



Australian
Human Rights
Commission

Inquiry into the Australian Security Intelligence Organisation Amendment Bill 2020

**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 (the Commission) makes this submission to the Parliamentary Joint Committee on Intelligence and Security (the PJCIS) in its Inquiry into the effectiveness of the Australian Security Intelligence Organisation Amendment Bill 2020 (the Bill).
2. The Bill would amend the Australian Security Intelligence Organisation's (ASIO's) compulsory questioning powers under *the Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act). Most importantly, the Bill would repeal the existing questioning and detention warrant (QDW) and questioning warrant (QW) regimes from the ASIO Act, and insert a new compulsory QW regime. The proposed new QW regime is in some respects the same as the present one, but has some very significant changes. These changes are said to implement the Government's response¹ to the recommendations made by the PJCIS in its 2018 report addressing the operation, effectiveness and implications of the ASIO Act's existing compulsory questioning framework (2018 PJCIS Report).²
3. ASIO's compulsory questioning and detention powers have been reviewed on numerous occasions by parliamentary committees and two former Independent National Security Legislation Monitors (INSLMs). It is noteworthy that the Bill deviates in a number of ways from the recommendations made by previous INSLMs, and to a certain extent those made by the PJCIS in its 2018 Report.
4. The Bill would also amend the surveillance device framework in the ASIO Act by changing the authorisation process for ASIO's use of tracking devices. The Bill would enable ASIO to use tracking devices with only internal authorisation and in some cases without a warrant.
5. This submission focuses on the changes the Bill would make to ASIO's questioning and detention powers.³
6. The Commission welcomes the proposal to repeal the QDW regime. The powers under the QDW regime represent an unjustified intrusion on the human rights of affected persons, and the Commission has called for their repeal in past submissions to this Committee.⁴ So too have both former INSLMs.⁵ In addition, there has been no demonstrated practical need for the QDW regime given that, to date, ASIO has never requested nor been issued with a QDW.
7. The Commission is concerned, however, about the replacement of the existing detention framework with a new questioning and apprehension framework. This 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. Other changes that would be made to the Bill include:

- a. the lowering of the minimum age for persons who may be subject to detention and questioning, from 16 to 14
 - b. a substantial increase in the kinds of intelligence that can be sought through the issuing of a QW
 - c. substantial reductions in safeguards in the current 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
 - d. 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.
8. The Commission acknowledges the critical importance of ensuring that our security and law enforcement agencies have appropriate powers to maintain national security and protect the Australian community from terrorism. Human rights law provides significant scope for such agencies to have robust and effective powers, even where those powers limit or restrict certain individual rights and freedoms. Such limitations on rights must, however, be clearly expressed, unambiguous in their terms, and must be necessary and proportionate responses to potential harms.
9. ASIO's current compulsory questioning powers are extraordinary. They were never intended to be permanent and have no equivalent in any other jurisdiction within the 'Five Eyes alliance'.⁶ The Bill would make the QW regime more rights-intrusive. This legislation therefore requires strong, rather than weakened, oversight and other human rights safeguards.
10. The Commission considers that many aspects of the redesigned compulsory questioning provisions as proposed in the Bill impose significant limitations on a number of rights protected by the International Covenant on Civil and Political Rights (ICCPR)⁷ and the Convention on the Rights of the Child (CRC).⁸ In many instances, the Bill limits human rights without reasonable justification under international

human rights law. In particular, these limitations have not been demonstrated to be necessary and proportionate.

11. Consistently with the views of previous INSLMs, the Commission considers that the entire QDW regime should be repealed and that no equivalent regime should be introduced in its place. That is, the Commission does not support the Bill's proposed redesigned QW regime allowing for apprehension of a subject. There should be no reduction in the safeguards in the current regime, and the minimum age limit for people subject to QWs should not be lowered. The Commission has made a number of recommendations in line with these views, which address the text of the Bill.

2 Recommendations

12. The Australian Human Rights Commission makes the following recommendations:

Recommendation 1

The provisions of the Bill that would repeal the questioning and detention warrant regime in the ASIO Act should be passed. However, the Bill should be amended to remove the proposed new questioning warrant regime.

If, contrary to Recommendation 1, the Bill includes a new questioning warrant regime, the Commission recommends that the Bill be amended as follows.

Recommendation 2

If the Bill proceeds, the provisions allowing for the immediate apprehension of the subject of a QW should be deleted.

Recommendation 3

There should be no expansion in the kinds of intelligence which can be sought under a QW. That is, a QW should only be able to be issued where the issuing authority is satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.

Recommendation 4

The current provisions in the ASIO Act requiring that QWs be issued by an issuing authority on receipt of an application made by the Director-General of ASIO and approved by the Attorney-General should be

maintained. There should be no change to the current requirement that issuing authorities for warrants be judges acting as *personae designata*.

Recommendation 5

The minimum age for subjects of QWs should not be lowered from 16 to 14.

Recommendation 6

If the Bill proceeds, the provisions that relax the current eligibility requirements for 'prescribed authorities' should be deleted.

Recommendation 7

Any person subject to a QW should be afforded the right to independent 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.

3 Summary of the Bill

13. The Bill amends ASIO's compulsory questioning, detention and surveillance device powers in a number of ways. This submission focuses on the following significant features of the amended QW regime that would be inserted in Division 3 of Part III of the ASIO Act:

- repealing ASIO's existing QDW power and introducing an alternative apprehension power to ensure attendance at questioning, to prevent contact with others or the destruction of information
- creating 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
- broadening the scope of the QW regime to enable the use of adult QWs to collect intelligence in relation to threats from espionage, politically motivated violence and acts of foreign interference, rather than only in relation to terrorism offences

- removing the current requirement that a QW must be approved by ‘issuing authorities’, who must be former superior court judges, and instead providing that the Attorney-General may issue, vary or revoke QWs directly, and authorise apprehension
- enabling ASIO to orally request, and the Attorney-General to orally authorise, QWs (including apprehension) in an emergency
- lowering the minimum age of a person who may be subject to compulsory questioning and apprehension by ASIO from 16 to 14, where the minor is the target of an ASIO investigation in relation to politically motivated violence
- significantly lowering the eligibility requirements for those who may serve as ‘prescribed authorities’ to supervise the execution of a QW. Currently only state or territory supreme court or district court judges may serve in this capacity (with exceptions only if there are not enough suitably qualified candidates available)
- 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 questioning 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.

