



Australian  
Human Rights  
Commission

# Review of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979

Australian Human Rights Commission

Submission to the Parliamentary Joint Committee on Intelligence  
and Security

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## 1 Introduction

1. The Australian Human Rights Commission (Commission) makes this submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in relation to its *Review into Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979*.
2. Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act) incorporated significant amendments to the ASIO's compulsory questioning powers, by the passing of the *Australian Security Intelligence Organisation Amendment Act 2020* (ASIO Amendment Act) on 10 December 2020.
3. The ASIO Amendment Act amended the ASIO Act, to repeal the previous questioning warrant and questioning and detention warrant regime and inserted a new compulsory questioning warrant (QW) and apprehension framework.
4. The current review is commenced pursuant to s 29(1)(ce) of the *Intelligence Services Act 2001* (Cth), 3 years after the commencement of the ASIO Amendment Act, to allow the PJCIS to review the operation, effectiveness and implications of ASIO's compulsory questioning powers.

## 2 Summary

5. The Commission has previously made a detailed submission to the PJCIS in relation to its 2020 review of the *Australian Security Intelligence Organisation Amendment Bill 2020* (the Bill).<sup>1</sup> Given that the proposed amendments to ASIO's compulsory questioning powers were largely implemented by the Amendment Act, the arguments in this submission remain substantially the same.
6. ASIO's questioning and detention powers were first introduced in 2002 in response to the 9/11 terrorist acts in the United States. The then Attorney-General, the Hon Daryl Williams QC, acknowledged that the powers were 'extraordinary' and were to be considered 'a measure of last resort'. They were never intended to be permanent and had no equivalent in any other jurisdiction within the 'Five Eyes alliance'.<sup>2</sup> They have, however, remained in place since their introduction over 2 decades ago.
7. Following the ASIO Amendment Act, ASIO's compulsory questioning powers were significantly expanded upon and a new apprehension

framework was introduced. The current QW regime is more rights-intrusive and therefore requires strong, rather than weakened, oversight and other human rights safeguards.

8. The Commission considers that many aspects of the current compulsory questioning powers impose significant limitations on a number of rights protected by the *International Covenant on Civil and Political Rights* (ICCPR)<sup>3</sup> and the *Convention on the Rights of the Child* (CRC).<sup>4</sup> In many instances, the questioning powers limit human rights without reasonable justification under international human rights law. In particular, these limitations have not been demonstrated to be necessary and proportionate.
9. Since the ASIO Amendment Act was passed, Australia's national terrorism threat level was lowered by ASIO from 'PROBABLE' to 'POSSIBLE' on 28 November 2022.<sup>5</sup> This is the lowest threat level since September 2014.
10. In a media release announcing this change, the Minister for Home Affairs said:

Overall, ASIO has assessed that the factors that contributed to raising the terrorism threat level in 2014 no longer exist, or persist to a lesser degree.

In particular, ASIO has assessed that while Australia remains a potential terrorist target, there are fewer violent extremists with the intention to conduct an attack in Australia than there were when the threat level was raised in September 2014.<sup>6</sup>
11. ASIO has emphasised that a threat level of 'possible does not mean negligible' and that a terrorist attack is most likely to be conducted by an individual or a small group, using simple tactics and readily available weapons such as a knife or vehicle.
12. The reduction of the threat level to the lowest it has been for a decade, suggests that the PJCIS should carefully consider whether extraordinary powers introduced on a temporary basis that have significant human rights implications, should be allowed to sunset as originally intended. The current review commenced 2 years prior to the sunset date of 7 September 2025 to allow time for the PJCIS to conduct its inquiry and report to government.
13. Since the questioning and detention powers were first introduced in 2002, no detention warrants have ever been issued. This remains the case following the apprehension power introduced by the ASIO

Amendment Act. No persons have been apprehended under the current regime.

14. While 15 QWs were issued between 2004 and 2006, only 1 was issued between 2006 and 2020. Since the ASIO Amendment Act, only 4 QWs have been issued, 3 in the period 2020–2021<sup>7</sup> and 1 in the period 2021–2022.<sup>8</sup> No QWs were issued in the period 2022–2023.<sup>9</sup> In none of the cases where QWs have been issued, was it necessary for the subject of the warrant to be detained for questioning.
15. Significantly, there are now alternative mechanisms and other intelligence-gathering agencies that can obtain relevant information in a way that is more proportionate with human rights. Overwhelmingly, terrorism threats have been dealt with through a combination of surveillance, arrest and prosecution.
16. In the Commission’s view, the current QW and apprehension regime as contained in Division 3, Part III of the ASIO Act, should be permitted to sunset as currently provided for on 7 September 2025.

### 3 Recommendations

17. The Commission makes the following primary recommendation:

#### **Recommendation 1**

Division 3 of Part III of the ASIO Act should be permitted to sunset on 7 September 2025, as currently provided for by s 34JF.

18. If this recommendation is not accepted, the Commission makes the following recommendations for amending the regime:

#### **Recommendation 2**

The provisions allowing a QW to be issued to assist the collection of intelligence in relation to espionage, acts of foreign interference or politically motivated violence should be repealed. A QW should only be able to be issued in relation to a terrorism offence.

#### **Recommendation 3**

The provisions which provide the Attorney-General with the sole responsibility for issuing QWs should be repealed. Issuing authorities for warrants should be judges acting as *personae designata*.

#### **Recommendation 4**

The provisions allowing for the immediate apprehension of the subject of a QW should be repealed.

#### **Recommendation 5**

The minimum age for subjects of QWs of 14 should be repealed. QWs should not be issued in relation to minors under the age of 18 years old.

#### **Recommendation 6**

Section 34AD should be amended to incorporate a tiered approach to eligibility requirements for prescribed authorities. There should be no former superior court judges available before Tribunal members or a King's Counsel or Senior Counsel can be appointed.

