ASIO's questioning and detention powers

Review of the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979

Parliamentary Joint Committee on Intelligence and Security
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Chair

Mr Andrew Hastie MP

Deputy Chair

Hon Anthony Byrne MP

Members

Hon Mark Dreyfus QC, MP          Senator the Hon Eric Abetz (from 7/2/18)
Hon Dr Mike Kelly AM, MP          Senator David Bushby
Mr Julian Leeser MP               Senator David Fawcett
Mr Jason Wood MP                  Senator Jenny McAllister

Senator Bridget McKenzie (to 20/12/17)

Senator the Hon Penny Wong
Terms of Reference

This inquiry and report is conducted under paragraph 29(1)(bb) of the Intelligence Services Act 2001, requiring the Committee:

- to review, by 7 March 2018, the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979 and any other provisions of that Act as far as it relates to that Division.
Abbreviations

ACC Act  Australian Crime Commission Act 2002
ACIC  Australian Criminal Intelligence Commission
ADJR Act  Administrative Decisions (Judicial Review) Act 1977
AFP  Australian Federal Police
AGD  Attorney-General’s Department
AIC  Australian Intelligence Community
ASIC  Australian Securities and Investments Commission
ASIO Act  Australian Security Intelligence Organisation Act 1979
ASIO  Australian Security Intelligence Organisation
FIS  Foreign Intelligence Service
ICCPR  International Covenant on Civil and Political Rights
IGIS  Inspector-General of Intelligence and Security
IGIS Act  Inspector-General of Intelligence and Security Act 1986
<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tr>
<td>INSLM</td>
<td>Independent National Security Legislation Monitor</td>
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<td>IPW</td>
<td>Identified Person Warrant</td>
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<tr>
<td>IS Act</td>
<td><em>Intelligence Services Act 2001</em></td>
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<tr>
<td>PJCIS</td>
<td>Parliamentary Joint Committee on Intelligence and Security (the Committee)</td>
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<tr>
<td>PJCAAD</td>
<td>Parliamentary Joint Committee on ASIO, ASIS and DSD</td>
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List of Recommendations

Recommendation 1

2.22 The Committee recommends that the Australian Security Intelligence Organisation retains a compulsory questioning power under the *Australian Security Intelligence Organisation Act 1979*.

Recommendation 2

2.68 The Committee recommends that ASIO’s current detention powers, as set out in Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979*, be repealed.

Recommendation 3

2.72 The Committee recommends that the Government develop legislation for a reformed ASIO compulsory questioning framework, and refer this legislation to the Committee for inquiry and report.

The Committee further recommends that proposed legislation be introduced by the end of 2018 and that the Committee be asked to report to the Parliament no sooner than three months following introduction.

The Committee considers any proposed legislation should include an appropriate sunset clause.

Recommendation 4

2.73 The Committee recommends that the *Australian Security Intelligence Organisation Act 1979* be amended to extend the sunset date of 7 September 2018 by 12 months to allow sufficient time for legislation to be developed and reviewed.
1. Introduction

1.1 Under section 29 of the *Intelligence Services Act 2001* (IS Act), it is a function of the Parliamentary Joint Committee of Intelligence and Security (the Committee) to review the operation, effectiveness and implications of Division 3 of Part III (the questioning and detention powers) of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act).

1.2 This report is in fulfilment of that function.

Conduct of the inquiry

1.3 The Chair of the Committee, Mr Andrew Hastie MP, announced the commencement of the inquiry by media release on 22 February 2017 and invited written submissions from government agencies, organisations, and members of the public. Submissions were requested by 21 April 2017.

1.4 The Committee received 22 submissions, including 14 supplementary submissions, from government, academia, and other stakeholders. A list of submissions received by the Committee is at Appendix A.

1.5 When the questioning and detention powers were reviewed by the precursor to this Committee—the Parliamentary Joint Committee on ASIO, ASIS and DSD (the PJCAAD)—in 2005, the PJCAAD received 113 submissions to that inquiry. While there were a smaller number of submissions received for this inquiry, the Committee wishes to recognise the calibre and scope of the submissions. The Committee has drawn heavily on this evidence in this report, and notes it represents a range of views and has usefully informed the Committee’s deliberations.

1.6 The Committee has undertaken a large number of inquiries over recent years, which have placed a considerable burden on contributors. The
Committee expresses its appreciation to all submitters and witnesses for their contributions to this inquiry.

1.7 At all times it was the Committee’s preference for submissions and hearings to be made publicly available. The Committee is grateful to the Australian Security Intelligence Organisation (ASIO) and the Attorney-General’s Department (the Department) for providing a number of additional unclassified submissions at the Committee’s request.

1.8 The Committee held public hearings on 16 June and 9 August 2017. The Committee also received private briefings from, or conducted private hearings with, ASIO, the Department, the Australian Criminal Intelligence Commission (ACIC), the former Independent National Security Legislation Monitor (INSLM) the Hon Mr Roger Gyles AO QC, and the National Counter-Terrorism Coordinator Mr Tony Sheehan. A list of hearings and witnesses who appeared before the Committee is included at Appendix B.

1.9 Copies of submissions received and transcripts of public hearings can be accessed on the Committee’s website.

1.10 On 1 March 2018, the Chair made a statement to the House of Representatives to advise that the Committee’s review was completed and that the Committee’s report would be presented shortly.

1.11 This review follows the 2005 review conducted by the PJCAAD and the 2012 and 2016 reviews by the INSLM. In its 2005 review, the PJCAAD considered the operation of this legislation in some detail, including the types of warrants issued, the length of questioning under each warrant, the appointment of prescribed authorities, and the process of questioning.

1.12 In this review, given the lack of use of the powers since that 2005 review, and the Inspector-General of Intelligence and Security’s (IGIS) close focus on the operational activities of ASIO, the Committee does not examine the operational activities associated with the use of these powers.

1.13 Instead, this review focuses on whether there is a need for an ASIO questioning power in the current security context, and the interaction of ASIO’s questioning and detention powers with other counter-terrorism powers that have more recently been introduced.

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1 The PJCAAD’s report can be accessed from http://www.aph.gov.au/Parliamentary_Business/Committees
Report structure

1.14 This report consists of three chapters:

- This chapter describes the current questioning and detention powers, the legislative history and use of the powers, and previous independent reviews. It also considers the extraordinary nature of the questioning and detention powers, and provides an overview of the current security environment,
- Chapter 2 considers the need for an ASIO questioning power and need for an ASIO detention power in the current context, and
- Chapter 3 considers the possible form of a future questioning model and presents the Committee’s findings.

Current provisions for questioning and detention

1.15 Division 3 of Part III of the ASIO Act allows ASIO, upon obtaining a warrant, to question a person under compulsion in order to obtain intelligence that is important in relation to a terrorism offence.²

1.16 With the Attorney-General’s consent, ASIO may request either a questioning warrant (QW) or a questioning and detention warrant (QDW) from an issuing authority (a judge acting in a personal capacity). Both warrant types require the person to appear before a prescribed authority for questioning in relation to the relevant terrorism offence(s).³ The primary difference between the two warrant types is that under a QDW police officers take the person into custody and detain that person;⁴ under a QW the person is not initially apprehended or detained, instead appearing for questioning at a specified time. QDWs may be obtained where there are reasonable grounds for believing that, if the person is not immediately detained, the person may alert someone involved in a terrorism offence, may not appear for

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² ‘Terrorism offence’ is defined in section 4 of the ASIO Act as an offence against Subdivision A of Division 72 of the Criminal Code Act 1995 (Cth) (Criminal Code), or an offence against Part 5.3 of the Criminal Code.

³ A ‘prescribed authority’ presides over and controls the questioning and detention authorised by the warrant. The 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, may be appointed.

⁴ Although it is an ASIO warrant, only police officers are authorised under a warrant to take a person into custody.
questioning, or may destroy or damage relevant records or things; and that relying on other methods of collecting that intelligence would be ineffective.\textsuperscript{5}

1.17 The prescribed authority controls the questioning and detention process and may make a range of directions, including to detain the person or defer (or extend) questioning.\textsuperscript{6} Questioning may occur for up to eight hours, but this can be extended on request up to a maximum of 24 hours (or 48 hours if using an interpreter).\textsuperscript{7} Under a QDW, the person is detained until either the questioning has ceased, the above maximum questioning period is reached, or 168 hours (7 days) has passed from the time the person was brought before the prescribed authority, whichever is the earliest.\textsuperscript{8}

1.18 During questioning, the person must provide any information, records or things requested. There is no privilege against self-incrimination—the person must answer the questions or produce the requested things even though it may incriminate them; however, any information provided cannot be used against the person in a criminal proceeding.\textsuperscript{9}

1.19 A range of safeguards apply. The IGIS must be provided with a copy of any warrant requests, issued warrants, recordings made of questioning, and details of actions undertaken pursuant to a warrant.\textsuperscript{10} The IGIS may be present when a person is taken into custody under a QDW and during questioning under either warrant type.\textsuperscript{11} The IGIS may raise concerns about any impropriety or illegality under the warrant and the prescribed authority must consider those concerns and may suspend questioning and other processes until the concerns are addressed.\textsuperscript{12} If the person wishes to make a

\textsuperscript{5} ASIO Act, s. 34F.

\textsuperscript{6} ASIO Act, s. 34K.

\textsuperscript{7} The questioning can occur at any time during the life of the warrant and does not have to occur in one questioning session; therefore, the allowed questioning could occur over multiple questioning sessions over the maximum 28 day life of the warrant. If the person is not being detained under the warrant, the person would be free to depart the questioning premises at the conclusion of each questioning session and then be required to return for any subsequent sessions.

\textsuperscript{8} ASIO Act, s. 34G(4).

\textsuperscript{9} The only exception to this is in a criminal proceeding for an offence under section 34L of the ASIO Act, such as for providing false or misleading answers during questioning.

\textsuperscript{10} ASIO Act, s. 34ZI.

\textsuperscript{11} ASIO Act, s. 34P.