4 History of review

14. Following the terrorist attacks in the United States on 11 September 2001, the Australian Government introduced the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002, which proposed the QDW and QW powers.
15. Upon introducing that Bill to Parliament, the then Attorney-General, the Hon Daryl Williams QC, acknowledged that the coercive detention and questioning powers provided in the Bill were ‘extraordinary’ and were to be considered ‘a measure of last resort’.⁹ As enacted, the powers were never intended to be permanent, with a sunset clause providing that the powers would expire after three years. However, the powers were renewed in 2006 for ten years and subsequent sunset clauses were

further extended by parliament in 2016, 2018 and 2019. They are due to expire on 7 September 2020.

16. The powers have been the subject of several independent reviews since their introduction, including:

- by the Parliamentary Joint Committee on ASIO, ASIS and DSD (PJCAAD)¹⁰
- two separate reviews, by former INSLMs—Mr Bret Walker SC in 2012,¹¹ and in 2016 by the Hon Roger Gyles AO QC (the 2016 Gyles Review),¹² and
- by the PJCIS in the context of its review of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.¹³

17. In their reviews, both former INSLMs called for the repeal of ASIO's existing detention power and supported the retention of a compulsory questioning power—subject to a number of amendments to the legislative framework to ameliorate infringements on human rights.

18. For example, as part of his INSLM review in 2016, the Hon Roger Gyles AO QC expressed concern about the limited use of QWs, and identified a number of provisions which required significant amendment:

The present questioning power is heavy duty with heavy duty safeguards. It is unwieldy and not being used, but has the potential for oppression. It was devised at a time when Australia had a different counter-terrorism framework and is no longer fit for purpose. The key to an effective but reasonable questioning power for ASIO is to accept that it should not be seen as a front-line means of disruption of an imminent terrorist attack, nor as a primary means of collecting evidence to support a criminal prosecution, but rather it should be seen as a tool for the collection of intelligence relating to the threat of terrorist activity.¹⁴

19. In 2017, the PJCIS commenced an inquiry to review the operation, effectiveness and implications of ASIO's questioning and detention powers (the 2017 PJCIS Review), and recommended that:

- ASIO retain a compulsory questioning power
- ASIO's current detention powers be repealed
- legislation for a reformed compulsory questioning framework be introduced by the end of 2018 and include an appropriate sunset clause
- the sunset date of 7 September 2018 be extended by 12 months.

20. The findings and recommendations of the PJCIS were recorded in the 2018 PJCIS Report.
21. The Government tabled its response to the 2018 PJCIS Report on 3 April 2019. It accepted the Committee's first recommendation and accepted in-principle the Committee's second and third recommendations. As per the fourth recommendation, the sunset clause was extended for 12 months to 7 September 2019. The *Australian Security Intelligence Organisation Amendment (Sunsetting of Special Powers Relating to Terrorism Offences) Act 2019* further extended ASIO's current QDW powers until 7 September 2020, to allow time to develop the Bill and for review by the PJCIS.
22. Essentially, while many of the reforms proposed by the Bill are consistent with the PJCIS recommendations, a number of the proposed provisions deviate from that suggested by the PJCIS. The Department of Home Affairs claims that such deviation is necessary 'to ensure the proposed powers are effective in the current security environment, and to support the unique functions and operational requirements of ASIO.'¹⁵
23. The Commission notes that many of the recommendations made by the PJCIS did not reflect the recommendations made in the 2016 Gyles Review. The INSLM plays a vital role in reviewing laws and other national security measures by reference to international human rights law standards. The INSLM receives and considers classified and security-sensitive information, scrutinises the claims and arguments submitted by intelligence agencies in justification of any proposed measures and assesses whether the restrictions they may impose on human rights are necessary and proportionate to achieving the stated aim.¹⁶
24. In conducting the 2016 Gyles Review, the INSLM obtained oral and/or written submissions from ASIO, the AFP and the Attorney-General's Department¹⁷. He considered the history of the provisions, the use of the QWs and the QDW regimes since their inception, and the current security environment, including changes to the 'security landscape' since 2003. After assessing the classified and detailed material before him, he ultimately recommended that any reformed questioning regime not include a direct apprehension power, among other things.
25. The Commission considers that a regime that is more intrusive on rights than that contemplated by the former INSLM should not be implemented. Further, the Commission does not support any amended questioning regime that goes beyond that proposed by the PJCIS.

26. For the reasons discussed below, the Commission considers that elements of the proposed amended QW regime would not be consistent with Australia's international human rights obligations.

5 The human rights framework

27. The measures contained in the Bill engage a number of the human rights contained in the ICCPR, including:

- a) the right to freedom of movement, protected by article 12
- b) the right not to be subject to arbitrary detention, protected by article 9
- c) the right to privacy, protected by article 17
- d) the right to freedom of thought and freedom of opinion, protected by articles 18 and 19
- e) the right not to be compelled to confess guilt, protected by article 14.

28. Insofar as the amended QW regime would permit the apprehension and compulsory questioning of minors, it also implicates a number of rights protected by the CRC:

- a) 'In all actions concerning children ... the best interests of the child must be a primary consideration' (CRC, article 3)
- b) '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' (CRC, article 37(b))
- c) 'every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance' (CRC, art 37(d)).

5.1 Permissible limitations on human rights

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 (under Article 7 of the ICCPR) and the freedom to hold opinions and beliefs (under Articles 18 and 19 of the ICCPR).

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:
- (a) be prescribed by law
 - (b) be directed towards a legitimate purpose and be necessary to achieve that purpose
 - (c) not impair the essence of any human rights
 - (d) be necessary in a democratic society
 - (e) be proportionate to achieving its legitimate purpose
 - (f) be appropriate to achieve its legitimate purpose, and be the least intrusive measures necessary to achieve that purpose
 - (g) be compatible with the objects and purposes of human rights treaties
 - (h) respect the principle of non-discrimination
 - (i) not be arbitrarily applied.¹⁸
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.
33. The measures under the proposed QW regime are highly intrusive of the human rights of any persons subject to their use. They would allow for the apprehension and compulsory interrogation of persons—including children—under threat of criminal sanction. They could be applied to persons who are not suspected of having engaged in any wrongdoing and limit access to legal representation, judicial oversight and the right to silence. Only the most pressing need for such laws, and overwhelming evidence of that need, could justify the measures proposed. In the event that such powers are justified, it is imperative that they be subject to adequate safeguards to prevent misuse, to ensure that fundamental rights are limited to the minimum extent necessary, and to ensure that public confidence is maintained.