#### **Recommendation 7**

Any person subject to a QW should be afforded the right to independent and unrestricted legal representation at all stages of the questioning process.

#### **Recommendation 8**

The provisions dealing with post-charge questioning should be amended to make it clear that a person who has been charged with a criminal offence cannot be subject to a QW until the end of their criminal trial.

## **4 Background**

19. In July 2020, the Commission made a detailed submission to the PJCIS in relation to its inquiry into the effectiveness of the Bill, focusing on the changes the Bill would make to ASIO's questioning and detention powers.
20. The Commission welcomed the proposal to repeal the previous questioning and detention warrant regime, however expressed concern about the replacement of the existing detention framework with a new questioning and apprehension framework. The Commission submitted that the proposed framework would, in some cases, allow for the immediate detention of the subjects of QWs, and would therefore pose many of the same limitations on human rights as the detention framework it would replace.<sup>10</sup>

21. The Bill also sought to amend ASIO's compulsory questioning powers in a number of ways, including:
  - lowering the minimum age for persons who may be subject to detention and questioning, from 16 to 14
  - substantially increasing the kinds of intelligence that could be sought through the issue of a QW
  - substantially reducing safeguards in the previous regime, including a removal of the requirement that warrants be issued by an independent member of the judiciary, and a reduction in the qualifications for the independent persons who supervise questioning under warrants
  - introducing new provisions allowing for questioning to be conducted where criminal charges are contemplated or have commenced; and allowing for information obtained through questioning to be shared with, and used by, prosecutors, even when criminal proceedings are already under way.
22. Following its inquiry into the Bill, the PJCIS tabled its Advisory Report in Parliament in December 2020 (PJCIS's 2020 report).
23. In its 2020 report, the PJCIS stated that it was comfortable with the majority of the Bill that dealt with QWs and was satisfied that ASIO should have these powers within the current 'complex and elevated security environment'. The PJCIS was not persuaded by any argument suggesting that the limited use of questioning warrants in the past meant that such power was not necessary.<sup>11</sup>
24. The PJCIS's 2020 report recommended however, that the Bill be passed by Parliament, following the implementation of the following recommendations:
  - requiring a legal practitioner who is appointed as a prescribed authority to be a Queen's Counsel (now a King's Counsel) or a Senior Counsel
  - requiring the Attorney-General to take into account the best interests of the child as a primary consideration in deciding whether to issue a 'minor questioning warrant'
  - allowing the PJCIS to request a written or oral briefing on any matter in relation to any QW as reported in the Annual Report prepared by the Director-General of Security
  - introducing a sunset clause with the questioning powers, as amended by the Bill, ceasing to have effect on 7 September 2025



- allowing the PJCIS to commence a review into the operation, effectiveness and implications of the new framework by 7 September 2023
  - clarifying that the making of a public interest disclosure to an authorised internal recipient under the *Public Interest Disclosure Act 2013* (Cth) is a ‘permitted disclosure’ for the purposes of the disclosure offences
  - clarifying that ASIO is prohibited from using a tracking device without an internal authorisation (if the tracking device is to be installed in a public place in a jurisdiction where doing so is otherwise not permissible, and does not exceed the limits of authority under proposed sections 26J and 26K of the Bill).
25. All of the recommendations in the PJCIS’s 2020 report were addressed in amendments to the Bill, except in relation to the recommendation allowing the PJCIS to request a written or oral briefing on any matter in relation to QWs as reported in ASIO’s Annual Report. In making this recommendation, the PJCIS observed that QWs may relate to ongoing operational activities, and that s 29(3)(c) of the *Intelligence Services Act 2001* (Cth) provides that the functions of the PJCIS do not include reviewing particular operations that have been, are being or are proposed to be undertaken by ASIO.<sup>12</sup> The Amendment Act inserted new annual reporting requirements in section 94(1) in relation to the number of warrants issued and persons apprehended under Division 3 of Part III of the ASIO Act.

## 5 The current compulsory questioning regime

26. Division 3 of Part III of the ASIO Act provides for a compulsory questioning regime and includes the following significant features:
- an apprehension power to ensure attendance at questioning, to prevent contact with others or the destruction of information
  - enabling the use of adult QWs to collect intelligence in relation to threats from espionage, politically motivated violence and acts of foreign interference
  - powers for police officers: to conduct a search of a person who is apprehended in connection with a QW; to seize items that could be used to communicate the existence of the warrant or escape from custody; and, when authorised by the Attorney-General, to seize items of intelligence relevant to the questioning matter

- providing that the Attorney-General has the sole responsibility for issuing a QW as well as authorising a subject's apprehension
- enabling ASIO to request, and the Attorney General to issue, QWs orally in an emergency
- providing that the minimum age of a person who may be subject to compulsory questioning and apprehension by ASIO is 14 years old
- including in eligibility requirements for those who may serve as 'prescribed authorities' to supervise the execution of a QW - a legal practitioner who has engaged in legal practice for at least 10 years and is a Queen's Counsel (now a King's Counsel) or Senior Counsel
- permitting QWs to be issued, questioning under a warrant to commence or continue, and questioning information to be used and shared by ASIO, even when criminal charges are imminent or have commenced, and when the QW covers matters that are the subject of those charges
- limiting the right to legal representation of the subject's choice during questioning, introducing the ability of a prescribed authority to appoint a lawyer for the subject of a QW, and enabling prescribed authorities to remove, at their discretion, a lawyer deemed to be 'unduly disrupting' questioning.