\textsuperscript{12} ASIO Act, s. 34Q.
complaint to the IGIS or the Ombudsman, then the person must be given
facilities to enable them to make the complaint.\textsuperscript{13}

1.20 The person may contact a lawyer. However, the person may be prevented
from contacting a particular lawyer if the person is in detention and the
prescribed authority is satisfied, on the basis of circumstances relating to
that lawyer, that contacting that lawyer would mean:

a. a person involved in a terrorism offence may be alerted that the
   offence is being investigated; or

b. a record or thing that the person may be requested to produce in
   accordance with the warrant may be destroyed, damaged or
   altered.\textsuperscript{14}

1.21 A person’s contact with their lawyer can be monitored by ASIO. Reasonable
opportunities must be provided for the lawyer to advise the person, and the
lawyer may request permission to address the prescribed authority during
breaks in questioning. The lawyer may not, however, intervene in the
questioning or address the prescribed authority during questioning, except
to clarify an ambiguous question. If the lawyer fails to comply with these
restrictions, and is considered by the prescribed authority to be unduly
disruptive of the questioning, the lawyer may be removed. If removed, the
prescribed authority must permit the person to contact another lawyer.\textsuperscript{15}

1.22 A range of criminal offences apply for non-compliance with the warrant,
including for when the person fails to appear for questioning, makes a false
statement, or fails to answer a question. Persons who commit these offences
face a five year term of imprisonment.\textsuperscript{16}

1.23 Secrecy offences also apply. During the life of a warrant, the person and
their lawyer must not, on a strict liability basis, disclose the existence of the
warrant, the fact of the questioning or detention or any operational
information. In the two years following the expiry of the warrant, the person
and lawyer also must not, on a strict liability basis, disclose any operational
information obtained as a result of the questioning. The penalty for either
offence is five years imprisonment.\textsuperscript{17}

\textsuperscript{13} ASIO Act, s. 34K(9), s. 34K(11).
\textsuperscript{14} ASIO Act, s. 34ZO.
\textsuperscript{15} ASIO Act, s. 34ZQ.
\textsuperscript{16} See ASIO Act, s. 34L.
\textsuperscript{17} See ASIO Act, s. 34ZS.
Legislative history

1.24 Following the 11 September 2001 terrorist attacks, the Commonwealth Government announced a range of measures to improve its capacity to identify and prevent threats of terrorism in Australia. In March 2002, the Government introduced the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002, containing the questioning and detention powers.

1.25 During the Bill’s second reading speech, the then Attorney-General, the Hon Daryl Williams QC, noted that the objective of the Bill was ‘to strengthen Australia’s counter-terrorism capabilities by enhancing ASIO’s investigative powers.’ The questioning and detention powers would assist ASIO to investigate terrorism offences and to discover the perpetrators of these offences ‘preferably before they perpetrate their crimes’. Attorney-General Williams noted that such warrants may provide for custody and detention incommunicado, and that the powers were extraordinary and were to be ‘a measure of last resort’. 18

1.26 The Bill was the subject of significant public and political debate. It was reviewed by the PJCAAD, 19 the Senate Legal and Constitutional Legislation Committee, 20 and the Senate Legal and Constitutional References Committee. 21 Various amendments were made to the Bill as a result of these reviews. The Bill was subsequently the subject of lengthy debates in the House of Representatives and the Senate in December 2002. After agreement failed to be reached on the Bill, it was laid aside on 13 December 2002. It was then re-introduced in the House of Representatives in March 2003 and was finally passed by the Parliament in June 2003. Royal Assent occurred on 22 July 2003. The questioning and detention powers were to sunset on 23 July 2006.

2005 PJCAAD review


1.27 The enacted Bill also amended the IS Act to require the PJCAAD to review the operation, effectiveness and implications of the questioning and detention powers ahead of that 2006 sunset date. In its November 2005 report, the PJCAAD supported the continuation of the powers, finding that they had been useful. The PJCAAD found, though, that the powers ‘should not be permanent and should be scrutinised as thoroughly as possible.’ As a result, the PJCAAD recommended that the sunset clause be extended to November 2011, and that the Committee be required to review the questioning and detention powers again prior to that date.  

1.28 The PJCAAD made 18 other recommendations in its report, predominantly centred on improving safeguards and providing greater clarity in the legislation. The recommendations included that:

- the ASIO Act be amended to provide more clarity between the QW and QDW regimes,
- the availability of judicial review be more clearly expressed,
- a person subject to a warrant have greater access to legal representation and a clear right of access to the IGIS or Ombudsman,
- the Commonwealth make available reasonable financial assistance to the subject of a warrant, and
- ASIO publish additional information in its annual report on the use of the warrants.  

1.29 In response, the Commonwealth Government made a number of amendments to the provisions to improve their clarity and operation and to enhance safeguards relating to access to lawyers. The three year sunset period was extended by 10 years to 22 July 2016.  

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24 Amendments were made via *Australian Security Intelligence Organisation Legislation Amendment Act 2006 (Cth)*.

extended to 7 September 2018, and subject to statutory reviews by the Committee and the INSLM.26

Independent reviews

2012 INSLM review

1.30 In 2012, the then INSLM, Mr Bret Walker SC, conducted a review of the questioning and detention powers. INSLM Walker’s extensive review examined the files of each issued QW, including the transcripts of the questioning carried out under those warrants.27

1.31 INSLM Walker found that the safeguards relating to the treatment of persons contained within Division 3 of Part III were ‘impressive’:

The considerable safeguards on the treatment of persons questioned under QWs, especially the involvement of the Inspector-General of Intelligence and Security, constitute best practice according to a general review of international standards. Nothing untoward has been discovered by the INSLM in relation to any of the actual questioning under QWs, so far as concerns oppressive or other unlawful or improper conduct. The panoply of provisions in the ASIO Act to this end is on its face impressive, and according to experience so far, effective.28

1.32 INSLM Walker ultimately found that QWs ‘are sufficiently effective to be appropriate, and in a relevant sense necessary’ and rejected ‘the criticism that questioning warrants are an unjustified infringement of liberty’.29 He observed:

The efficacy of the QW provisions and their worth as an intelligence collection tool has been established through review of the files and discussions with relevant agencies. Questioning under QWs has played a role in informing intelligence assessments and progressing terrorism investigations. It should be

26 See Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth).
emphasized that ASIO is an intelligence agency, not an investigation bureau for law enforcement such as police detectives are.\textsuperscript{30}

1.33 However, INSLM Walker held that QDWs were an unnecessary extension of QWs and were not a justifiable intrusion on personal liberty.\textsuperscript{31}

1.34 INSLM Walker recommended:

1. The QDW provisions be repealed,\textsuperscript{32} and

2. The QW provisions be amended to permit arrest if the police officer serving the warrant believes on reasonable grounds from anything said or done by the person served that there is a serious possibility that he or she intends not to comply with the warrant, and also to permit the prescribed authority to direct detention after service of a QW but before the time specified in it for attendance if it appears on reasonable grounds that there is an unacceptable risk of the person tipping off another involved in terrorism, failing to attend or destroying or tampering with evidence.\textsuperscript{33}

1.35 These recommendations were not implemented.

\textbf{2016 INSLM review}

1.36 In 2016, the then INSLM, the Hon Roger Gyles AO QC, conducted a subsequent review into the questioning and detention powers. In his report, INSLM Gyles accepted that a compulsory questioning power to gather intelligence was a useful tool for ASIO’s counter-terrorism work; however, he expressed concerns about the limited of use of QWs (discussed later in this chapter), and identified a number of provisions which required significant amendment.\textsuperscript{34} He found:


\textsuperscript{34} Independent National Security Legislation Monitor, \textit{Certain Questioning and Detention Powers in Relation to Terrorism}, 2016, p. 42.
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.\(^{35}\)

1.37 INSLM Gyles recommended that the QDW provisions be repealed or cease when the current sunset date (7 September 2018) is reached. He found that the provisions were not necessary to prevent or disrupt a terrorist act, and he voiced some concerns about whether QDWs were constitutionally valid and in line with Australia’s international human rights obligations. He concluded that

QDWs are not proportionate to the threat of terrorism and are not necessary to carry out Australia’s counter-terrorism and international security obligations. 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.\(^{36}\)

1.38 Noting the use and usefulness of similar compulsory examinations conducted by the Australian Criminal Intelligence Commission (ACIC), the high level of understanding of the ACIC’s examination powers amongst the legal profession, and the recent scrutiny of those powers by the Parliament and the courts, INSLM Gyles recommended that the QW provisions be repealed, or not extended beyond the sunset date, and be replaced by a questioning power following the model available to the ACIC in the Australian Crime Commission Act 2002 (ACC Act) ‘as closely as possible’. INSLM Gyles explained:

The previous INSLM did not have the experience of the last five years to guide him when considering these powers — particularly, the successful use of the ACIC powers, the non-use of the ASIO powers, and the regular use by the AFP of the pt IC power. There is a plethora of state inquisitorial bodies and each has different functions, powers, and safeguards. Different constitutional considerations apply to those than to Commonwealth bodies. The ACC Act is

\(^{35}\) Independent National Security Legislation Monitor, Certain Questioning and Detention Powers in Relation to Terrorism, 2016, p. 51.

\(^{36}\) Independent National Security Legislation Monitor, Certain Questioning and Detention Powers in Relation to Terrorism, 2016, p. 41.
the appropriate model and it would not be appropriate to cherry-pick parts of other models and graft them on, or to excise some parts unless it is necessary to accommodate the different repository of the power.  

1.39 INSLM Gyles also recommended that the definition of a ‘terrorism offence’ be amended to include the foreign incursion and recruitment offences in Part 5.5 of the Criminal Code and the terrorism financing offences in the *Charter of the United Nations Act 1945*, and the phrase ‘important in relation to a terrorism offence’ should be amended to read ‘important in relation to an actual or threatened terrorism offence’ wherever appearing.  

1.40 Finally, to avoid oppression by successive examinations, INSLM Gyles recommended the creation of a protocol between ASIO, the ACIC, and any relevant state body that shares information obtained by compulsory questioning. INSLM Gyles was of the view that this protocol should then be approved and given appropriate status by the Attorney-General. He suggested that the INSLM and other supervisory bodies, such as the IGIS and the Commonwealth Ombudsman, should be able to monitor how this protocol operates in practice.  

1.41 The Committee notes that the current INSLM, Dr James Renwick SC has stated that the report and recommendations of Mr Gyles stand as the views of his office.  