6 The Commission's view of the proposed amendments

6.1 *Repeal of the questioning and detention warrant powers, amended questioning warrant powers and new power to apprehend*

34. The Bill proposes to repeal the current QDW and QW regimes and to introduce a reformed compulsory questioning framework for ASIO, including a new apprehension power to ensure attendance at questioning, prevent the 'tipping off' of others or the destruction of records or other things.¹⁹
35. New section 34B of the Bill provides that under this new framework, the Director-General may request the Attorney-General to issue either an adult or a minor QW.

(a) *Adult questioning warrants*

36. Under proposed section 34BA, if requested, the Attorney-General may issue a warrant if satisfied that:
- (a) the person is at least 18 years old; and
 - (b) there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to an adult questioning matter; and
 - (c) 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.²⁰

(b) *Minor questioning warrants*

37. Currently, ASIO may seek a QW against a person as young as 16 years of age, if the Attorney-General is satisfied on reasonable grounds that it is likely that the minor will commit, is committing, or has committed a terrorism offence. Proposed s 34BB(1) would lower the minimum age of questioning to 14, and broaden the circumstances in which a warrant could be issued to those where the Attorney-General is satisfied that there are reasonable grounds to believe the person has engaged in, is likely engaged in, or is likely to engage in activities prejudicial to protecting people, the Commonwealth, States and Territories from 'politically motivated violence'.²¹

38. Further analysis of the criteria for the issuing of a minor QW and other provisions related to minors is explored in more detail below in section 6.4 'Questioning of minors'.
39. Unless otherwise apparent, the provisions of the Bill discussed below apply equally to both adult and minor QWs.

(c) *Immediate appearance requirement*

40. Under the Bill, if the Attorney-General were satisfied that it is reasonable and necessary in the circumstances, a QW could include an 'immediate appearance requirement', which requires the subject of the warrant to appear before a prescribed authority for questioning under the warrant, immediately after the subject is given notice of the warrant.²²

(d) *Apprehension powers*

41. The Bill provides that a subject may be apprehended in connection with a QW in a number of circumstances.

(i) *Where apprehension is expressly authorised in the warrant*

42. Where the Attorney-General issues a warrant containing an 'immediate appearance requirement', the Attorney may, if satisfied of certain matters, include in the warrant an authorisation for a police officer to apprehend the questioning subject.²³
43. Where apprehension is authorised in the warrant, upon execution of the warrant, a police officer is authorised to apprehend the subject to bring them immediately before a prescribed authority for questioning.²⁴ 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 under this subsection ends when the subject appears before a prescribed authority for questioning under the warrant.²⁵

(ii) *Where apprehension is not expressly authorised in the warrant*

44. Under the proposed framework, a police officer may apprehend the subject of a warrant even where apprehension has not been authorised in the warrant, if:
 - (a) a questioning warrant includes an immediate appearance requirement; and

- (b) at the time the subject is given notice of the requirement in accordance with section 34BH, the subject makes a representation that the subject intends to:
 - (i) alert a person involved in an activity prejudicial to security that the activity is being investigated; or
 - (ii) not appear before the prescribed authority; or
 - (iii) 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.²⁶

45. Under section 34C(4), a 'representation':

- (c) can be express or implied (either oral or in writing)
- (d) can be inferred from conduct, and
- (e) does not need to be communicated, or to have been intended to be communicated to or seen by another person.²⁷

(e) Other provisions related to the apprehension power

46. If under the Bill a police officer is authorised to apprehend the subject of a QW, the warrant may also authorize the police officer to enter the premises, using such force as is necessary and reasonable in the circumstances, at any time of the day or night, to search the premises for the subject or to apprehend the subject, if the police officer believes on reasonable grounds that the subject is on those premises.²⁸

47. A QW may also provide that if a police officer conducts a search of the subject of the warrant under section 34CC and a record or other thing is found during the search, which the officer reasonably believes is relevant to the collection of intelligence that is important in relation to the warrant, the officer is authorised to seize the record or other thing.²⁹

48. A police officer may also use such force as is necessary and reasonable to apprehend the subject of a QW or to prevent the subject from escaping apprehension, or to conduct a search or a frisk search of a subject of a QW.³⁰

49. These apprehension powers are a significant extension of the current QW regime.

(f) Human rights implications of proposed apprehension powers

50. The ability to apprehend a person aged 14 years and above under a QW 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.

51. 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'.³¹
52. The Commission agrees with the observation of the IGIS that a requirement that a person immediately accompany a police officer to a place of questioning effectively amounts to detention.³² In the absence of compelling evidence that appending these apprehension powers to ASIO's powers under QWs is 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.
53. ASIO has asserted that the current threat environment has evolved considerably since 11 September 2001 and, in June 2017, stated that it is 'steadily worsening'.³³ In its submission to the present inquiry, the Department of Home Affairs states that reform to the existing QW framework of the ASIO Act is necessary 'to optimise the powers for the current security environment and ensure ASIO may utilise these powers to protect Australians from the most serious threats to security'.³⁴
54. The Commission endorses the proposal to repeal the current QDW provisions. Two former INSLMs and the Commission have called repeatedly for their repeal, on the basis that those powers are, in the words of former INSLM the Hon Roger Gyles AO:

not proportionate to the threat of terrorism and are not necessary to carry out Australia's counter-terrorism and international security obligations.³⁵

55. The former INLSM went on to say:

It is time to accept that the capacity to secretly and immediately detain persons whether or not they are implicated in terrorism is a step too far.³⁶

56. Yet a 'power to secretly and immediately detain' is precisely what the new apprehension powers in the Bill amount to. The Commission's view is that amending the compulsory questioning framework to include powers of apprehension is neither necessary nor proportionate to achieving the objective of protecting Australia's national security interests, for the following reasons.