## 6 Relevant human rights

27. The measures contained in Division 3, Part III of the ASIO Act, engage a number of human rights contained in the ICCPR, including:
  - the right to freedom of movement (article 12)
  - the right not to be subject to arbitrary detention (article 9)
  - the right to privacy (article 17)
  - the right to freedom of thought and freedom of opinion (articles 18 and 19)
  - the right not to be compelled to confess guilt (article 14).
28. The current provisions relating to the apprehension and compulsory questioning of minors, also implicate a number of rights protected by the CRC:
  - 'In all actions concerning children ... the best interests of the child must be a primary consideration' (article 3)

- ‘No child shall be deprived of their liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child ... shall be used only as a measure of last resort and for the shortest appropriate period of time’ (article 37(b))
  - ‘Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance’ (article 37(d)).
29. Some of the human rights protected by the ICCPR may not be subject to any limitation in the interests of balancing competing interests. These ‘absolute freedoms’ include freedom from torture (article 7) and the freedom to hold opinions and beliefs (articles 18 and 19).
30. Many human rights are not absolute, and may be subject to some degree of limitation, either for purposes expressly contemplated by the ICCPR or to accommodate other human rights.
31. For any limitations to be permissible, any law which authorises restrictions on human rights must:
- be prescribed by law
  - be directed towards a legitimate purpose and be necessary to achieve that purpose
  - not impair the essence of any human rights
  - be necessary in a democratic society
  - be proportionate to achieving its legitimate purpose
  - be appropriate to achieve its legitimate purpose, and be the least intrusive measures necessary to achieve that purpose
  - be compatible with the objects and purposes of human rights treaties
  - respect the principle of non-discrimination
  - not be arbitrarily applied.
32. The assertion or existence of a pressing need is not, by itself, sufficient to satisfy these criteria. Instead, any significant limitation of a human right must be justified by reference to compelling evidence that each of the above criteria is satisfied.

## 7 Consideration of current compulsory questioning regime

### 7.1 Scope of questioning warrant

33. ASIO's current compulsory questioning powers are extraordinary in their intrusions on a number of fundamental rights, including the right to freedom of movement, the right to freedom of expression, the right to privacy, and freedom of opinion and belief. The powers allow for people to be compelled to attend at a nominated place, with very limited contact with the outside world, and limited legal representation, and answer questions under penalty of criminal sanction. These powers may be exercised in relation to people who have not been charged with any criminal offence, and who are not suspected of having committed any criminal offence. It is therefore necessary to scrutinise closely the kinds of circumstances in which these powers may be used.
34. Section 34BA of the ASIO Act, provides that for an adult QW (where the person is at least 18 years old), the Attorney-General may issue a warrant if satisfied that there are reasonable grounds for believing that the warrant 'will substantially assist the collection of intelligence' that is important in relation to the protection of Australia from 'espionage', 'politically motivated violence' or 'acts of foreign interference'. The issue of a minor QW is limited to the collection of intelligence in relation to 'politically motivated violence' (s 34BB).
35. Previously, ASIO could obtain a warrant to use its questioning and detention powers only where that would assist the collection of intelligence in relation to a 'terrorism offence' under the *Criminal Code Act 1995* (Cth) (Criminal Code).<sup>13</sup>
36. In its 2020 report, the PJCIS indicated that it was clear that the Government had given detailed consideration to the matter of broadening the questioning power and had decided to do so. The PJCIS was comfortable with this expansion 'given the threat environment, as set out by the Director-General of ASIO at the 10 July 2020 public hearing'.<sup>14</sup> At that hearing, the Director-General of ASIO described Australia's security environment in his opening statement:

As the national security threat evolves, ASIO's ability to respond must also evolve. This bill gives ASIO the ability to respond to a challenging and changing security environment that includes unprecedented levels of

espionage and foreign interference; a terrorist threat that remains at the elevated level of probable; an escalating threat of violence from extremists such as neo-Nazis, who are becoming more organised, committed and capable; Australians being radicalised to extreme ideology and support for violence at a younger age than previously; the possible return of battle-hardened foreign fighters from Syria and Iraq; multiple convicted terrorists being scheduled for release from jail over the next five years; and the continuing phenomenon of lone-actor attacks, ensuring or requiring us to have enhanced operational dexterity.<sup>15</sup>

37. The Department of Home Affairs also argued for the expansion on the basis that:
- Broadening the scope of the powers will ensure that questioning warrants may be used where appropriate to investigate those threats that pose the greatest potential harm to Australians and Australian interests. Removing the existing link to a criminal offence better aligns the powers with ASIO's functions as an intelligence agency. ASIO's investigations focus on anticipating threats to security, often before it is possible to identify a criminal offence. This amendment will enable the use of the powers to collect intelligence at an earlier stage of investigation by removing the need to establish the presence of criminality.<sup>16</sup>
38. ASIO has argued for the availability of compulsory questioning powers in relation to espionage and foreign interference on the basis of both the scale and breadth of current threats and the nature of such activities.<sup>17</sup>
39. The former INSLM, Mr Grant Donaldson SC stated in his 2022–2023 Annual Report that there had been a number of prominent matters involving alleged acts of espionage and foreign interference during the reporting period. He set out 3 publicly reported cases:
- Di Sanh Duong – a prominent member of the Chinese Australian community, who is accused of preparing for an act of foreign influence;
  - Marina Sologub – an Irish citizen working for an Adelaide Council as a space-industry consultant, who had her visa cancelled over concerns about her Russian links; and
  - Alexander Csergo – a businessman based in Shanghai, who has been arrested for allegedly selling Australian defence and security secrets to foreign spies.<sup>18</sup>
40. The Commission accepts that foreign interference and espionage may pose significant threats to Australia's national security but repeats its argument in its 2020 submission that this fact alone does not justify

the expansion and retention of the most intrusive intelligence-gathering powers. It has not been demonstrated that other existing mechanisms were inadequate with respect to the 3 publicly reported cases referred to in the INSLM's annual report.