**Use of warrants**  

1.42 To date, ASIO has requested and has been issued with 16 QWs in relation to 15 persons. ASIO has never requested nor been issued with a QDW.  

**Table 1.1 Use of QWs since introduction of legislation in July 2003**

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41 Attorney-General’s Department, *Submission 7*, p. 55.
<table>
<thead>
<tr>
<th>Year ending 30 June</th>
<th>Number of warrants issued</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>3</td>
</tr>
<tr>
<td>2005</td>
<td>11</td>
</tr>
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<td>2016</td>
<td>0</td>
</tr>
<tr>
<td>2017</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>16</strong></td>
</tr>
</tbody>
</table>

Source: Attorney-General’s Department, Submission 7, p. 55; ASIO Annual Report 2016-17, p. 127.

1.43 On the use of these powers, the IGIS advised the Committee that, in her Office’s experience,

There have been no significant concerns with the use of the powers and the procedural and technical matters that have arisen have been resolved satisfactorily.42

**The extraordinary nature of the questioning and detention powers**

1.44 The questioning and detention powers were one of the first legislative measures that form what is now the modern Australian counter-terrorism framework. The powers predate all other major counter-terrorism regimes in

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42 Inspector-General of Intelligence and Security, Submission 1, p. 8.
force today, including the preventative detention and control order regimes, and Part IC of the *Crimes Act 1914*.\footnote{Commonwealth of Australia, Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism*, 2016, p. 22.}

1.45 When the questioning and detention powers were first introduced to the Parliament in 2002, the then Attorney-General, the Hon Daryl Williams QC, acknowledged that:

> These measures are extraordinary, but so too is the evil at which they are directed.\footnote{The Hon Daryl Williams QC MP, Attorney-General, *House of Representatives Hansard*, 21 March 2002, p. 1936.}

1.46 The measures were intended to allow ASIO to collect intelligence that could assist in the prevention of terrorist attacks. The powers were seen, in light of the recent September 11 attacks, and then the October 2002 Bali attacks, as a necessary response to what was a fundamentally altered security environment.\footnote{The Hon Daryl Williams QC MP, Attorney-General, *House of Representatives Hansard*, 27 March 2003, p. 13762.} The powers would allow Australia’s security agency to question in secret (and potentially detain) any person, including those not suspected of committing a terrorism offence. Further, the powers made it a criminal offence carrying five years imprisonment if the person revealed, on a strict liability basis, that questioning had occurred.

1.47 The PJCAAD noted in its 2005 review of the powers:

> Intelligence gathering, where compulsory questioning is the only way to elicit information, which is important in relation to a terrorist offence, was put forward on the introduction of the Bill as necessary for the protection of the community. It was to be a measure of last resort. The assumption was that extraordinary powers were necessary to protect the community in the face of terrorism threats. Secrecy, it was argued, was necessary because the powers are part of the intelligence gathering of ASIO, whose methods and collected information needed to be protected on national security grounds. Because the powers were extraordinary, because they involved secret processes and a secret service, because they could not be scrutinised in the way that normal police powers are scrutinised, the Parliament inserted into the Act a series of protections, including the protection of immunity from prosecution, albeit not derivative use immunity, for any information given under compulsion.\footnote{PJCAAD, *Review of the operation, effectiveness and implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979*, 2005, pp. 24-25.}
1.48 One of these protections was the imposition of a sunset clause. Professor George Williams AO explained:

 Even at that time it was thought that [the questioning and detention powers] need to be reviewed and cannot be a permanent measure. It was always seen as something that would be on the books while there was a particular threat of terrorism that required this exceptional response...47

1.49 This exceptional response generated significant public and parliamentary debate when first proposed. As one submitter explained, much of what was said or written at the time was highly charged:

 On the one hand, it was said that the regime, at least in the form in which it was first introduced into the Commonwealth Parliament, would not be out of place in former dictatorships such as General Pinochet’s Chile or Suharto’s Indonesia. On the other hand, those who opposed or delayed the regime were said to be to blame if any Australian blood was spilt by terrorism as a result.48

1.50 The charged debate had a firm basis—the proposed powers were extraordinary. INSLM Gyles observed in his 2016 review:

 A warrant enabling a person to be ‘detained in custody, virtually incommunicado without even being accused of involvement in terrorist activity, on grounds which are kept secret and without effective opportunity to challenge the basis of his or her detention’, to use the words of former High Court Chief Justice Sir Gerard Brennan (on the basis of possession of intelligence in relation to a terrorism offence), is an extraordinary power. Further, the decision on whether the grounds to make a QDW application rather than a QW application lies with a member of the executive. No precedent in any comparable country has been identified.49

1.51 Professor Williams supported this observation, submitting:

 there is no other comparable nation in the world that gives a coercive questioning power, let alone a detention power, to an intelligence agency of this kind.50

47 Professor George Williams AO, Committee Hansard, Canberra, 16 June 2017, pp. 15-16.
50 Professor George Williams AO, Committee Hansard, Canberra, 16 June 2017, p. 12.
Professor Williams suggested that other nations have not provided their intelligence agencies with compulsory questioning powers due to recognition that powers like compulsory questioning are best left to law enforcement agencies. He explained:

The simple reason for that is that it is thought that these [intelligence] agencies must operate with a level of secrecy. They cannot have the same level of public accountability and transparency that other bodies have. As a result, that means that extreme caution must be given as to the form of coercive powers that are issued. In this case, the decision has been given to give it a coercive questioning power that takes it beyond those other agencies.\(^{51}\)

At the Committee’s request, ASIO and the Department confirmed the accuracy of the proposition that no like countries have provided their intelligence agencies with such powers. However, the Department cautioned that care must be taken when attempting to draw direct comparisons between countries, and that ‘any comparison should take into account the whole security framework of respective countries, and the roles, relationships and powers afforded to agencies within that broader landscape’.\(^{52}\)

At a public hearing, the Committee asked the Acting Director-General of Security whether she agreed with the proposition that these are extraordinary powers. The Acting Director-General of Security replied:

I would argue that the compulsory questioning power is not extraordinary, given the range of Commonwealth and state agencies that have them. We still treat them as extraordinary and recognise their intrusive nature, but I am not certain that I would describe ASIO’s compulsory questioning powers as extraordinary.\(^{53}\)

The Committee suggested to the Acting Director-General of Security that the questioning and detention powers were more intrusive than any of ASIO’s other powers available under warrant. The Acting Director-General responded:

Yes, I do accept the degree of intrusiveness. We consider the suite of our special powers as intrusive, which is why they are handled in a very special way—applied judiciously and proportionate to the threat. But I do not

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\(^{51}\) Professor George Williams AO, Committee Hansard, Canberra, 16 June 2017, p. 12.

\(^{52}\) Attorney-General’s Department, Submission 7.2, p. 2.

disagree with what you are saying. I suppose there could be different views about whether or not open questioning—albeit in secret—of an individual would be perceived as more intrusive than some of the other sorts of powers where the individual would not be aware that, say, their communications were being intercepted or those sorts powers that would be used at that point. That is seen as intrusive. I guess the weighting of what is more intrusive may be questionable, but I do not disagree with you that these are intrusive powers.54

The current security environment

1.56 The questioning and detention powers were introduced in 2002-03 to deal with what was seen as a profoundly altered security environment. At the time, the then Attorney-General, the Hon Daryl Williams QC, noted:

The world shaking and tragic events of 11 September claimed close to 3,000 lives, including a number of Australians. The more recent atrocity in Bali, in which 88 Australians tragically lost their lives, brought terrorism to our very doorstep and proved to Australians that geography does not protect us from terror. The security environment has changed forever and the spectre of terrorism is omnipresent.55

1.57 According to ASIO, the threat environment has since evolved, and is steadily worsening.56

What we are experiencing now, as opposed to how the threat manifested a decade ago, in the post September 11 environment, represents quite a dramatic change. Previously, the sorts of activities in the terrorism space that were observed were larger networks of individuals and larger scale plots with more involved planning and longer term planning. As you would be aware, the current environment is pretty much the opposite of that: lone actors or very small groups and very short time frames between forming the intent to undertake an attack and actually being able to acquire the capability to do so.

54 Ms Heather Cook, Acting Director-General of Security, ASIO, Committee Hansard, Canberra, 16 June 2017, p. 27.

55 The Hon Daryl Williams QC MP, Attorney-General, House of Representatives Hansard, 27 March 2003, p. 13762.

56 Ms Heather Cook, Acting Director-General of Security, ASIO Committee Hansard, Canberra, 16 June 2017, p. 20.
That is because of the use of more readily available weaponry—more easily accessible types of tools of attack are the preferred mode of attack now.\(^{57}\)

1.58 ASIO advised that since the national terrorism threat level was raised to ‘PROBABLE’ in September 2014, there have been five onshore terrorist attacks and 12 disruption operations in response to imminent attack planning.\(^ {58}\)

1.59 Since the commencement of this review in February 2017, there has been an attack in Melbourne, and an alleged plot to attack aviation interests has been disrupted in Sydney. Over this same period, there have been attacks in Manchester and Barcelona, and multiple attacks in London. Some of those incidents led to the loss of Australian lives. According to ASIO,

these events highlight the enduring and dynamic nature of the extremism challenge to Australia, with the conflicts in Syria and Iraq energising local extremists in a way no other terrorism arena ever has. Over the same time frame, we have seen the subjects of our counter-terrorism investigations greatly increase in number, reduce in average age and diversify in ethnicity and gender.\(^ {59}\)

1.60 ASIO set out what it sees as a continuing and evolving threat environment:

The conflict in Syria and Iraq has now shaped a generation of violent Islamist extremists here, some of whom will pose a threat to security for at least the coming decade. Returning foreign fighters who have spent time with extremist groups globally will further affect the threat. Some will have greatly enhanced capabilities to undertake terrorist attacks. Any planning to do so may take many years to manifest. The shift in what is deemed to be a successful Islamist extremist terrorist attack—from complex methodologies to simple, but very difficult to prevent, low-capability attacks undertaken by individuals enabled by technologies, including encrypted-by-default internet communications and device security—will challenge our ability to disrupt future terrorist attacks. Regardless of actions taken, highly sophisticated violent Islamist extremist propaganda in English and a range of other languages will continue to be accessible to potential extremists, including here, to justify their actions for years to come. As such, the threat we face is self-sustaining.\(^ {60}\)

\(^{57}\) Ms Heather Cook, Acting Director-General of Security, ASIO, *Committee Hansard*, Canberra, 16 June 2017, p. 22.