57. First, no evidence has been provided to demonstrate why the current QW regime is inadequate to fulfil their purpose of protecting national security.
58. No detention warrants have ever been issued since the powers were first introduced in 2002. While 15 QWs were issued between 2004 and 2006, only one has been issued between 2006 and today. In none of those 16 cases was it necessary for the subject of the warrant to be detained for questioning.
59. The Commission agrees with Professor George Williams that such limited use in the last 16 years:
- coincides with the fact that since this was first brought into place a range of other mechanisms have been introduced ... [I]n 2003 there were no control orders. We did not have preventative questioning in the AFP in the form we now do. In fact, a range of other things were not on the books either, including at the state level.³⁷
60. It is not surprising therefore that the use of QWs has dropped, because there are other mechanisms to obtain relevant information, as well as other agencies empowered to obtain it. As Professor Williams points out, ‘the utility it serves is just not the case as it was when it was first enacted.’³⁸ It is hard to see why it is necessary or proportionate to expand the already extraordinary QW regime, when there are clearly other intelligence-gathering agencies and mechanisms—which involve more oversight and public scrutiny—that can be and are more readily used instead. No compelling evidence or argument has been presented that the ‘steadily worsening’ security environment requires these additional powers.³⁹
61. Secondly, as the Commission argued in its submission to this Committee in 2017, the proposal is inconsistent with the conclusions of the 2016 Gyles Review. That review concluded that a scheme of immediate executive detention for the purpose of compulsory questioning is ‘a step too far’.⁴⁰ That finding applies equally to the QDW regime as it currently stands or to any equivalent scheme designed to replace it. All of the factors identified in the 2016 Gyles Review in support of the conclusion that the QDW regime should be discontinued would apply equally to any new questioning regime allowing for the issuing of a warrant authorising immediate apprehension by, or on behalf of, ASIO for the purpose of compulsory questioning.
62. For the reasons above, the Commission endorses those provisions of the Bill that repeal the current QDW regime. However, insofar as the Bill replaces the current QW regime with one that allows for immediate

detention (or 'apprehension') for the purposes of questioning, the Bill should not be passed. Further, no revised QW regime should be introduced that allows for immediate detention for the purpose of questioning.

Recommendation 1

The provisions of the Bill that would repeal the questioning and detention warrant regime in the ASIO Act should be passed. However, the Bill should be amended to remove the proposed new questioning warrant regime.

Recommendation 2

If the Bill proceeds, the provisions allowing for the immediate apprehension of the subject of a QW should be deleted.

63. While this is the Commission's primary position, the remainder of this submission proceeds from the supposition that the Government is nevertheless minded to introduce a replacement QW and apprehension regime.

6.2 Broadening of the purposes for which QWs may be issued

64. Currently, ASIO may 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', being an offence under Subdivision A of Division 72 of the *Criminal Code* (Cth) ('International terrorist activities using explosive or lethal devices') or Part 5.3 of the *Criminal Code* (Cth) ('Terrorism').
65. The Bill proposes to expand the circumstances in which ASIO may seek warrants to use compulsory questioning powers, to include cases where a warrant would assist in the collection of intelligence relating to politically motivated violence, espionage and foreign interference.⁴¹
66. In its submission to the PJCIS in relation to the present inquiry, the Department of Home Affairs justified these amendments on the basis that:

The focus on terrorism offences ... precludes the use of the powers in relation to other serious threats within ASIO's remit, such as espionage and acts of foreign interference. While the threat from terrorism remains unacceptably high, hostile espionage and foreign intelligence activities are occurring on an unprecedented scale and pose an increasing threat to our nation and its security. ASIO's inability to use its compulsory questioning

powers against persons suspected of being involved in espionage or acts of foreign interference is a serious gap in the powers available to safeguard Australia's national security.⁴²

67. ASIO's current compulsory questioning powers are exceptional 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. In some cases, the exercise of these powers could come close to incommunicado detention and interrogation. 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. Only exceptional circumstances, and the most pressing need, can justify the existence of such intrusive powers.
68. When the questioning and detention powers were first introduced in 2002, the then Attorney-General the Hon Daryl Williams QC argued that although they were 'extraordinary', they were nonetheless necessary and appropriate because terrorism was an extraordinary 'evil'.⁴³ The creation of strong investigative powers was said to be necessary to achieve the purpose of deterring potentially catastrophic consequences of terrorist acts, like those perpetrated on 9/11. The key aim of the legislation, he stated, was to 'enable ASIO to question people in emergency terrorist situations in order to obtain the information we need to stop terrorist attacks before people are hurt or killed'.⁴⁴
69. The Commission accepts that foreign interference and espionage may present increasingly complex threats to national security in Australia. However, that fact alone does not justify the extension of the most intrusive intelligence-gathering powers. It has not been demonstrated that the threats posed to national security by foreign interference and espionage are of the same magnitude as those posed by the kinds of catastrophic terrorist attacks which were said to justify the introduction of the current powers in 2002. Nor has it been explained why less intrusive powers would be inadequate in addressing the current threats.
70. The Commission also notes in this context the views of the IGIS, who noted in her submission to the 2017 PJCIS Review that:

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. It may be the case that currently, as the Attorney-General's submission states 'terrorism is not necessarily a more serious threat than other matters that fall within the definition of 'security''; however, it does not follow that questioning and questioning and detention warrants should always be available for every aspect of the definition of security.⁴⁵

71. The Commission understands the IGIS' remarks to mean that while all aspects of 'security' are important in protecting national security, the prevention of 'terrorism offences' can be considered the most pressing, or more pressing than some others. It follows that combatting terrorism may justify the retention of a compulsory questioning power, while addressing other kinds of risk to security may not.
72. The Commission does not consider that the expansion of the circumstances in which ASIO could exercise its mandatory questioning powers under the Bill, and the human rights limitations that would entail, has been demonstrated to be necessary or proportionate to achieve a compelling objective.

Recommendation 3

There should be no expansion in the kinds of intelligence which can be sought under a QW. That is, a QW should only be able to be issued where the issuing authority is satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.