41. The Commission refers to the remarks of the former Inspector-General of Intelligence and Security (IGIS), the Hon Margaret Stone AO in her submission to the 2017 PJCIS review:

One of the key things that IGIS considers when looking at the propriety of ASIO operations is that the exercise of a power should be proportionate to the gravity of the threat posed, the probability of its occurrence, as well as the imminence of the threat. The threat of an imminent major terrorist attack in Australia is at the top of the current scale of potential threats and would justify the use of the most intrusive powers. Other threats to Australia, including from espionage and foreign interference, can also be serious but this does not mean that there is no hierarchy of threats.<sup>19</sup>

42. While the retention of a compulsory questioning power may be justified in order to combat terrorism, it has not been demonstrated that such a power is necessary or proportionate in relation to other kinds of risks to security.

43. The Commission agrees with the Law Council of Australia that ASIO's compulsory questioning powers apply in very broad circumstances:

The inclusion of these matters in the re-designed questioning warrant scheme will mean that compulsory questioning powers are available to ASIO to investigate threats to Australia's economic or political interests, and not merely the protection of life and safety, as is presently the case for terrorism offences. This breadth will be compounded by the fact that adults who are not the targets of investigations may be compulsorily questioned to obtain information about third parties. The proposed expansion will also mean that there will be greater scope for the exercise of multiple investigative powers by ASIO and the AFP against the same individuals.<sup>20</sup>

44. The Commission does not consider that the scope of ASIO's compulsory questioning powers under the ASIO Act, and the human rights limitations that would entail, has been demonstrated to be necessary or proportionate to achieve a compelling objective.

## **Recommendation 2**

The provisions allowing a QW to be issued to assist the collection of intelligence in relation to espionage, acts of foreign interference or politically motivated violence should be repealed. A QW should only be able to be issued in relation to a terrorism offence.

## 7.2 Issuing authority for questioning warrants

45. The current QW regime provides the Attorney-General with the sole responsibility for issuing, varying and revoking a QW.<sup>21</sup> Previously, a QW could only be issued by an issuing authority who was a judge acting in their personal capacity and only after the Attorney-General's consent was received.
46. A QW may also be issued by the Attorney-General in an emergency, upon an oral request by the Director-General of Security if satisfied that there are reasonable grounds that the delay caused by issuing a written warrant may be prejudicial to security.<sup>22</sup>
47. The Department of Home Affairs has previously argued that this more 'streamlined' warrant issuing process is consistent with the authorisation of other ASIO warrants and ensures that ASIO's compulsory questioning powers are operationally efficient in a fast-paced, high-threat environment.<sup>23</sup>
48. The former IGIS, the Hon Margaret Stone AO, pointed out that Australia is alone among the other countries in the 'Five Eyes alliance' in authorising its intelligence services to conduct compulsory questioning. She submitted that the removal of the role of an independent issuing authority departs from the trend towards increased requirements for external authorisation for intelligence activities such as in the United Kingdom and New Zealand, which require intrusive powers to be approved by the responsible Minister and an independent judicial commissioner.<sup>24</sup>
49. The Commission agrees with Dr Nicola McGarrity and Professor George Williams AO that an independent issuing authority process plays an integral role in safeguarding the fundamental human rights of the person in relation to whom a Questioning Warrant is sought. Furthermore, and just as importantly, its involvement helps to maintain public confidence that the decision-making process has been approached in a non-discriminatory manner.<sup>25</sup>
50. The extraordinary nature of ASIO's questioning powers differentiate them from its other special powers. It follows that such powers require greater independent oversight, not less. Limitations on human rights cannot be justified only on the basis of administrative efficiency.
51. The Commission considers that a requirement that warrants be both issued and supervised by judges as independent persons is a vital safeguard to ensure that these powers are only authorised where lawful and appropriate. It is likely to ensure applications are well-

prepared and documented, and that decisions to issue warrants are made objectively.

### **Recommendation 3**

The provisions which provide the Attorney-General with the sole responsibility for issuing QW's should be repealed. Issuing authorities for warrants should be judges acting as *personae designata*.

## **7.3 Apprehension powers**

52. Section 34C of the ASIO Act provides for an apprehension power for both adults and minors, to ensure attendance at questioning and prevent contact with others or the destruction of information.
53. The Attorney-General may only issue a QW that authorises the apprehension of the subject of the warrant if the warrant includes an 'immediate appearance requirement', and the Attorney-General is satisfied that there are reasonable grounds for believing that if the subject is not apprehended, the person is likely to:
  - alert a person involved in an activity prejudicial to security that the activity is being investigated, or
  - not appear before the prescribed authority, or
  - destroy, damage or alter, or cause another person to destroy, damage or alter, a record or other thing the subject has been or may be requested in accordance with the warrant to produce.<sup>26</sup>
54. Even where the QW includes an immediate appearance requirement but does not expressly authorise apprehension of the subject, a police officer may still apprehend the person for the purpose of bringing them immediately before a prescribed authority for questioning if at the time the subject is given notice of the immediate appearance requirement, the subject makes a 'representation' that they intend to: alert a person, not appear or destroy/damage/alter things.<sup>27</sup>
55. Under section 34C(4), a 'representation' is broadly defined and can be implied, inferred from conduct and does not need to be communicated or intended to have been communicated to or seen by another person.
56. Where apprehension is authorised in the warrant, upon execution of the QW, a police officer is authorised to apprehend the subject to bring them immediately before a prescribed authority for questioning. There are no additional matters about which the police officer must be satisfied prior to apprehending the subject of the warrant. A police



officer's power to apprehend the subject of a QW ends when the subject appears before a prescribed authority for questioning under the warrant.