\(^{58}\) Australian Security Intelligence Organisation, *Submission 8*, p. 4.


\(^{60}\) Australian Security Intelligence Organisation, *Submission 8*, p. 5.
The 2017 Independent Intelligence Review supported this assessment, noting that ‘Australia’s national security circumstances have been re-shaped by the realities of extremism with global reach.’ The authors of that review stated:

In our view, the terrorist and extremist threats to Australia and Australian interests will continue to grow in scale and complexity. Detecting and countering such threats will be increasingly challenging for our intelligence and law enforcement agencies. The greater numbers of Australians travelling and living overseas, as well as the international movement of radicalised individuals, will magnify the security threats Australia faces.\(^{(61)}\)

ASIO presented the Committee with this prediction:

We do not expect the terrorism threat to diminish in the foreseeable future.\(^{(62)}\)

There are also a number of other threats to our national security. ASIO noted in its most recent annual report that the threat from espionage and foreign interference to Australian interests is extensive, unrelenting and increasingly sophisticated. In addition to traditional espionage efforts to penetrate government, foreign intelligence services are targeting a range of Australian interests, including clandestine acquisition of intellectual property, science and technology, and commercially sensitive information. Foreign intelligence services are also using a wider range of techniques to obtain intelligence and clandestinely interfere in Australia’s affairs, notably including covert influence operations in addition to the tried and tested human-enabled collection, technical collection, and exploitation of the internet and information technology.\(^{(63)}\)

In addition, the clandestine nature of espionage and foreign interference means that the aggregate cost is difficult to quantify, particularly in dollar terms. However, the harm caused by hostile intelligence activity can undermine Australia’s national security and sovereignty, damage Australia’s international reputation and relationships, degrade its diplomatic and trade relations, inflict substantial


economic damage, degrade or compromise nationally vital assets and critical infrastructure, and threaten the safety of Australian nationals.\textsuperscript{64}

1.65 ASIO also noted that ‘Australia continues to experience low levels of communal violence, although incidents in response to specific local or international events that resonate with expatriate communities do occur occasionally,’ and that ‘most Australian protests, while occasionally employing disruptive tactics, comply with regulations and conclude without significant incident.’\textsuperscript{65}

1.66 In relation to border security, ASIO stated in its annual report:

The people-smuggling environment is characterised by a continuing suppressed demand among potential illegal immigrants (PIIs) for travel by illegal maritime venture to Australia; however, Operation Sovereign Borders (OSB) and offshore regional processing constitute a significant and ongoing deterrent. Demand among PIIs for travel to Australia has fallen but is not universally or permanently suppressed. Illegal maritime ventures to Australia continue to be organised mainly from Sri Lanka and Indonesia, with the greatest interest in illegal travel being shown by PIIs from Sri Lanka, Bangladesh, Afghanistan, Myanmar and Vietnam. As such, planned and actual illegal maritime ventures to Australia will remain an enduring challenge over the next decade.\textsuperscript{66}


\textsuperscript{65} Australian Security Intelligence Organisation, \textit{Annual Report 2016-17}, p. 23.

2. ASIO's questioning powers

2.1 This chapter examines whether there is a need for ASIO’s questioning powers and detention powers. This examination takes account of the current security context and the range of state and federal counter-terrorism measures introduced in recent years.

The need for a questioning power

2.2 Despite the increase in threat and resultant counter-terrorism activity over the last decade, ASIO has requested only one QW since 2006. ASIO has never requested a QDW.

2.3 The Castan Centre for Human Rights Law and the Australian Lawyers Alliance suggested this demonstrated a lack of need for the questioning and detention powers.\(^1\) INSLM Gyles similarly questioned the necessity of the powers:

> The non-use of the power since 2010 is striking. Two QWs have been issued since 2005; one in 2006 and the other in 2010. The number of potential terror incidents has increased rather than diminished during that time. The necessity for, and the efficacy of, the power comes into question. No entirely satisfactory reason for non-use has been given by ASIO. The changing nature of the threat from large-scale targets requiring considerable planning to one-off single incidents with little notice is cited.\(^2\)

\(^1\) Castan Centre for Human Rights Law, Submission 2, p. 7; Australian Lawyers Alliance, Submission 6, p. 16.

\(^2\) Independent National Security Legislation Monitor, Certain Questioning and Detention Powers in Relation to Terrorism, 2016, p. 42.
2.4 From their introduction, it was the Government’s intention that these powers would be used sparingly. The then Attorney-General, the Hon Daryl Williams QC, noted in 2003:

It must be remembered that warrants issued under the bill will be tools of last resort. It is anticipated they will be used rarely and only in extreme circumstances.³

2.5 ASIO offered the following to explain the lack of use of these powers:

First, ASIO is judicious in its use of these resource-intensive and intrusive powers. This is in line with the Attorney-General’s Guidelines, which require ASIO to undertake inquiries and investigations using, wherever possible, the least intrusive techniques to collect information; therefore, they are only considered in a limited number of cases. Second, the current framework does not lend itself to the collection of intelligence with the agility and speed regularly demanded of ASIO in current terrorist offence investigations. Third, the earlier ‘last resort criterion’ statutory threshold, repealed in October 2014 and replaced with a ‘most effective’ requirement, has been difficult to satisfy and has limited ASIO’s ability to obtain a questioning warrant.⁴

2.6 According to ASIO, the recent shift toward less sophisticated attack planning—with very short time frames between the person forming the intent to undertake an attack and actually being able to acquire the capability to do so—has limited the effective use of the powers. ASIO claimed that the multi-step process in applying for and acquiring a warrant prevents the timely execution of a warrant, particularly where there is an imminent threat to public safety and immediate action is required.⁵ The Acting Director-General of Security explained:

So, the time it would take to form the view that a questioning warrant or a questioning and detention warrant would be an appropriate way to proceed in the current environment, and then the time taken to actually acquire such an instrument, would probably preclude its general utility in the current environment. But we can certainly conceive, and have considered in the current environment, whether or not they would be appropriate to use. But,

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again, because of the fluidity and the speed with which these sorts of plots emerge, we need to be much more agile.\(^6\)

2.7 ASIO argued that, notwithstanding the problems with the current provisions, a questioning power is a useful intelligence collection tool:

In many cases, when faced with criminal offences for non-cooperation, persons being questioned may be more inclined to give truthful answers and provide information that ASIO would otherwise not have obtained. There are situations where some people will be reluctant to volunteer information to ASIO because of perceived competing loyalties or obligations, notwithstanding that they have serious security concerns about the conduct of an individual. Those competing loyalties or obligations may include personal and professional relationships which cause people to hesitate in volunteering information to ASIO. In many cases, the lawful requirement to provide information may be an effective means of overcoming those competing loyalties and gaining full cooperation.\(^7\)

2.8 It was argued that the questioning and detention powers have produced useful intelligence. According to ASIO:

Since their introduction, questioning warrants have enabled ASIO to collect valuable and previously unknown information on key individuals, tactical information related to investigative targets and information on which more confident intelligence assessments could be made concerning an individual’s intent, extremist views and motivations. Such information could not have been achieved through other collection methods. Given this, it is important that a regime of questioning warrants and questioning and detention warrants in relation to ASIO’s intelligence functions be retained beyond the current sunset period.\(^8\)

2.9 Dr McGarrity and Professor Williams were not convinced by ASIO’s explanations for the lack of use of the questioning and detention powers, suggesting instead that the lack of use was a result of the existence of alternative methods of gathering intelligence.\(^9\) Professor Williams submitted:

If you look at the use [of the questioning and detention powers] recently it coincides with the fact that since this was first brought into place a range of

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\(^6\) Ms Heather Cook, Acting Director-General of Security, ASIO, *Committee Hansard*, Canberra, 16 June 2017, p. 22.


\(^9\) Dr Nicola McGarrity and Professor George Williams AO, *Submission 5*, p. 7.
other mechanisms have been introduced. When this was first brought about in 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. So it is no surprise to us that, if you look at the figures where there was 11 of these questioning warrants issued in 2005—which does demonstrate the capacity to use the scheme—you will see that it has really dropped off since then, and that since 2006 it has only been used once. And that is explicable, because there are simply so many other mechanisms to get this information that the utility it serves is just not the case as it was when it was first enacted.\textsuperscript{10}

2.10 It was suggested that the increased interaction between ASIO and law enforcement agencies may be a factor in the lack of use of the questioning and detention powers. ASIO confirmed that the recent trend of a reduction in time frames from attack planning to execution has led to more intensive cooperation between ASIO and law enforcement agencies and the use of other investigative tools. According to ASIO,

the nature of the current environment means that the way we collaborate with law enforcement also is compressed and more engaged as well in terms of the capability and tools that are available in respect of investigations of emerging plots. There is a fluidity between moving from the intelligence space of an operation into the law enforcement space, and that too has compressed when you compare it to a decade ago.\textsuperscript{11}

2.11 The 2017 Independent Intelligence Review supported this proposition, arguing that the traditional distinctions between intelligence and law enforcement were now less definitive than in the past:

… our view is that the changing nature of the security threats facing Australia and the opportunities opened up by new technologies, particularly in relation to data analytics, mean that these points of interaction between Australia’s intelligence agencies and law enforcement authorities are becoming more intensive. The points of interaction relate to co-operation not only among Commonwealth entities but also among relevant State and Territory bodies. They need to be managed in ways that respect the information sharing arrangements, the accountability and the obligations under law of each entity, including arrangements for managing intelligence-derived information in the conduct of legal proceedings. What is clear, however, is that many of the traditional distinctions between intelligence and law enforcement in the

\textsuperscript{10} Professor George Williams AO, \textit{Committee Hansard}, Canberra, 16 June 2017, p. 10.