6.3 Warrant issuing authority and emergency authorisations

73. Under the existing QW regime, a warrant can only be issued by an issuing authority (a judge acting in their personal capacity) after the Attorney-General's consent is received—a 'two-step process'.
74. The Bill removes the role of the issuing authority and provides that the Attorney-General has the sole responsibility to issue warrants—a 'one-step' threshold.⁴⁶ The Bill also provides the Attorney-General with express power to vary or revoke a QW.⁴⁷

75. The Bill would also allow a warrant to be issued either by a written document signed by the Attorney-General or orally, if the Attorney-General reasonably believes that the delay caused by issuing a written warrant may be prejudicial to security and only if a written record is made within 48 hours of the warrant being issued.⁴⁸
76. The Department of Home Affairs argues that the amendments are necessary as the two-step process is 'inconsistent with the authorisation of other ASIO warrants and is not conducive to the efficient execution of a QW'⁴⁹. A more 'streamlined' warrant issuing process is therefore required to ensure the 'efficient and timely execution of QWs, particularly where there is an imminent threat to public safety'.⁵⁰
77. Of course, allowing the Minister to issue all warrants would make it simpler and quicker for ASIO to exercise its questioning powers. If the QW regime could be made more 'streamlined' or efficient, without diminishing the effectiveness of safeguards against abuse, it would make sense to amend it accordingly. However, limitations on human rights cannot be justified only on the basis of administrative efficiency.
78. An amendment of this nature, which would mean that it no longer would be necessary to seek the approval of a judge acting as *persona designata*, could be justified only if the judge provides inadequate value in the process of deciding whether to authorise a warrant. However, non-government submissions to the 2016 INSLM inquiry supported greater, not less, independence in the authorisation process.⁵¹
79. Moreover, although the Department of Home Affairs submits that the amendments are necessary to ensure more 'timely' execution of warrants, no supporting evidence has been provided to demonstrate that any of the 16 QWs 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.
80. In his 2016 review, former INSLM the Hon Roger Gyles AO QC considered the merits of replacing the QW provisions with a scheme modelled on the Australian Criminal Intelligence Commission's compulsory questioning powers. In that context, he found:

[T]he procedure governing the ASIO power is more complicated than the procedure governing the ACIC power. This may affect the ease of use of the ASIO power, and involve more time and effort, but would hardly preclude its use.⁵²

81. That is, the 2016 Gyles Review concluded that the current, two-step process for issuing QWs does not render the current regime impracticable or ineffectual.
82. The IGIS, the Hon Margaret Stone AO, has 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 has submitted that the removal of the role of an independent issuing authority is at odds with the position in other likeminded countries, where the trend is to increase the requirements for external authorisation for intelligence activities.⁵³
83. The powers under contemplation involve very significant restrictions of a number of human rights. The Commission considers that a requirement that warrants be both issued and supervised by independent persons (who must be current or former judges) 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 4

The current provisions in the ASIO Act requiring that QWs be issued by an issuing authority on receipt of an application made by the Director-General of ASIO and approved by the Attorney-General should be maintained. There should be no change to the current requirement that issuing authorities for warrants be judges acting as *personae designata*.

6.4 Questioning and apprehension of minors

84. One of the most serious concerns raised by the Bill is that it would lower the minimum age of people who could be subject to compulsory questioning detention, from 16 to 14.
85. If passed, the Bill provides that the Attorney-General could issue 'a minor QW' if satisfied that:
 - (a) the person is at least 14 years old; and
 - (b) 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 [a 'minor questioning matter']; and

- (c) 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; and
- (d) having regard to other methods (if any) of collecting intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued.⁵⁴

86. In its submission to this inquiry, the Department of Home Affairs stated that the need for the lowered age is to protect the community from terrorism attacks perpetrated by minors, as illustrated by the 2015 politically motivated shooting of NSW Police Force employee by a 15-year-old boy.⁵⁵ The exclusion of people under the age of 18 years from QWs, including the proposed apprehension power, would 'leave a significant gap in ASIO's ability to collect crucial intelligence on threats to Australia's security.'⁵⁶

87. When the QW and QDW provisions were first proposed, they were the subject of an inquiry by the PJCAAD. In considering the possible application of this regime to children, the PJCAAD concluded:

It is a major concern that children could be subject to the provisions in the Bill. The Committee does not support the right to detain ... children as provided for under the legislation. There already exists a procedure under the Crimes Act which allows for the questioning of children.

...

Many protections could be put into the legislation with regard to children under the age of 18, however, it is the view of the Committee that it would be simpler and safer to have the legislation not apply to anyone under 18 year [sic] of age.⁵⁷

88. The PJCAAD recommended that the relevant Bill be 'amended to ensure that no person under the age of eighteen years may be questioned or detained under the legislation'.⁵⁸ Ultimately, of course, that recommended was not fully implemented.

89. The preamble to the CRC states that, in light of their physical and mental immaturity, children have special need of safeguards, care and protection. As noted above, article 3 of the CRC requires that in all actions concerning children, the best interests of the child shall be a primary consideration.

90. The current provision for detention and compulsory questioning of minors as young as 16 is itself highly controversial. The proposal that children as young as 14 should be subject to apprehension and

compulsory questioning, in circumstances where they might not have their lawyer of choice present to guide and advise them, is even more extraordinary. The Commission considers that no evidence has been made public that supports the claim that it is necessary and proportionate to lower the age of questioning to 14. Although the Department of Home Affairs points out that one of the seven terrorist attacks conducted in Australia since 2014 involved a young person ‘of school age’, and three of the 18 disrupted plots have ‘involved minors’, they do not provide any evidence that these minors were in fact below the age of 16.

91. The Commission acknowledges that the fact that one person 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 subject to the mandatory questioning regime contemplated by the Bill. It is noteworthy that it has not been claimed that the existence of these powers would have prevented the 2015 crime referred to above.
92. It is also worth noting that, to date, no QWs have been issued in relation to anyone under the age of 18. The argument that the exclusion of persons as young as 14 years of age from the proposed apprehension power would ‘leave a critical gap in ASIO’s compulsory questioning powers’ is not justified when there is no supporting evidence that, to date, a threshold age of 18 would have proven too high.
93. The Commission considers that the proposed amendments have not been demonstrated to be a proportionate, necessary or justified response to the threat to national security. The Commission recommends that the provisions lowering the minimum age for subjects of QWs from 16 to 14 not be passed.

Recommendation 5

The minimum age for subjects of QWs should not be lowered from 16 to 14.

6.5 Prescribed authorities

94. Under the current compulsory questioning regime, a ‘prescribed authority’ oversees and controls the questioning authorised by a QW. Section 34B of the ASIO Act provides that a prescribed authority is a person, appointed by the Attorney-General, who has served as a judge in one or more superior courts for a period of five years and no longer holds

a commission as a judge of a superior court. If there is an insufficient number of former judges available, then persons from other categories, such as current serving judges of State and Territory superior courts, may be appointed.