57. Other powers in connection with the apprehension framework, include police powers to: enter premises and use necessary and reasonable force at any time of the day or night, to apprehend the subject of a warrant,<sup>28</sup> search the subject and seize certain records/things,<sup>29</sup> conduct an ordinary search or frisk search of the subject.<sup>30</sup>
58. The apprehension power engages the rights in article 9 of the ICCPR that no one shall be subjected to arbitrary arrest or detention or deprived of their liberty except on such grounds and in accordance with such procedure as are established by law.
59. The United Nations Human Rights Committee has commented that the notion of 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly 'to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality'.<sup>31</sup>
60. The Commission agrees with the former IGIS that a requirement that a person immediately accompany a police officer to a place of questioning, effectively amounts to detention in substance and practice.<sup>32</sup> The Commission refers to the comments of the Law Council of Australia:

This is because a person is under pain of criminal penalty if they fail to attend for questioning, or if they decline to answer questions while in attendance, or if they attempt to leave the place of questioning without permission from the prescribed authority. A person who is apprehended for the purpose of being brought in for questioning is also subject to the use of force by the police officers exercising the power of apprehension, should the person attempt to resist apprehension or search while apprehended.<sup>33</sup>
61. Since the questioning and detention powers were first introduced in 2002, no detention warrants have ever been issued. Even after the commencement of the ASIO Amendment Act, no person was apprehended during the period from 2020 to 2022.
62. In relation to QWs, since the ASIO Amendment Act, there have only been 4 QWs issued. This is despite ASIO arguing for the expansion of its compulsory questioning powers due to the scale and breadth of current threats and 'unprecedented levels of espionage and foreign interference'.<sup>34</sup>

63. The limited use of QWs can be viewed in the context of the availability of other alternative mechanisms to obtain relevant information which are generally more consistent with human rights. For example:
- The Criminal Code includes a broad range of preparatory offences that allow police to intervene at an early stage. These include offences of conspiracy, and of doing an act in preparation for, or planning, a terrorist act.
  - Police have greater ability to intervene early to disrupt potential criminal activity because of the lower threshold for arresting a person for a terrorism offence, compared with any other Commonwealth offence. Since 2014, police have been able to take someone into custody based on a 'reasonable suspicion' that they have committed a terrorism offence, rather than the usual standard of 'reasonable belief'.<sup>35</sup>
  - Part IC of the Crimes Act provides for post-arrest detention for the purpose of investigating Commonwealth offences and since 2010 has had specific provisions in relation to terrorism offences. In the case of a person arrested for a terrorism offence they may be held for the purpose of investigation (including questioning) for up to 24 hours after arrest (with the approval of a Magistrate). However, this investigation period may be paused for a variety of reasons. The total period that person may be held, including any pauses in investigation, is eight days (again, with the approval of a Magistrate).
64. The Commission notes the comments of the former INSLM, the Hon Roger Gyles AO KC, in his 2016 report that the questioning detention warrant power was not necessary to prevent or disrupt a terrorist act, in terms equally applicable to the current apprehension powers under QWs:
- ASIO has all of its other powers and capacities including QWs. The federal, state and territory police have their powers and capacities including: arrest and questioning, and pre-charge detention if there is reasonable suspicion or suspicion on reasonable grounds of a preparatory act; warrants of various kinds (eg, search warrants, delayed notification search warrants, warrants for arrest); control orders; and preventative detention. The ACIC and some state bodies have intelligence-gathering powers including questioning. There is co-ordination between these various organisations related to the exercise of these powers. There is a risk that the power to immediately detain in addition to questioning could be used as a power to detain for the purpose of disruption — de facto preventative detention. History, including recent history, teaches that

power can be misused by the well-intentioned as well as those deliberately abusing the power. Procedural safeguards cannot entirely rule out that possibility.<sup>36</sup>

65. In the absence of compelling evidence that these apprehension powers under QWs are necessary, the Commission considers that this proposal would involve the increased likelihood of QWs resulting in arbitrary detention, in violation of article 9 of the ICCPR.
66. The Commission's view is that the current powers of apprehension are neither necessary nor proportionate to achieving the objective of protecting Australia's national security interests, in light of the availability of effective, less restrictive alternatives.

#### **Recommendation 4**

The provisions allowing for the immediate apprehension of the subject of a QW should be repealed.

### **7.4 Questioning and apprehension of minors**

67. One of the most serious concerns in the current regime is that children as young as 14 can be subject to apprehension and compulsory questioning under a QW, in relation to politically motivated violence.
68. In its 2018 review, while the PJCIS supported in principle the lowering of the minimum age for warrants to 14 years of age, it considered that additional oversight and safeguards were essential in doing so. It recommended that apprehension should not be available in relation to children.<sup>37</sup>
69. ASIO has stated that it is 'particularly concerned that vulnerable and impressionable young people will continue to be at risk of being ensnared in the streams of hate being spread across the internet by extremists of every ideology'.<sup>38</sup> It provided details of 3 major disruptions involving people under the age of 18 which led to children being charged with preparing for a terrorist act. No evidence has been provided, however, that these children were as young as 14 years of age.
70. The Department of Home Affairs has previously pointed to the need to protect the community from terrorism attacks perpetrated by children, as illustrated by the 2015 politically motivated shooting of NSW Police Force employee by a 15-year-old boy.<sup>39</sup>
71. The Commission acknowledges that the fact that one child aged 15 has, on one occasion, engaged in a 'lone-wolf' style attack adds to the

complexity of Australia's threat matrix. It does not, however, support a claim that all children 14 and over should be potentially subject to the compulsory questioning regime.

