Office of Parliamentary Counsel to discuss the draft Bill.
- On 30 October 2019, the Department met with the Office of Parliamentary Counsel to discuss the draft Bill.
- On 28 November 2019, the Department met with the Office of Parliamentary Counsel to discuss the draft Bill.
- On 13 December 2019, the Department met with ASIO and the Office of Parliamentary Counsel to discuss the draft Bill.
- On 19 December 2019, the Department circulated the draft Bill to the following stakeholders for comment:
    - the Australian Criminal Intelligence Commission
    - the Australian Federal Police
    - ASIO
    - the Inspector-General of Intelligence and Security
    - the Department of the Prime Minister and Cabinet
    - the Office of National Intelligence
    - the Attorney-General's Department
    - the Treasury
    - the Department of Defence
    - the Department of Finance
    - the Department of Foreign Affairs and Trade
- On 10 January 2020, the Department met with ASIO to discuss the draft Bill.
- On 14 January 2020, the Department met with ASIO to discuss the draft Bill.
- On 17 January 2020, the Department met with the Attorney-General's Department to discuss the draft Bill.
- On 29 January 2020, the Department met with the Office of Parliamentary Counsel to discuss the draft Bill.
- On 3 February 2020, the Department met with ASIO to discuss the draft Bill.
- On 6 February 2020, the Department met with the Attorney-General's Department to discuss the draft Bill.
- On 13 February 2020, the Department met with the Office of Parliamentary Counsel and ASIO to discuss the draft Bill.
- The Department continued to work very closely with OPC and stakeholders throughout February and March 2020 to finalise the Bill and brief Ministers.
- The Bill was scheduled to be introduced to Parliament in late March 2020, however due to the impacts of the COVID-19 pandemic on the 2020 parliamentary sittings this was unable to occur.
    - The Government introduced the Bill in the next available sitting week in May 2020.

**(82) In respect of the public hearing on Friday 10 July in respect of the Australian Security Intelligence Organisation Amendment Bill 2020 (and noting the importance and the significance of the bill):**

**(a) Why didn't the Secretary of the Department of Home Affairs attend the hearing?**

**(i) If the Secretary was unavailable, why was he unavailable? What was he doing instead of attending the public hearing?**

**(ii) If the Secretary was available, why didn't he attend the hearing?**

**(b) What Deputy Secretary – or Deputy Secretaries – are responsible for the bill?**

**(c) In respect of each Deputy Secretary with responsibility for the bill:**

**(i) Why didn't the Secretary of the Deputy Secretary attend the hearing?**

**(ii) If the Deputy Secretary was unavailable, why was he or she unavailable? What was he or she doing instead of attending the public hearing?**

**(iii) If the Deputy Secretary was available, why didn't he or she attend the hearing?**

During this time of COVID-19 many priorities have to be juggled, including appearances before Parliamentary Committees which are dealing with sensitive legislation. Typically on a day when National Cabinet is meeting there are requirements leading up to and immediately after, and the Secretary manages his time accordingly. In this particular instance First Assistant Secretary, Law Enforcement Policy Division, Anthony Coles and Assistant Secretary, National Security Policy Branch, Andrew Warnes were the best placed senior executives to assist the Committee in relation to this Bill. The Deputy Secretary Strategy and Law Enforcement is now responsible for the Bill.