95. The Bill amends the existing eligibility criteria in section 34B of the ASIO Act. If passed, any of the following people could be appointed as prescribed authorities:
- former judges of superior courts, who served in that capacity for at least five years
 - the current President or a current Deputy President of the Administrative Appeals Tribunal, provided that they have held a legal practising certificate for at least five years
 - legal practitioners with over 10 years of experience who hold a current practising certificate.⁵⁹
96. The current requirement that no former superior court judges be available before Tribunal members or other legal practitioners could be appointed, is removed by the Bill.
97. The Department of Home Affairs states that the purpose of broadening the eligibility criteria for the appointment of a prescribed authority is to 'increase the pool of suitable candidates and facilitate the development of institutional expertise in supervising compulsory questioning under a QW'.⁶⁰
98. However, no evidence has been provided to support a claim this is necessary, and given how sparingly QWs have been used to date, it is hard to envisage any difficulty in finding enough suitably qualified candidates for appointment under the current provisions.
99. Performing the role of a prescribed authority requires a mixture of independence and finely-honed legal skills that are associated most particularly with current and retired judges. Retired judges generally are independent from government and will be more likely to have the skills and attributes necessary to perform the relevant functions. The exacting qualifications required for persons to be appointed as prescribed authorities provide a vital safeguard against arbitrary exercise of the powers in the ASIO Act.
100. 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. These include: giving directions to allow the subject of a questioning warrant to contact others; giving directions that a subject may only disclose information about the warrant or the questioning in specified ways and to specified people; appointing a lawyer for the subject; giving directions to have a subject's lawyer removed from the place of questioning if deemed to be unduly disruptive; allowing questioning to proceed in the absence of lawyer (for adult QWs); giving directions in relation to the right of minors to contact a non-lawyer representative and authorising the removal of a minor's representative if deemed to be unduly disruptive; controlling the length of questioning time by setting breaks between periods of questioning, extending the maximum questioning time, or deferring questioning; giving directions to inform the subject of their right to make a complaint to the Ombudsman or the IGIS; and deferring questioning in response to concerns raised by the IGIS.

101. The fact that the Bill would expand the powers exercisable by prescribed authorities (for example, in some circumstances the Bill would allow the prescribed authority to make directions restricting a person's choice of lawyer) means that it is essential that the current stringent qualifications for appointment to that role should be maintained.
102. The Commission considers that the provisions of the Bill amending the necessary qualifications of prescribed authorities should not be passed.

Recommendation 6

If the Bill proceeds, the provisions that relax the current eligibility requirements for 'prescribed authorities' should be deleted.

6.6 *Limits on access to legal counsel*

103. The Bill restricts the right of the subject of an adult QW to access independent legal counsel in a number of ways.
104. Although the subject of an adult QW may be permitted to contact a lawyer and have them attend during questioning, the Bill restricts this right in a number of ways:
 - The prescribed authority may make a direction denying access to those lawyers of which he or she disapproves, if satisfied that, if the subject is permitted to contact the lawyer, a person involved in activity prejudicial to security may be alerted or that a record or thing the subject might be requested to produce might be destroyed, damaged or altered.⁶¹ For example, if their original

choice of lawyer is denied, the subject is entitled to choose another lawyer, but that lawyer may also be rejected.⁶²

- If the QW is not to be executed immediately, the subject of the warrant is entitled to contact a lawyer of their choice, but if that lawyer does not arrive in what the prescribed authority deems to be a reasonable amount of time, then the prescribed authority may direct that questioning of the subject can start in the absence of the lawyer.⁶³
- If the warrant is to be executed immediately, the prescribed authority can make a direction assigning a lawyer to the subject.⁶⁴ In that case, the subject of the warrant is entitled to request and contact another lawyer of their own choosing.⁶⁵ However, questioning of the subject can begin before that requested lawyer arrives.

105. All the directions described in the paragraphs above can be made orally. Further, under the provisions of the Bill:

- A questioning subject's lawyer must play a passive role during any questioning. The lawyer (like the subject of the warrant) is not told why the warrant was issued,⁶⁶ is not permitted to ask questions, cross-examine, object or 'intervene in questioning ... except to request clarification of an ambiguous question' or request a break to provide advice to the subject,⁶⁷ which the prescribed authority has the discretion to approve or deny.⁶⁸
- A lawyer can be ejected at any time during questioning if deemed by the prescribed authority to be 'unduly disrupting' the proceedings.⁶⁹
- There is no safeguard to ensure that a prescribed authority must allow a lawyer and their client to communicate in private either in break time or otherwise, which would mean any communication between the subject and their lawyer would be capable of being monitored by ASIO.

106. It should be noted that a minor must not be questioned under a QW in the absence of a lawyer;⁷⁰ however, where the warrant includes an 'immediate appearance requirement', the prescribed authority may appoint a lawyer for the subject.⁷¹

107. In its submission to the present inquiry, the Department of Home Affairs argued that the provisions limiting contact with lawyers

... are crucial in the context of a security intelligence investigation to ensure that an investigation is not jeopardised due to contact with a particular person who happens to be a lawyer. These provisions are also necessary to prevent a subject from intentionally delaying questioning.⁷²

108. Despite this argument, the effect of these provisions is that those questioned under the revised regime may be denied the right to effective, or indeed any, legal representation. The restrictions may inhibit full and open communication between the subject and their lawyer. They create a real risk that the person will not understand their legal rights or obligations. Essentially, it means the lawyer is prevented from performing the most basic duties of any legal representative, that is, to advise their client of their rights, protect the interests of their client and to object to and prevent inappropriate or unlawful questioning or other activity.
109. Meaningful access to legal representation is necessary to ensure the subject of a QW understands their rights and can exercise those rights to challenge the legality and conditions of their apprehension and any ill-treatment occurring during the apprehension/questioning process. Access to a lawyer is essential to ensure that the severe limitations on human rights occasioned by questioning under warrant are within the boundaries prescribed by law, which is a precondition for any limitation on rights to be permissible under international human rights 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 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 legal representation at all stages of the questioning process.