72. To date, the Commission is not aware of any QWs having been issued in relation to anyone under the age of 18. It is difficult to see how excluding children as young as 14 years of age from the apprehension power would 'leave a critical gap in ASIO's compulsory questioning powers'<sup>40</sup> in the absence of supporting evidence directly relevant to this cohort.
73. The Commission notes that s 34BB(2) incorporates the PJCIS recommendation that the Attorney-General be required to take into account the best interests of the child as a primary consideration in deciding to issue a minor QW. This creates a necessary safeguard, consistent with article 3 of the CRC which requires that in all actions concerning children, the best interests of the child shall be a primary consideration. However, the lowering of the minimum age for QWs to 14 years and the expanded scope of minor QWs from terrorism offences to politically motivated violence, requires further and more substantial safeguards.
74. The Commission notes that the PJCIS considered that ASIO might consider the inclusion of an Independent Child Advocate when using its questioning powers.<sup>41</sup> However, in a joint briefing provided to the PJCIS by the Department of Home Affairs and ASIO, it was stated that the Government's position was that introducing an Independent Child Advocate was neither required nor desirable due to the existing safeguards and the potential impact on the operational effectiveness of the compulsory questioning framework.<sup>42</sup>
75. Notwithstanding the additional requirement for the Attorney-General to take the best interests of children into account, the Commission considers that the questioning and apprehension of children has not been demonstrated to be a proportionate, necessary or justified response to the threat to national security. The Commission recommends that the provisions providing for the minimum age for subjects of QWs from 14, be repealed.

### **Recommendation 5**

The minimum age for subjects of QWs of 14 should be repealed. QWs should not be issued in relation to minors under the age of 18 years old.

## 7.5 Prescribed authorities

76. Under the current compulsory questioning regime, a 'prescribed authority' oversees and controls the questioning authorised by a QW. Section 34AD provides for 3 classes of persons who will be equally eligible for appointment by the Attorney-General as prescribed authorities:
- former judges of superior courts, who served in that capacity for at least five years
  - the current President or Deputy President of the AAT, currently enrolled as a legal practitioner of a federal court or of a Supreme Court, and have been so enrolled for at least five years
  - legal practitioners of a federal court or of a Supreme Court, currently enrolled, and have engaged in practice for at least 10 years and are a Queen's Counsel (now King's Counsel) or Senior Counsel.
77. The Commission agrees with the requirement in relation to the third class of persons that a legal practitioner who is appointed as a prescribed authority be a King's Counsel or Senior Counsel with at least 10 years of professional experience.
78. The Commission considers however that a tiered approach should be incorporated, with preference given to former judges as prescribed authorities. This would be consistent with the position prior to the ASIO Amendment Act.
79. The Commission maintains that performing the roles of a prescribed authority requires a mixture of independence and finely-honed legal skills that are associated most particularly with current and retired judges. The gravity of the power being exercised also makes it appropriate for the power to be exercised by a judge (acting as *persona designate*), if available.
80. Prescribed authorities oversee questioning by ASIO and exercise a range of functions and powers that can both protect and restrict the rights of people subject to questioning such as giving directions. The Commission has previously described these in detail in its 2020 submission.<sup>43</sup> It is essential that there are stringent qualifications for the appointment of prescribed authorities.

## Recommendation 6

Section 34AD should be amended to incorporate a tiered approach to eligibility requirements for prescribed authorities. There should be no former superior court judges available before Tribunal members or a King's Counsel or Senior Counsel can be appointed.

## 7.6 Limits on access to lawyers

81. Section 34F provides that the subject of a QW may contact a lawyer to obtain legal advice in relation to the warrant and to have a lawyer present during questioning. However, these rights are restricted in a number of ways:
- The prescribed authority can prevent contact with a particular lawyer if they are satisfied, on the basis of circumstances relating to the lawyer, that a person involved in an activity prejudicial to security may be alerted that the activity is being investigated or a record may be destroyed, damaged or altered (s 34F(4)). The subject may choose another lawyer; however the same restriction would apply. The prescribed authority's decision to prevent contact with a particular lawyer inevitably relies on information provided by ASIO. This information may be unsubstantiated but would have the effect of depriving the subject of their lawyer of choice.<sup>44</sup>
  - An adult may be questioned in the absence of a lawyer if the person is given reasonable time and a lawyer is still not present (s 34FB(3)(b)). For a minor, the prescribed authority must instead direct that a specified person be appointed as the lawyer for the person and be present during questioning (s 34FC(3)(b)). However, as to *what* constitutes a reasonable amount of time is not defined. For minors, this is of particular concern given there may be genuine reasons for a delay in arranging legal representation.<sup>45</sup> Similarly, as to *who* may be an alternative 'appointed lawyer' is unclear and lacking in transparency. The provisions should provide clearer guidance in relation to these terms.
  - The lawyer may only intervene in questioning to request clarification of an ambiguous question or request a break in questioning to provide advice (s 34FF(3)).
  - The lawyer may be removed if the prescribed authority considers the lawyer's conduct is unduly disrupting the questioning, in which

case the person must be allowed to contact another lawyer (s 34FF(6)-(7)). No guidance is provided, however, as to what constitutes 'undue disruption' allowing for the removal of a lawyer. This appears to be at the sole discretion of the prescribed authority.

82. As a result of these limitations, a lawyer's role is effectively relegated to a passive one during questioning. The lawyer is not told why the warrant was issued and is not permitted to ask questions, apart from to clarify an ambiguous question, or object to inappropriate or unlawful questioning or other activity. These restrictions may inhibit full and open communication between the subject and their lawyer and mean that the lawyer is prevented from performing the most basic duties of any legal representative, to advise their client of their rights and protect their interests. This creates a real risk that the person may not understand their legal rights or obligations.
83. In its 2020 submission, the Commission emphasised the need for 'meaningful access to legal representation' to ensure the subject of a QW understands their rights and can exercise those rights to challenge any illegality or ill-treatment during the apprehension/questioning process.<sup>46</sup>
84. The Commission maintains that proper access to a lawyer is essential to ensure that the risk for severe limitations on human rights posed by QWs are within the boundaries prescribed by law. Proper access to legal counsel will generally be necessary for an individual to exercise the right to challenge the lawfulness of detention under article 9(4) of the ICCPR. In the case of people under the age of 18, article 37(6) of the CRC explicitly guarantees the right of any child deprived of liberty to prompt legal assistance.