\textsuperscript{11} Ms Heather Cook, Acting Director-General of Security, ASIO, \textit{Committee Hansard}, Canberra, 16 June 2017, p. 22.
2.12 Notwithstanding the increased availability of law enforcement powers, ASIO noted the distinction between itself as an intelligence agency, and the role of law enforcement agencies. Accordingly, ASIO contended that it required a questioning power to enable it to perform its functions independently of other agencies. The Department supported this:

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

2.13 The Department also countered the suggestion that intelligence agencies should not be afforded compulsory questioning powers, suggesting that compulsory questioning arguably best sits with agencies responsible for gathering intelligence, as opposed to purely law enforcement agencies. The Department contended that this is due to the necessary constraints placed on the use of information obtained against the person in criminal proceedings. The Department stated:

The outcomes an intelligence agency seeks from its investigations will not always be directed at achieving a successful criminal prosecution, but often have a broader focus on building a stronger understanding of the security or crime environment. Therefore, the existence of direct use immunities in regard to compulsory questioning is unlikely to be a major impediment to intelligence agencies pursuing their functions.

2.14 Despite their concerns with the existing questioning and detention powers, Dr McGarrity and Professor Williams did endorse ASIO retaining a

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12 Commonwealth of Australia, Department of the Prime Minister and Cabinet, *2017 Independent Intelligence Review*, 2017, p. 38.


15 Attorney-General’s Department, *Submission 7*, p. 8.

16 Attorney-General’s Department, *Submission 7.2*, p. 4.
questioning power.\textsuperscript{17} Similarly, both former INSLMs and the Law Council had no objection to ASIO retaining such a power.\textsuperscript{18} INSLM Gyles concluded:

I accept that a compulsory questioning power to gather intelligence is a useful tool for ASIO’s counter-terrorism work, despite its sparse use to-date. I also accept that the potentially serious impact of terrorism on the community justifies this inroad into civil liberties. That premise is now generally uncontentious. I accept that the power can properly extend to those not accused or suspected of implication in terrorism. That extension carries limitations. The collecting of intelligence must not be confused with law enforcement. A questioning power for that purpose should not be considered or justified as a front-line method of preventing imminent terrorist attacks.\textsuperscript{19}

**Committee comment**

2.15 ASIO’s questioning powers are extraordinary powers. They were introduced into an unprecedented security environment. As noted, this security environment has changed considerably since that time, but the threat of terrorist attack persists. Other security threats have also increased during this period.

2.16 The Committee notes ASIO’s evidence that Australia currently is facing a significant threat from terrorism. The frequency and unpredictable nature of recent attacks is alarming.

2.17 The Committee supports the intention of this legislation—the protection of the community from terrorist acts—and remains of the view that our national security agencies, including ASIO, must have sufficient powers to enable them to respond to this evolving threat.

2.18 The Committee acknowledges the view of some submitters that the limited use of the questioning and detention powers demonstrates that the powers are not necessary to protect the community from terrorism. The Committee accepts that the limited use of the powers is, in part, due to terrorist threats

\textsuperscript{17} Professor George Williams AO, *Committee Hansard*, Canberra, 16 June 2017, p. 9.


being resolved via other means, such as police arrest powers or some other disruptive strategy.

2.19 However, the Committee also accepts INSLM Gyles’ finding that, although such a power should not be seen as a front-line tool for disruption, a questioning power is useful for ASIO’s counter-terrorism work.

2.20 An increasingly co-operative counter-terrorism response does not reduce the preference or need for agencies to have available and to exercise their own legislated powers, tailored to their unique functions and roles. In this case, it is important that the powers available to ASIO are appropriate for its role as an intelligence, rather than a law enforcement, agency.

2.21 The Committee therefore concludes that ASIO should continue to have a compulsory questioning power.

Recommendation 1

2.22 The Committee recommends that the Australian Security Intelligence Organisation retains a compulsory questioning power under the Australian Security Intelligence Organisation Act 1979.

The need for detention powers

2.23 One of the most extraordinary aspects of the questioning and detention powers is the ability to detain persons, including those not suspected of involvement in a terrorism offence. A QDW authorises the pre-emptive detention of a person, and a QW allows the prescribed authority to order the detention of a person who has appeared for questioning. Under either warrant, a person may be detained for up to seven days.

2.24 The Department advised the Committee that the overriding purpose of a QDW is ‘the ability to compulsorily question a person in time critical circumstances where it is important that others are not alerted to the investigation and security-relevant material not destroyed.’\(^{20}\) The Acting Director-General of Security elaborated on the three key elements underpinning this:

> Where we may choose to question somebody and we are concerned about, firstly, the possibility of the person not complying or absconding, that is one element. The second element is our concern about the possibility that the individual will be able to destroy documents or intelligence, be they electronic

\(^{20}\) Attorney-General’s Department, \textit{Submission 7.2}, p. 5.
or otherwise, that would be relevant to the investigation we are conducting. The third element that we would want to prevent is their ability to alert others who may be involved or associated with the investigation, which could, again, have a negative or harmful effect. If we are talking in the terrorism space, we would not want them to be able to alert others in a way that may result in a plot being accelerated or obfuscated or otherwise reduce our ability to do something about it.21

2.25 ASIO requested the retention of a detention power, but did not argue to keep the QDW regime in its current format. In the event that the QDW regime is repealed as a result of a recommendation of this Committee, ASIO advised that it requires a similar ability to pre-emptively detain a person in order to ensure a person:

- appears for questioning,
- is prevented from alerting others as to ASIO’s interest, or
- is prevented from destroying relevant material.

2.26 Throughout this inquiry, ASIO has stressed the importance of preventing the occurrence of those three scenarios. For ASIO the critical issue is removing any period of time between the service of the questioning warrant and the appearance of the subject at questioning during which others could be alerted to the investigation or material of security relevance could be destroyed (including electronic records accessible from a mobile phone). In 2017 where mobile phones are prevalent and likely to be immediately at-hand for any person, the time period that would enable these things to occur is literally a matter of seconds or minutes.22

2.27 The Committee asked whether ASIO had powers available to it—other than a QDW or detention under a QW—that could be used to prevent ASIO’s concerns from eventuating. In response, ASIO and the Department detailed a range of ASIO and law enforcement powers that go some way to addressing those three concerns; however, they concluded that ‘their use as a substitute would either be ineffective in preventing one or more of those three outcomes, or result in compulsory questioning being detrimentally affected or unavailable altogether.’23

21 Ms Heather Cook, Acting Director-General of Security, ASIO, Committee Hansard, Canberra, 16 June 2017, p. 25.
22 Attorney-General’s Department, Submission 7.2, p. 10.
23 Attorney-General’s Department, Submission 7.2, p. 5.
2.28 As a result, it was ASIO’s view that the ability to pre-emptively detain was an essential component of its questioning framework, despite it not having been used to date.\textsuperscript{24} The Acting Director-General of Security advised the Committee that, if ASIO did not have the ability to detain a person, its questioning powers would be of less utility:

If we could not ensure that others would not be alerted or that information would not be destroyed, we would simply not use that tool; we would have to find other investigative means which could take longer and be less efficient to be able to reach the same result.\textsuperscript{25}

2.29 In private evidence, the Acting Director-General further advised that if a pre-emptive requirement to have a person present and be compelled to attend immediately could be added as a provision to the QW regime, then ASIO would be ‘absolutely supportive’ of the existing QDW regime being repealed.\textsuperscript{26}

2.30 Notwithstanding ASIO’s stated need for a detention power, the non-use of the existing QDW regime was consistently raised by submitters as evidence that the powers were not needed. For example, the Australian Lawyers Alliance observed, ‘if they were necessary, they would surely be used’.\textsuperscript{27}

2.31 In a similar vein, Dr McGarrity and Professor Williams commented that, even accepting ASIO’s claim that the threat to Australia from terrorism has increased in recent years, it has never proved necessary for a QDW to be issued.\textsuperscript{28} They pointed out that in none of the 16 QWs, or in respect of any of the dozens of persons charged with terrorism offences since 2003, has ASIO used its detention powers. This suggested, to them, that the detention powers were not necessary for terrorism investigations or prosecutions.\textsuperscript{29} They concluded that the detention powers may never be used:

The only situation in which there is still an arguable need for these powers is in respect of non-suspects. However, it is very unlikely that the additional

\textsuperscript{24} Australian Security Intelligence Organisation, \textit{Submission 8}, p. 17.

\textsuperscript{25} Ms Heather Cook, Acting Director-General of Security, ASIO, \textit{Committee Hansard}, Canberra, 16 June 2017, p. 33.

\textsuperscript{26} Unclassified text from classified transcript, \textit{Committee Hansard}, Canberra, 7 September 2017, p. 9.

\textsuperscript{27} Australian Lawyers Alliance, \textit{Submission 6}, p. 11.

\textsuperscript{28} Dr Nicola McGarrity and Professor George Williams AO, \textit{Submission 5}, p. 3.

detention criterion could be satisfied in respect of non-suspects. ASIO will also no doubt be alert to the public reaction that detention of a person, especially a non-suspect, might provoke. The case of Dr Mohamed Haneef demonstrates how the use of extraordinary powers that contravene accepted community standards may cause considerable damage to the reputation of executive agencies. This suggests that it will take a truly extraordinary case for the detention power to be used (if at all).30

2.32 The Law Council submitted that ‘the QDW power appears unnecessary to prevent or disrupt a terrorist act, in light of all of ASIO’s other powers including QWs, and the questioning and detention powers of federal, state and territory police and the ACIC’.31

2.33 The Department acknowledged that the introduction of a number of other arrest and detention regimes with lower thresholds since Division 3 of Part III was enacted was a factor in the non-use of QDWs.32 However, it added that

simply because the warrant has not been used does not mean there are no grounds for it to be kept. QDWs are expressed to be used as a last resort and it is important to retain a last resort in an evolving security environment, particularly one where a terrorist act in Australia is ‘probable’.33

2.34 At the public hearing, the Committee asked the Acting Director-General of Security why the detention powers had never been used. She explained that obtaining and using a warrant is a labour intensive process that would require unique circumstances to be met, and those circumstances have not yet arisen in a way that meant that detention was the right tool in those particular circumstances.34 In addition,

they are a last resort power. They would be very judiciously applied. We have considered a few occasions where it might be appropriate, but, again, I think you are quite right that in the current environment, and because they are specific to terrorism offences, we do find ourselves in the situation where we