6.7 Post-charge questioning

110. Presently, the ASIO Act is silent on whether ASIO may compulsorily question a person after that person has been charged with an offence. In its submission to the 2017 PJCIS Review, the Attorney-General's Department stated this is because the purpose of ASIO questioning is 'to gather intelligence, rather than gathering evidence to support prosecutions'.⁷³
111. The Bill introduces explicit 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.⁷⁴ The Bill would explicitly allow post-charge questioning material to be used to obtain 'derivative material'.⁷⁵

112. The Bill contains some restrictions on the use and disclosure of 'post-charge' questioning material.
113. The Bill provides that a prescribed authority would be required to give a direction limiting disclosure of information obtained under a QW if satisfied that this action was 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.⁷⁶
114. The Explanatory Memorandum states that the Bill would allow for 'post-charge' disclosure of questioning material or derivative material to a prosecutor only following a court order, in circumstances where the court is satisfied that the disclosure is required in the interests of justice.⁷⁷
115. The Explanatory Memorandum to the Bill states that the objective of the post-charge questioning provisions is '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'.⁷⁸ 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'.⁷⁹
116. The Explanatory Memorandum also asserts that the measures proposed are 'the least rights restrictive means of achieving this necessary purpose',⁸⁰ given that the questioning material can only be disclosed to a prosecutor post-charge under a court order, and that there is a criminal use immunity under proposed section 34GD(6). That section provides that, in general, anything said by the subject, or any record or thing produced by the subject, while appearing before a prescribed authority for questioning under a warrant, is not admissible in evidence against the subject in a criminal proceeding.⁸¹ That provision does not, however, render derivative evidence inadmissible.
117. In his 2012 Review of the current QW provisions, former INSLM Mr Bret Walker SC, wrote:

To exert executive force against an accused person to compel answers incriminating him or her of the very matters for which he or she is facing

trial before the judicial power, constitutes a fundamental challenge to the capacity of the judicial power to ensure a fair trial. It would be a mockery of the standard trial judge's direction to a jury that the accused is under no requirement to give evidence, if simultaneously a statute purported to require the accused to give answers that may be either tendered against the accused at the trial or may lead to other damaging material being tendered at the trial.⁸²

....

[T]he lack of derivative use immunity leaves open the possibility of answers being compelled to questions in such a way as to arm a prosecution with information, insights and warnings about what might be called loosely the defence 'case'. That would be of potential great disadvantage to a prosecution even without the tender of any such answers directly against the accused.⁸³

118. As a result, Mr Walker recommended that the QW provisions be amended to make it clear that a person who has been charged with a criminal offence cannot be subject to questioning until *the end* of their criminal trial. The Commission supports this recommendation.

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.

7 Recommendations

119. For the reasons above, the Commission makes the following recommendations:

Recommendation 1

The provisions of the Bill that would repeal the questioning and detention warrant regime in the ASIO Act should be passed. However, the Bill should be amended to remove the proposed new questioning warrant regime.

If, contrary to Recommendation 1, the Bill includes a new questioning warrant regime, the Commission recommends that the Bill be amended as follows.

Recommendation 2

If the Bill proceeds, the provisions allowing for the immediate apprehension of the subject of a QW should be deleted.

Recommendation 3

There should be no expansion in the kinds of intelligence which can be sought under a QW. That is, a QW should only be able to be issued where the issuing authority is satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.

Recommendation 4

The current provisions in the ASIO Act requiring that QWs be issued by an issuing authority on receipt of an application made by the Director-General of ASIO and approved by the Attorney-General should be maintained. There should be no change to the current requirement that issuing authorities for warrants be judges acting as *personae designata*.

Recommendation 5

The minimum age for subjects of QWs should not be lowered from 16 to 14.

Recommendation 6

If the Bill proceeds, the provisions that relax the current eligibility requirements for 'prescribed authorities' should be deleted.

Recommendation 7

Any person subject to a QW should be afforded the right to independent 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.

¹ Explanatory Memorandum, Australian Security Intelligence Organisation Amendment Bill 2020 (Cth) 2 [1].

² Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, [Review of the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979](#) (2018).

³ The Commission has previously expressed concern about inadequate human rights protections in a number of existing provisions of the ASIO Act. See Australian Human Rights Commission, [Submission No 10 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; Australian

Human Rights Commission, Submission to the Independent National Security Legislation Monitor, *Review of Counter-Terrorism and National Security Legislation*, 14 September 2012.

⁴ Australian Human Rights Commission, [Submission No 10 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.

⁵ Independent National Security Legislation Monitor, *Declassified Annual Report: 20th December 2012* (2012), chs IV and V); Independent National Security Legislation Monitor, [Certain Questioning and Detention Powers in Relation to Terrorism](#) (2016), [9.1]-[9.10].

⁶ 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, 6.

⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁸ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1930 (Daryl Williams).

¹⁰ Parliamentary Joint Committee on ASIO, ASIS and DSD, [Review of the effectiveness and implications of the Australian Security Intelligence Organisation Act 1979](#) (2005).

¹¹ Independent National Security Legislation Monitor, [Declassified Annual Report: 20th December 2012](#) (2012).

¹² Independent National Security Legislation Monitor, [Certain Questioning and Detention Powers in Relation to Terrorism](#) (2016).

¹³ Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014).

¹⁴ Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016) p.51.

¹⁵ Department of Home Affairs, Submission to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Australian Security Intelligence Amendment Bill 2020*, 25 May 2020, p.5.

¹⁶ *Independent National Security Legislation Monitor Act 2010* (Cth) s6(b)(ii).

¹⁷ Independent National Security Legislation Monitor, [Certain Questioning and Detention Powers in Relation to Terrorism](#) (2016), 55.

¹⁸ See, for instance, UN High Commissioner for Human Rights, *Human rights: a uniting framework – Report of the High Commissioner submitted pursuant to General Assembly resolution 48/141* UN Doc E/CN.4/2002/18 (27 February 2002), 17-18.

¹⁹ Proposed Subdivision C of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth).

²⁰ Proposed s 34BA of the *Australian Security Intelligence Organisation Act 1979* (Cth).

²¹ Proposed s 34BB(1)(b) of the *Australian Security Intelligence Organisation Act 1979* (Cth).

²² Proposed s 34A of the *Australian Security Intelligence Organisation Act 1979* (Cth)

²³ Proposed s 34BE(2) of the *Australian Security Intelligence Organisation Act 1979* (Cth).

²⁴ Proposed s 34C(1) of the *Australian Security Intelligence Organisation Act 1979* (Cth).

²⁵ Proposed s 34C(1) of the *Australian Security Intelligence Organisation Act 1979* (Cth).

²⁶ Proposed s 34C(2) of the *Australian Security Intelligence Organisation Act 1979* (Cth).

²⁷ Proposed s 34C(4) of the *Australian Security Intelligence Organisation Act 1979* (Cth).

²⁸ Proposed s 34CA of the *Australian Security Intelligence Organisation Act 1979* (Cth).

²⁹ Proposed s 34BE(3) of the *Australian Security Intelligence Organisation Act 1979* (Cth).

³⁰ Proposed s 34CD of the *Australian Security Intelligence Organisation Act 1979* (Cth).