### **Recommendation 7**

Any person subject to a QW should be afforded the right to independent and meaningful legal representation at all stages of the questioning process.

## **7.7 Post-charge questioning**

85. The current provisions expressly authorise an adult or child to be questioned while they are charged with a related offence, or where such a charge is imminent (post-charge), and while they are the subject of a related confiscation proceeding, or where such a proceeding is

imminent (post-confiscation application).<sup>47</sup> Usually, questioning of this nature is prohibited by law because of the prejudice that it can cause to other proceedings.

86. Questioning is expressly permitted on the subject matter of any charge or imminent charge, and of any confiscation proceeding or imminent confiscation proceeding, against the person.<sup>48</sup>
87. The Explanatory Memorandum to the Bill described the rationale for post-charge questioning ‘to obtain information that is available in the mind of the person subject to a QW in order to collect intelligence in relation to ongoing security threats’. The ability to question a person where they have been charged, or charges are imminent, ‘is necessary to achieve the legitimate aim of intelligence collection in light of the potential harm caused by ongoing security threats’.<sup>49</sup>
88. There are some restrictions on the use and disclosure of post-charge questioning material. The prescribed authority is required to give a direction limiting disclosure of information obtained under a QW if satisfied that this action is necessary to protect the subject’s right to a fair trial, if the subject has been charged with a related offence or such a charge is imminent.<sup>50</sup> Questioning material and derivative material can only be disclosed to a prosecutor post-charge under a court order.<sup>51</sup>
89. Section 34E explicitly allows post-charge questioning material to be used to obtain ‘derivative material’, that is, further information gained through the use of information contained in questioning material. While s 34GD(6) provides that information obtained under a QW is not admissible in most criminal proceedings, this provision does not apply in relation to derivative evidence which would be admissible.
90. The Commission agrees with the Law Council of Australia’s submission that:

despite various purported safeguards, post-charge questioning overturns the privilege against self-incrimination and creates an overwhelmingly risk that a person who is compulsorily questioned, in detail, as to the circumstances of an alleged offence, is very likely to prejudice their own defence.<sup>52</sup>
91. The Commission continues to support the recommendation made by the former INSLM, Mr Bret Walker SC, that the QW provisions be amended to make clear that a person who has been charged with a criminal offence cannot be subject to questioning until the end of their criminal trial.<sup>53</sup>



### **Recommendation 8**

The provisions dealing with post-charge questioning should be amended to make it clear that a person who has been charged with a criminal offence cannot be subject to a QW until the end of their criminal trial.



## Endnotes

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- <sup>1</sup> Australian Human Rights Commission, *submission to the PJCIS in relation to the Australian Security Intelligence Organisation Amendment Bill 2020*, 1 July 2020, at <https://humanrights.gov.au/our-work/legal/submission/inquiry-australian-security-intelligence-organisation-amendment-bill-2020>
- <sup>2</sup> Inspector-General of Intelligence and Security, *Submission No 1.2 to the Parliamentary Joint Committee on Intelligence and Security*, Parliament of Australia, *Inquiry into the Review of ASIO's Questioning and Detention Powers*, 22 January 2018, p 6.
- <sup>3</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- <sup>4</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
- <sup>5</sup> Australian Government, Australian National Security, *Current National Terrorism Threat Level*, at <https://www.nationalsecurity.gov.au/national-threat-level/current-national-terrorism-threat-level>.
- <sup>6</sup> The Hon Clare O'Neil MP, Minister for Home Affairs, 'National terrorism threat level' *Media release*, 28 November 2022, at <https://minister.homeaffairs.gov.au/ClareONeil/Pages/national-terrorism-threat-level.aspx>.
- <sup>7</sup> Australian Government, Australian Security Intelligence Organisation, Annual Report 2020-21, p.149, at <https://www.asio.gov.au/system/files/2022-10/Report%20to%20Parliament%202020-21.pdf>.
- <sup>8</sup> Australian Government, Australian Security Intelligence Organisation, Annual Report 2021-22, p.135, at <https://www.asio.gov.au/system/files/2022-10/ASIO%20Annual%20Report%202021-22.pdf>.
- <sup>9</sup> Australian Government, Australian Security Intelligence Organisation, Annual Report 2022-23, p.118, at <https://www.asio.gov.au/system/files/2023-10/ASIO%20Annual%20Report%202022-23.pdf>.
- <sup>10</sup> Australian Human Rights Commission, *submission to the PJCIS in relation to the Australian Security Intelligence Organisation Amendment Bill 2020*, 1 July 2020, at [6]-[7], at <https://humanrights.gov.au/our-work/legal/submission/inquiry-australian-security-intelligence-organisation-amendment-bill-2020>
- <sup>11</sup> Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Australian Security Intelligence Organisation Amendment Bill 2020* (December 2020), at [4.3] and [4.6], at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/ASIOAmendmentBill2020/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOAmendmentBill2020/Report)
- <sup>12</sup> Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Australian Security Intelligence Organisation Amendment Bill 2020* (December 2020), at [4.28]-[4.30], at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/ASIOAmendmentBill2020/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOAmendmentBill2020/Report)
- <sup>13</sup> A 'terrorism offence' being an offence under Subdivision A of Division 72 of the Criminal Code ('International terrorist activities using explosive or lethal devices') or Part 5.3 of the Criminal Code ('Terrorism').
- <sup>14</sup> Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Australian Security Intelligence Organisation Amendment Bill 2020* (December 2020), at [4.3] and [4.6].