31 Law Council of Australia, Submission 4, p. 7.
32 Attorney-General’s Department, Submission 7, p. 14.
33 Attorney-General’s Department, Submission 7, p. 38.
34 Ms Heather Cook, Acting Director-General of Security, ASIO, Committee Hansard, Canberra, 16 June 2017, p. 29.
are working more closely with our law-enforcement partners and that those sorts of capabilities combined can be applied so that we are transitioning from the intelligence space into the law enforcement space more quickly.\textsuperscript{35}

2.35 In 2012, INSLM Walker was not convinced of the need for the detention powers:

The INSLM asked agencies and departments to give evidence demonstrating why QDWs are necessary. No scenario, hypothetical or real, was shown that would require the use of a QDW where no other alternatives existed to achieve the same purpose. The power to arrest and question without charge for a broad range of preparatory and inchoate offences, the power to order the surrender of passports and prohibit a person from leaving Australia and the existing powers of detention or forcibly compelled immediate attendance under QWs all provide less restrictive alternatives to QDWs.\textsuperscript{36}

2.36 Similarly, in 2016 INSLM Gyles found that the QDW powers were not necessary to prevent or disrupt a terrorist act:

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 coordination between these various organisations related to the exercise of these powers.\textsuperscript{37}

2.37 The Committee asked ASIO for a hypothetical scenario which would demonstrate why the detention powers were necessary in the 2017 context. In response, ASIO offered a number of hypothetical scenarios, including the following:\textsuperscript{38}

\begin{itemize}
  \item[Box 2.1] ASIO counter-terrorism scenarios
\end{itemize}

\textsuperscript{35} Ms Heather Cook, Acting Director-General of Security, ASIO, \textit{Committee Hansard}, Canberra, 16 June 2017, p. 29.


Scenario 1: unexpected arrival in Australia of a returnee from Syria

‘Around 110 Australians are currently fighting or engaged with terrorist groups in Syria and Iraq. While the Australian Government has consistently stated that anyone fighting with, providing material support to or associating with organisations on either side of the conflict is committing a serious crime and will be subject to the full force of the law upon their return to Australia, evidence collection in a conflict zone is extremely challenging.

In this context, the role of intelligence collection is vital. For example, we could see use of a questioning and detention warrant in a case involving an individual who was identified at the Australian border as a member of the Islamic State of Iraq and the Levant (ISIL) who had been active with the group in Syria, but where detail of activity was limited and based on intelligence reporting. With a more tactically flexible regime—and if the requirement for linkages to specific terrorism-related offences were removed—ASIO could use a questioning and detention power to detain the individual and question them in relation to their ISIL role in order to determine the extent of any capability obtained, what contacts they had formed, their intended location, what activities they might undertake once in Australia, and other relevant information to support an assessment of the threat they pose to the community. This questioning might also identify that, from their ISIL activities, the individual had knowledge of or involvement in current attack planning in Australia; capacity to obtain this information would enable ASIO to provide advice to other agencies in order to activate mitigation measures to meet the assessed level of threat.

In such circumstances, an emergency oral warrant may be required, and immediate pre-emptive detention necessary, in the case where ASIO thought they had knowledge of current attack planning, to ensure the individual was not able to contact others involved in the conspiracy and cause them to accelerate their attacks, or to ensure the individual did not destroy electronic records related to their activities in Syria before being required to produce them to ASIO under compulsory questioning. Further, immediate pre-emptive detention would enable force to be used
to ensure the individual’s attendance at questioning in circumstances where it may otherwise be unlikely they would attend as required.’\(^{39}\)

**Scenario 2: a complex/multi-mode terrorist attack plot scenario**

‘In this scenario, a complex terrorist plot involving multiple possible attack vectors—such as explosives, in addition to edged weapons or motor vehicles—has been discovered and the main perpetrators have been arrested. However, not all the devices have been found and the arrested perpetrators are not giving law enforcement agencies information to assist ASIO in assessing the residual threat to the community.

If thought appropriate in the circumstances, ASIO could seek a questioning and detention warrant on another family member or associate who was assessed to hold relevant information or leads. Immediate preemptive detention would be necessary because we would not want that person to notify anyone else that they are being questioned by ASIO. Such notification could result in others being able to destroy or hide the devices or, worse, accelerate the attack planning’\(^{40}\)

### Constitutional validity of detention

2.38 A number of submitters raised concerns about whether the Commonwealth Parliament can validly confer on the Executive the power to detain a person for the purpose of intelligence gathering. A central question was whether the detention was punitive or non-punitive.\(^{41}\)

2.39 One submitter explained that it is the general position that the detention of a citizen may only be ordered by a court after a finding of criminal guilt or as an adjunct to the judicial process. An exception to this is that the Executive may order the ‘non-punitive’ detention of a citizen for a pressing public purpose, such as to protect the community from non-criminals who pose a

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\(^{40}\) Australian Security Intelligence Organisation, *Submission 8.6*, pp. 3–4. Several other scenarios were provided in classified evidence.  

\(^{41}\) Australian Security Intelligence Organisation, *Submission 8.6*, p. 4.
risk to public health or safety. Executive detention is generally only permitted where it is justified on strong grounds.\textsuperscript{42}

2.40 The Australian Lawyers Alliance suggested that if the detention authorised under the questioning and detention powers was considered to be punitive, the provisions could be found to infringe the separation of powers entrenched in the Constitution due to the lack of involvement of a court in the issuance of the warrants.\textsuperscript{43} It explained:

\begin{quote}
There is a lot of High Court authority around this, and it is not necessarily always easy to navigate. But there is a presumption that detention is punishment. Clearly the detention that is allowed under these warrants is circumscribed ostensibly around national security, but there is certainly an argument to be made that allowing an intelligence agency to detain someone in line with the permissions that are acquired with that detention would conflict with the separation of powers which essentially says that only courts can take away individual liberty in line with a fair trial.\textsuperscript{44}
\end{quote}

2.41 Dr McGarrity and Professor Williams suggested that, because of this accepted position that detention may only be ordered by a court after a finding of criminal guilt, the detention powers should not be accepted unless there is clear evidence that they are necessary to protect the community from terrorism.\textsuperscript{45}

2.42 In his 2016 review, which recommended the repeal of the QDW provisions, INSLM Gyles found that the detention powers raised significant constitutional concerns. The former INSLM explained his concerns in this way:

\begin{quote}
The constitutional validity of these provisions has not been tested, as the provisions are yet to be used. The issue of a warrant for detention without the involvement of the courts certainly tests the doctrine of the separation of powers. Both a QW and a QDW are issued by the issuing authority on the request of the Director–General with the consent of the Minister. The issuing authority has to be satisfied of the same thing in each case: that the warrant
\end{quote}

\begin{footnotes}

\textsuperscript{43} Australian Lawyers Alliance, Submission 6, p. 9.

\textsuperscript{44} Ms Anna Talbot, Australian Lawyers Alliance, \textit{Committee Hansard}, Canberra, 16 June 2017, p. 18.

\end{footnotes}
will substantially assist the collection of intelligence that is important in relation to a terrorism offence. The difference lies in the matters the Minister must be satisfied of before consenting to a QDW. Thus, the effective decision about the use of that warrant rests with the Director-General and the Minister rather than with the issuing authority. In any event, the issuing authority is not to be equated with a court, although it may be a judge. That judge would act in a personal capacity, as *persona designata*, and would be chosen and appointed by the Minister either directly, or possibly as one of a member of a class. Even if valid, executive orders for detention are odious and no case can be made for them in this context.46

2.43 The Department advised the Committee that it had obtained legal advice from the Australian Government Solicitor as to the constitutional validity of the questioning and detention powers regime as proposed in 2002.47

*International human rights considerations*

2.44 Some submitters suggested that the QDWs appear to be in conflict with a number of Australia’s obligations under international human rights law, including the rights to freedom of movement and freedom of expression. These submitters were of the view that the QDW provisions were not a necessary or proportionate response to terrorism.48

2.45 The Australian Lawyers Alliance explained that QDWs were relevant to human rights law in a number of ways:

Primarily, the right to privacy is compromised by forcing individuals who are not suspected or accused of any crime to answer questions with protections regarding the right not to incriminate oneself and the right to legal advice compromised. Secondly, the right to freedom of expression, which domestically is recognised in the constitutional protection of freedom of political communication, is undermined by the secrecy provisions that surround these warrants. Thirdly, in relation to questioning and detention warrants, the right to be free from arbitrary detention is undermined.49

2.46 They continued,

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49 Ms Anna Talbot, Australian Lawyers Alliance, *Committee Hansard*, Canberra, 16 June 2017, p. 17.
While we understand that the motivation for undermining these rights comes from a concern of public safety, we also believe that it is a mistake to see human rights and national security as in any way in conflict. Our national security is stronger if we protect human rights. If human rights are undermined, feelings of injustice might be the result. Human rights cater for national security concerns, allowing, for example, restrictions on freedom of expression for national security purposes to the extent that the restrictions are necessary and proportionate. Under domestic law a similar test is applied to permissible restrictions on freedom of political communication.

2.47 In his review, INSLM Gyles found that there was much in the argument that QDWs breach Australia’s international human rights obligations:

It can be concluded that QDWs are not proportionate to the threat of terrorism and are not necessary to carry out Australia’s counter-terrorism and international security obligations. 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.

2.48 INSLM Walker similarly found that the provisions were not a justifiable intrusion on personal liberty. He noted that the provisions were also not necessary to prevent someone from alerting others, failing to attend, or destroying information, as a QW could compel immediate attendance, with police officers able to use reasonable force to ensure compliance, thereby removing the need for the QDW provisions. INSLM Walker stated:

In practice, service of a QW requiring immediate attendance for questioning thereby opens the possibility for the police officer or officers involved to exert reasonable force if there is resistance to or unwillingness concerning compliance with the legal obligation, by the person served with the QW. It is difficult to see why further provision, as seen in the QDW powers, is necessary let alone proportionate as a response to these risks.