³¹ UN Human Rights Committee, *General Comment No 35: Article 9 – Liberty and Security of Person*, 112th Sess, UN Doc CCPR/C/35 (2014), [12].

³² IGIS Submission 1.2 (16 October 2017), 6. Being subject to involuntary transport by law enforcement officials amounts to detention. See UN Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112th Sess, UN Doc CCPR/C/GC/35 (2014), [5].

³³ Ms Heather Cook, Acting Director-General of Security, ASIO Committee Hansard, Canberra, 16 June 2017, p. 20.

- ³⁴ Department of Home Affairs, Submission to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Australian Security Intelligence Amendment Bill 2020*, 25 May 2020, p.6.
- ³⁵ Independent National Security Legislation Monitor, [Certain Questioning and Detention Powers in Relation to Terrorism](#) (2016), [9.10].
- ³⁶ Independent National Security Legislation Monitor, [Certain Questioning and Detention Powers in Relation to Terrorism](#) (2016), [9.10].
- ³⁷ Professor George Williams AO, Committee Hansard, Canberra, 16 June 2017, p.10.
- ³⁸ Professor George Williams AO, Committee Hansard, Canberra, 16 June 2017, p.10..
- ³⁹ Explanatory Memorandum, Australian Security Intelligence Organisation Amendment Bill 2020 (Cth) 5[10].
- ⁴⁰ Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016), [9.10].
- ⁴¹ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34BA. See also, the definition of ‘adult questioning matter’ at cl 34A.
- ⁴² Department of Home Affairs, Submission to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Australian Security Intelligence Amendment Bill 2020*, 25 May 2020, p.11.
- ⁴³ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1932.
- ⁴⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10 429 (Daryl Williams).
- ⁴⁵ 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, 2–3.
- ⁴⁶ Proposed s 34BA and s 34BB of the *Australian Security Intelligence Organisation Act 1979* (Cth).
- ⁴⁷ Proposed s 34BG(1) of the *Australian Security Intelligence Organisation Act 1979* (Cth).
- ⁴⁸ Proposed s 34B(1)(b) of the *Australian Security Intelligence Organisation Act 1979* (Cth).
- ⁴⁹ Department of Home Affairs, Submission to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Australian Security Intelligence Amendment Bill 2020*, 25 May 2020, p.13.
- ⁵⁰ Department of Home Affairs, Submission to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Australian Security Intelligence Amendment Bill 2020*, 25 May 2020, p.8.
- ⁵¹ Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016), [9.19].
- ⁵² Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016), [9.12].
- ⁵³ 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, 6.
- ⁵⁴ Proposed s 34BB(1) of the *Australian Security Intelligence Organisation Act 1979* (Cth).
- ⁵⁵ Department of Home Affairs, Submission to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Australian Security Intelligence Amendment Bill 2020*, 25 May 2020, p.21.
- ⁵⁶ Department of Home Affairs, Submission to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Australian Security Intelligence Amendment Bill 2020*, 25 May 2020, p.23.
- ⁵⁷ Parliamentary Joint Committee on ASIO, ASIS and DSD, *An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002* (2002), 51 [3.82]-[3.83].
- ⁵⁸ Parliamentary Joint Committee on ASIO, ASIS and DSD, *An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002* (2002), 51 [3.84].
- ⁵⁹ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34AD(1).
- ⁶⁰ Department of Home Affairs, Submission to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Australian Security Intelligence Amendment Bill 2020*, 25 May 2020, p.34.
- ⁶¹ Proposed s 34F(4) of the *Australian Security Intelligence Organisation Act 1979* (Cth).
- ⁶² Proposed s 34F(5) of the *Australian Security Intelligence Organisation Act 1979* (Cth).
- ⁶³ Proposed s 34FB(3)(b) of the *Australian Security Intelligence Organisation Act 1979* (Cth).

- ⁶⁴ Proposed s 34FB(2) of the *Australian Security Intelligence Organisation Act 1979* (Cth).
- ⁶⁵ Proposed s 34FB(2)(b) of the *Australian Security Intelligence Organisation Act 1979* (Cth).
- ⁶⁶ Proposed s 34FH of the *Australian Security Intelligence Organisation Act 1979* (Cth).
- ⁶⁷ Proposed s 34FF(3) of the *Australian Security Intelligence Organisation Act 1979* (Cth).
- ⁶⁸ Proposed s 34FF(4) of the *Australian Security Intelligence Organisation Act 1979* (Cth).
- ⁶⁹ Proposed s 34FF(6) of the *Australian Security Intelligence Organisation Act 1979* (Cth).
- ⁷⁰ Proposed s 34FA(1) of the *Australian Security Intelligence Organisation Act 1979* (Cth).
- ⁷¹ Proposed s 34FC(2) of the *Australian Security Intelligence Organisation Act 1979* (Cth).
- ⁷² Department of Home Affairs, Submission to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Australian Security Intelligence Amendment Bill 2020*, 25 May 2020, p.26.
- ⁷³ Attorney-General's Department, [Submission No 7 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, 23.
- ⁷⁴ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34BA(1)(d), cl 34BB(1)(e), cl 34DB(1), and Subdivision E.
- ⁷⁵ Proposed s 34E(1) of the *Australian Security Intelligence Organisation Act 1979* (Cth).
- ⁷⁶ Proposed s 34DF(1) of the *Australian Security Intelligence Organisation Act 1979* (Cth).
- ⁷⁷ Explanatory Memorandum, Australian Security Intelligence Organisation Amendment Bill 2020 (Cth)
- ⁷⁸ [396]. Proposed s 34EC(1) of the *Australian Security Intelligence Organisation Act 1979* (Cth).
- ⁷⁸ Explanatory Memorandum, Australian Security Intelligence Organisation Amendment Bill 2020 (Cth) 11 [35].
- ⁷⁹ Explanatory Memorandum, Australian Security Intelligence Organisation Amendment Bill 2020 (Cth) 11 [35].
- ⁸⁰ Explanatory Memorandum, Australian Security Intelligence Organisation Amendment Bill 2020 (Cth) 11 [36].
- ⁸¹ Proposed s 34AD(1) of the *Australian Security Intelligence Organisation Act 1979* (Cth).
- ⁸² Independent National Security Legislation Monitor, *Declassified Annual Report 20th December 2012* (2012), p. 93.
- ⁸³ Independent National Security Legislation Monitor, *Declassified Annual Report 20th December 2012* (2012), p. 93.