- <sup>15</sup> Mr Mike Burgess, Director-General of Security, ASIO, *Committee Hansard*, Canberra, 10 July 2020, p 34.
- <sup>16</sup> Department of Home Affairs, [Submission No. 4](#) to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Review into the effectiveness of the *Australian Security Intelligence Organisation Amendment Bill 2020*, 3 July 2020, p 11.
- <sup>17</sup> Australian Security Intelligence Organisation, [Submission No. 3](#) to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Review into the effectiveness of the *Australian Security Intelligence Organisation Amendment Bill 2020*, 29 May 2020, pp 5, 6.
- <sup>18</sup> Independent National Security Legislation Monitor, Annual Report 2022-2023, pp 8-9, at <https://www.inslm.gov.au/sites/default/files/2023-12/INSLM-annual-report-2022-23.pdf>.
- <sup>19</sup> Inspector-General of Intelligence and Security, [Submission No.1.2](#) to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Inquiry into the Review of ASIO's Questioning and Detention Powers, 22 January 2018, pp 2-3.
- <sup>20</sup> Law Council of Australia, [Submission No. 31](#) to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Review into the effectiveness of the *Australian Security Intelligence Organisation Amendment Bill 2020*, 3 July 2020, p 19 at [44].
- <sup>21</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)*, s 34BA for adult QW and s 34BB for minor QW.
- <sup>22</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)*, s 34B(2)(b).
- <sup>23</sup> Department of Home Affairs, [Submission No. 4](#) to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Review into the effectiveness of the *Australian Security Intelligence Organisation Amendment Bill 2020*, 3 July 2020, p 14.
- <sup>24</sup> Inspector-General of Intelligence and Security, [Submission No 1.2](#) to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Review of ASIO's Questioning and Detention Powers*, 16 October 2017, p 6.
- <sup>25</sup> Dr Nicola McGarrity, Professor George Williams, [Submission No. 22](#) to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Review into the effectiveness of the *Australian Security Intelligence Organisation Amendment Bill 2020*, 3 July 2020, p 5.
- <sup>26</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)*, s 34BE(2).
- <sup>27</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)*, s 34C(2).
- <sup>28</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)*, ss 34CA and 34CD.
- <sup>29</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)*, ss 34CC- 34E.
- <sup>30</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)*, s 34CC(2).
- <sup>31</sup> UN Human Rights Committee, General Comment No 35: Article 9 – Liberty and Security of Person, 112th Sess, UN Doc CCPR/C/35 (2014), [12].
- <sup>32</sup> Inspector-General of Intelligence and Security, [Submission No 1.2](#) to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Review of ASIO's Questioning and Detention Powers*, 16 October 2017, p 6.
- <sup>33</sup> Law Council of Australia, [Submission No. 31](#) to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Review into the effectiveness of the *Australian Security Intelligence Organisation Amendment Bill 2020*, 3 July 2020, p 14, at [25].
- <sup>34</sup> Mr Mike Burgess, Director-General of Security, ASIO, *Committee Hansard*, Canberra, 10 July 2020, p 34.
- <sup>35</sup> *Crimes Act 1914 (Cth)*, s 3WA.
- <sup>36</sup> Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (October 2016), p 41, at <https://www.inslm.gov.au/reviews-reports/certain-questioning-and-detention-powers-relation-terrorism>.

- <sup>37</sup> Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on Inquiry into Review of ASIO's Questioning and Detention Powers* (March 2018), p 80.
- <sup>38</sup> Australian Security Intelligence Organisation, [Submission No. 3](#) to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Review into the effectiveness of the *Australian Security Intelligence Organisation Amendment Bill 2020*, 29 May 2020, pp 4-5.
- <sup>39</sup> Department of Home Affairs, [Submission No. 4](#) to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Review into the effectiveness of the *Australian Security Intelligence Organisation Amendment Bill 2020*, 29 May 2020, p 22.
- <sup>40</sup> Department of Home Affairs, [Submission No. 4](#) to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Review into the effectiveness of the *Australian Security Intelligence Organisation Amendment Bill 2020*, 29 May 2020, p 23.
- <sup>41</sup> Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on Australian Security Intelligence Organisation Amendment Bill 2020* (December 2020), p 83 at [4.20].
- <sup>42</sup> Department of Home Affairs and Australian Security Intelligence Organisation, Briefing – Independent Child Advocates and the Australian Security Intelligence Organisation's Compulsory Questioning Powers, pp 3-4, at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/ASIOAmendmentBill2020/Additional\\_Documents](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOAmendmentBill2020/Additional_Documents)
- <sup>43</sup> Australian Human Rights Commission, *submission to the PJCS in relation to the Australian Security Intelligence Organisation Amendment Bill 2020*, 1 July 2020, at [100].
- <sup>44</sup> Also raised in the Australian Lawyers Alliance, [Submission No. 8](#) to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Review into the effectiveness of the *Australian Security Intelligence Organisation Amendment Bill 2020*, 3 July 2020, pp 7.
- <sup>45</sup> Also raised in the Law Council of Australia, [Submission No. 31](#) to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Review into the effectiveness of the *Australian Security Intelligence Organisation Amendment Bill 2020*, 3 July 2020, pp 73-74.
- <sup>46</sup> Australian Human Rights Commission, *submission to the PJCS in relation to the Australian Security Intelligence Organisation Amendment Bill 2020*, 1 July 2020, at [108].
- <sup>47</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), s 34A (definitions of *post-charge* and *post-confiscation application*) and ss 34BA(1)(d) and 34BB(1)(e).
- <sup>48</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), s 34BD(4).
- <sup>49</sup> Explanatory Memorandum, *Australian Security Intelligence Organisation Amendment Bill 2020* (Cth), p 11 at [35].
- <sup>50</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), s 34DF(1).
- <sup>51</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), ss 34EA(1)(b), 34EB(1)(b) and 34EC(1).
- <sup>52</sup> Law Council of Australia, [Submission No. 31](#) to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Review into the effectiveness of the *Australian Security Intelligence Organisation Amendment Bill 2020*, 3 July 2020, p 53.
- <sup>53</sup> Independent National Security Legislation Monitor, [Declassified Annual Report 20th December 2012](#) (2012), p 96.