50 Ms Anna Talbot, Australian Lawyers Alliance, Committee Hansard, Canberra, 16 June 2017, p. 17.
2.49 The Committee raised the various constitutional and human rights concerns with the Department at a public hearing. The Department offered the following in response:

From the department’s perspective, we would be quite confident that the current regime is compliant with the Constitution and with our human rights obligations. To go into a little bit more detail, we consider that the regime is both necessary and proportionate, which are issues to consider when you are looking at human rights issues. The minister can only consent to a request for making a questioning warrant if a certain threshold is met, which is quite a high threshold. At the moment, it is set out as being reasonable grounds for believing the issue of the warrant will substantially assist in the collection of intelligence that is important to a terrorism offence, having regard to other methods of collecting the intelligence and whether they are likely to be as effective and reasonable in all the circumstances. There is also a current written statement of procedures to be followed on the exercise of the authority pursuant to the warrant, and there are a number of safeguards within the regime as well which we would say assist in ensuring compliance from a human rights perspective.\(^54\)

**Detention of non-suspects**

2.50 The questioning and detention powers are not unique in permitting questioning of innocent persons—most compulsory questioning regimes allow the questioning of non-suspects. However, the current powers are unique, and unlike similar law enforcement powers, in that they permit the detention of non-suspects. The statutory test for obtaining a QDW focuses on the value of the intelligence that is likely to be obtained under the warrant, rather than the person from whom the intelligence will be obtained. According to the Department, this reflects the fact that persons other than the subject of an ASIO investigation may possess critical intelligence.\(^55\)

2.51 The ability to obtain a QDW against a non-suspect was a concern raised by a number of submitters.\(^56\) INSLM Gyles, in his review, noted that the

\(^54\) Ms Anne Sheehan, Attorney-General’s Department, *Committee Hansard*, Canberra, 16 June 2017, p. 21.

\(^55\) Attorney-General’s Department, *Submission 7.2*, p. 19.

fundamental distinction between those believed to be implicated in terrorism and those who are not is elided under these powers.\(^{57}\)

2.52 The Department justified the detention of non-suspects on the basis that there may be circumstances in which a person who is not the subject of an investigation will, nevertheless, be likely to tip off others about the investigation, or destroy records of things:

For example, a person may not be involved in the activities under investigation, but may:

- be sympathetic to the objectives or worldview of the subject(s) of the investigation;
- feel obliged to alert or assist the subject of the investigation, or to protect their interests; or
- be concerned (rightly or wrongly) that they may be implicated in the activities that are under investigation where, for example, they have provided (wittingly or otherwise) financial or other support to the subject of the investigation, and so take action they perceive may protect their own interests.\(^{58}\)

2.53 The Department added that there may also be situations where the person is directly involved in the security-relevant activities under investigation, but where ASIO wishes to question them in relation to another person’s involvement; or separately involved in security-relevant activities unrelated to those that are the subject of the immediate investigation.\(^{59}\)

**Committee comment**

2.54 It is now more than 14 years since the introduction of ASIO’s questioning and detention powers. The Committee has found that although the nature of the security environment has evolved and that there are now a range of additional counter-terrorism powers, there is a need for a continuing form of ASIO questioning power.

2.55 The Committee must similarly assess whether a need exists—in the current security context and given the existence of these other counter-terrorism powers—for a continuing form of ASIO detention power.

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\(^{58}\) Attorney-General’s Department, *Submission 7.2*, p. 19.

\(^{59}\) Attorney-General’s Department, *Submission 7.2*, p. 19.
2.56 One submitter summed up the challenge that this inquiry presents to the Committee:

The question of whether — and to what extent — individual rights and freedoms can be restricted in times of emergency is one of the most challenging to have faced Western democracies. An even more difficult question faces us today. A decade on from the September 11 terrorist attacks, this state of emergency has become the norm; there is no end in sight for the ‘war on terror’. Therefore, Australia must start considering and answering the question of what its anti-terrorism laws should look like for the long term. Is it prepared to accept the ASIO questioning and detention powers regime as an ‘ordinary’ part of the legal framework?  

2.57 Of the evidence the Committee received, a sizeable amount was dedicated to the detention powers. The Committee also took classified evidence from the Department and ASIO. The public and classified evidence has informed the Committee’s examination of this complex issue.

2.58 The Committee notes that all non-government submitters to this inquiry recommended that the QDW provisions be repealed. Former INSLMs Mr Bret Walker SC and the Hon Roger Gyles AO QC also recommended the provisions be repealed. These contributors highlighted the lack of need for the detention powers—ASIO has never used, nor requested, a QDW; nor has a person been detained under any of the 16 QWs issued to date. Contributors also raised a range of constitutional and human rights concerns. These contributions, and the recommendations of the former INSLMs, were given due consideration by the Committee.

2.59 The Committee acknowledges the opinion of the Department that the questioning and detention powers are not in breach of Australia’s Constitution or international human rights obligations. The Committee notes that, while it is ultimately a matter for the High Court to consider the constitutional validity of such powers, it is the responsibility of Parliament to ensure legislation is compliant with legal and human rights obligations.

2.60 The need for a detention power was a central consideration of this review. The original purpose of the questioning and detention powers was the prevention of terrorist acts. The powers were seen, in light of the limited availability of other powers at the time, as a necessary method of preventing terrorism.

The Committee stresses that the means of achieving that purpose is through the collection of intelligence. The powers, themselves, should not be used as a preventative detention power. That would not be acceptable for an intelligence agency. Instead, there are sound policy reasons for preferring that law enforcement agencies—which have legislated disruption functions—deploy their detention powers, under the observation of the courts, in order to prevent and disrupt terrorist acts.

The non-use of ASIO’s detention powers over the last 14 years—a period of sustained counter-terrorism activity—must be given considerable weight. The Committee notes that while the non-use of a power does not automatically lead to a finding that the powers are not necessary, it does suggest that close examination is warranted. The Department, in its submission, conceded that the present availability of a range of law enforcement powers, such as Part IC of the Crimes Act and preventative detention orders, was a factor in this non-use.

ASIO has made clear to the Committee that it is not wedded to the current model of detention under the QDW regime. In the evidence the Committee received from ASIO via hearings and submissions, ASIO emphasised that its principal concern was the retention of an apprehension power to ensure attendance and to prevent the person from contacting others and/or destroying information or other things. That is, ASIO’s concern focused on the period between service of the warrant and the commencement of questioning. ASIO did not place a similar emphasis on the need to retain its ability to continue to detain persons following questioning or between questioning sessions.

The hypothetical scenarios provided by ASIO (see, for example, Box 3.1), provide some justification for ASIO continuing to have available to it additional powers to support its questioning framework. The Committee reiterates its position that the current security environment necessitates that agencies have access to a range of effective counter-terrorism powers. The Committee accepts that there may be limited and exceptional circumstances where the power is required in order to ensure a person attends questioning, and consequently there is the need to provide a ‘power of attendance’.

However, noting the seriousness of ongoing detention, the constitutional and human rights concerns with the current framework and the non-use of the powers, the Committee is of the view that the current provisions are no longer the appropriate response to the threat of terrorism. The current detention framework should therefore be repealed.
2.66 In reaching this view, the Committee acknowledges ASIO’s advice that if a provision was added into the QW regime to enable a person to be pre-emptively compelled to attend questioning, then it would be ‘absolutely supportive’ of the existing QDW regime being repealed.

2.67 The Committee supports, in principle, an alternative apprehension framework, possibly with a separate authorisation process, to ensure attendance at questioning and prevent contact with others or the destruction of information.

**Recommendation 2**

2.68 The Committee recommends that ASIO’s current detention powers, as set out in Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979*, be repealed.

2.69 It was apparent from evidence received to the Committee’s review that the existing questioning and detention framework requires reformation. Issues raised in evidence to the Committee are presented in Chapter 3.

2.70 The Committee recommends that the Government develop legislation for a reformed ASIO questioning framework, and that this legislation be referred to the Committee for inquiry and report. In the following chapter, the Committee outlines its key findings from this review, which are intended to guide development of this legislation.

2.71 Further, given that the existing powers are due to sunset on 7 September 2018, the Committee recommends that the *Australian Security Intelligence Organisation Act 1979* be amended to extend the sunset date by 12 months to 7 September 2019 to allow sufficient time for legislation to be developed and reviewed.

**Recommendation 3**

2.72 The Committee recommends that the Government develop legislation for a reformed ASIO compulsory questioning framework, and refer this legislation to the Committee for inquiry and report.

The Committee further recommends that proposed legislation be introduced by the end of 2018 and that the Committee be asked to report to the Parliament no sooner than three months following introduction.

The Committee considers any proposed legislation should include an appropriate sunset clause.
Recommendation 4

2.73 The Committee recommends that the *Australian Security Intelligence Organisation Act 1979* be amended to extend the sunset date of 7 September 2018 by 12 months to allow sufficient time for legislation to be developed and reviewed.
3. A future questioning model

3.1 During the course of the inquiry, the Committee considered the adequacy of the existing questioning and detention framework to respond to current threats. It became apparent that over time this framework has become limited in its utility. At the Committee’s request, ASIO proposed a number of reforms. The Committee has considered the proposals from ASIO and other submitters, and has taken the opportunity in this review to consider the principles that should underpin a future compulsory questioning model.

3.2 This chapter presents evidence received by the Committee for an alternative questioning model.

3.3 The chapter concludes with a series of Committee findings.

Alternative examination models

3.4 In his review, INSLM Gyles found that ASIO’s questioning and detention powers were unwieldy and warranted reform.

3.5 INSLM Gyles considered that the obvious solution was for ASIO to adopt, as closely as possible, the model of questioning under the ACC Act. Mr Gyles argued that:

ASIO and the ACIC are similar Commonwealth bodies with similar roles in their fields. Those fields have overlapped to an extent for some years. During that time, the ACIC questioning power has been used on many occasions in relation to counter-terrorism, gathering useful intelligence without any known complaints. The results have been provided to ASIO. The ACC Act provisions have also regularly been used across a broad range of serious criminal activity and are known and understood in the legal profession. They have been scrutinised by the courts and by Parliament in recent times. That model addresses most of the legitimate complaints about the ASIO provisions and
ASIO’s questioning and detention powers would give ASIO a proven and practical procedure... The ACC Act is the appropriate model and it would not be appropriate to cherry-pick parts of other models and graft them on, or to excise some parts unless it is necessary to accommodate the different repository of the power.¹

3.6 Responses to INSLM Gyles’ recommendation varied. The Law Council, in its support of the recommendation, noted it was desirable to have consistent compulsory questioning models amongst agencies and suggested that there were a number of advantages to the ACC Act model, including:

- it affords greater access to legal representation,
- it is a known and tested regime,
- it specifically addresses post-charge questioning,
- it does not contain a detention power, and
- the appointment of ACIC examiners is more transparent and formal than the similar provisions under the ASIO Act.²

3.7 However, the Law Council noted concerns with the post-charge questioning provisions and low thresholds found within the ACC Act.³

3.8 Dr McGarrity and Professor Williams did not support the recommendation. They were of the view that a move to an ACC Act model would result in a ‘relaxing of the checks and balances which apply to questioning warrants at present’.⁴

3.9 ASIO initially accepted, in part, INSLM Gyles’ recommendation to adopt the ACC Act model although it was of the view that while there were benefits to that model, it would require significant amendments to meet ASIO's requirements.⁵

3.10 Upon further inquiry from the Committee, ASIO confirmed that the adoption of the ACC Act examination provisions was not ASIO’s preferred approach. ASIO explained:

While ASIO believes the ACIC framework could be seen as an appropriate starting point in developing a compulsory questioning model that would suit ASIO, this is not ASIO’s preferred approach. ASIO would prefer a model that

² Law Council of Australia, Submission 4, pp. 9, 10–11.
³ Mr Tim Game SC, Committee Hansard, Canberra, 9 August 2017, p. 2.
⁴ Dr Nicola McGarrity and Professor George Williams AO, Submission 5, p. 2.
⁵
broadly reflects the existing framework with a range of adjustments to make it more streamlined and ensure it better reflects ASIO’s intelligence collection functions.6

3.11 The Committee invited ASIO to provide a proposed questioning model that would accommodate its operational requirements and then invited submitters to consider the model put forward by ASIO and provide any further comments.

3.12 Following is a summary of ASIO’s preferred model.7

**Box 3.1 ASIO’s preferred questioning model**

The model proposes amending the existing questioning and detention powers as follows:

- **Scope of questioning:** Questioning would be broadened to occur in relation to all heads of security.
- **Issuing authority:** The minister responsible for issuing other ASIO warrants would issue QWs and QDWs. Emergency oral authorisations would be permitted.
- **Thresholds:** The legislative threshold for QDWs would be in line with QWs.
- **Apprehension powers:** A police officer serving a QW may take the subject of the warrant into custody where they suspect from anything said or done by the person that the person does not intend to comply with the warrant, including not appearing for questioning, alerting a person that there is an investigation into the security-relevant activity, and/or destroying or damaging a record or things that has been, or may be, requested to be produced. Entry to premises and person searches would be permissible.
- If QDWs were repealed, then under a QW, the Minister would have the option to authorise the apprehension of the person where satisfied that the person may not appear for questioning, may alert a person that there is an investigation into the security-relevant activity, and/or may destroy or damage a record or things that has been, or may be, requested to be produced. Entry to premises would be permitted. The Minister may also specifically authorise a police officer to search the person and seize found items and require immediate attendance at questioning, with the

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7 For further details, see Australian Security Intelligence Organisation, *Submission 8.6*. 
use of force available to ensure compliance.

- **Person searches:** In all cases, a police officer may search a person subject to a warrant and seize items found on them that could be used to harm another person, before that person enters the place of questioning.

- **Detention:** The presiding officer would retain the ability to direct the detention, or further detention, of the person.

- **Presiding officer:** The presiding officer would be statutorily appointed, and have been enrolled as a legal practitioner for a minimum of five years.

- **Minimum age of subject:** The minimum age of a person to be questioned would be lowered from 16 years to 14 years.

- **Post-charge questioning:** A warrant could be issued in respect of a person charged with a criminal offence, or where such charges are imminent, and questioning could cover the subject matter of those charges. The presiding officer may give directions regarding disclosure of information and derivative material in order to ensure the subject’s fair trial.

- **Secrecy offences:** The prohibition on disclosing operational information and the existence of a warrant would be extended from two years to five years.

- **Identified person warrant:** ASIO would be able to conduct compulsory questioning under an identified person warrant. However, an identified person warrant would not allow detention.

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**Broadening of questioning remit**

3.13 One of the most significant differences in the questioning model proposed by ASIO was that the scope of questioning would be expanded to apply to all heads of security, rather than the current restriction to terrorism offences.

3.14 Currently, ASIO may use the questioning and detention powers only in relation to a ‘terrorism offence’, being offences against Subdivision A of Division 72 of the Criminal Code (International terrorist activities using explosive or lethal devices) or Part 5.3 of the Criminal Code (Terrorism).

3.15 In his review, INSLM Gyles formed the view that this definition should be broadened to include the foreign incursion and recruitment offences in Part
5.5 of the Criminal Code and the terrorism financing offences in the *Charter of the United Nations Act 1945.*

3.16 The Department argued that tying ASIO’s questioning power to terrorism offences was at odds with ASIO’s role as an intelligence, not law enforcement, agency. It suggested that the requirement to identify a terrorism offence had the potential to prevent ASIO from collecting intelligence about terrorist threats where ASIO had yet to identify a specific offence that was being committed.

3.17 ASIO, with the Department’s support, proposed that Division 3 of Part III be amended to make questioning available in respect of all elements of the definition of ‘security’ under section 4 of the ASIO Act. These are:

- espionage,
- sabotage,
- politically motivated violence,
- promotion of communal violence,
- attacks on Australia’s defence system,
- acts of foreign interference, and
- threats to Australia’s territorial and border integrity.

3.18 It also includes Australia’s responsibilities to other countries in relation to the above elements.

3.19 Through the Department’s submission, ASIO submitted that the availability of ASIO’s compulsory questioning powers for espionage and foreign interference matters would provide a key tool in quickly and efficiently resolving complex, and in many cases extremely sensitive [espionage and foreign interference] investigations, and the reallocation of limited resources to other high priority investigations.

3.20 ASIO continued:

A security intelligence interview is often the most effective and efficient manner to resolve complex investigations. A non-adversarial compulsory interview regime with exemption from prosecution would provide an incentive for individuals to cooperate with ASIO during CEI investigations and afford ASIO the opportunity to meet face to face with an individual who

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9 Attorney-General’s Department, *Submission 7.2,* p. 17.
10 Attorney-General’s Department, *Submission 7.2,* p. 12.
could substantially assist in resolving a complex investigation. In addition, it would provide a more intimate, controlled environment without external distractions or interruptions for subjects of investigative interest to be fully explored.\textsuperscript{11}

3.21 ASIO described the current threat to Australia from espionage and acts of foreign interference as ‘an extreme threat because it is occurring now.’\textsuperscript{12} ASIO continued:

Espionage and foreign interference activity against Australian interests is extensive, unrelenting and increasingly sophisticated. Foreign interference is taking place in Australia. Foreign powers want to gain advantage for their nation or to disadvantage us. Adversaries seek information on our foreign policy, intelligence and defence capabilities, economy and industry, and alliance relationships. They try to influence our polity, bureaucracy and civil society, and they use a wide range of techniques to obtain intelligence and clandestinely interfere in Australia’s affairs.\textsuperscript{13}

3.22 ASIO offered the following example to support the broadening of the question powers to espionage and acts of foreign interference:

For example, if ASIO were investigating an Australian who was in direct contact with a Foreign Intelligence Service (FIS), and ASIO’s coverage via questioning and detention powers (for example, telephone interception) and other investigative techniques had determined the individual was engaged in acts of foreign interference as defined by the ASIO Act (1979), the use of questioning powers would assist ASIO to gather intelligence to assess the resultant harm from the individual’s activities. If elements of the case were highly classified and law enforcement outcomes were not possible, and a voluntary interview was inadequate to obtain the required intelligence without prejudicing the investigation, ASIO’s questioning power would be crucial in determining the nature and extent of the prejudicial security outcomes and the best manner in which to mitigate the harm. The sanctions for revealing the questioning would assist in deterring the individual from contacting their FIS handler to tell them about the fact and nature of their contact with ASIO.\textsuperscript{14}

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3.23 The Committee asked ASIO how this proposed broadening of questioning fits within, and complements, existing Australian Intelligence Community (AIC) efforts, strategies and policies aimed at countering espionage and acts of foreign interference. ASIO replied:

ASIO is the lead AIC agency responsible for identifying, countering and providing advice to government on threats emanating from espionage and acts of foreign interference. As the only AIC agency with the authority to exercise questioning and detention powers inside Australia, ASIO alone is empowered to investigate these threats.\(^\text{16}\)

ASIO is not aware of any other efforts, strategies and policy to counter threats to security from espionage and foreign interference.\(^\text{17}\)

3.24 ASIO also provided the Committee with real-life classified case studies in which the availability of a coercive questioning power would have assisted ASIO’s investigations into espionage or foreign interference activities.

3.25 The Department supported ASIO’s proposal, noting that a range of compulsory questioning powers are vested in other Commonwealth agencies with broad functions, without similar limitations as those present in the ASIO Act. Examples of broad questioning powers include those available to the ACIC, the Australian Taxation Office, the Australian Securities and Investments Commission, and the Australian Competition and Consumer Commission.\(^\text{18}\)

3.26 The Department provided the following explanation of the likely benefit to ASIO of having its compulsory questioning power available across all heads of security:

The particular value of ASIO’s compulsory questioning powers is that they enable ASIO to collect intelligence that is peculiar to the mind of the person concerned. This can enable ASIO to collect intelligence in circumstances where, for example, a person has not committed information about their activities into documentary form, which could be seized under a search warrant, or does not communicate such information electronically, which could be intercepted under a telecommunications interception warrant.

\(^{15}\) The AIC currently consists of ASIO, the Australian Secret Intelligence Service, the Australian Signals Directorate, the Office of National Assessments, the Defence Intelligence Organisation, and the Australian Geospatial-Intelligence Organisation.

\(^{16}\) Australian Security Intelligence Organisation, Submission 8.6, p. 5.

\(^{17}\) Australian Security Intelligence Organisation, Submission 8.6, p. 6.

\(^{18}\) Attorney-General’s Department, Submission 7, p. 17.
ASIO advises that persons involved in espionage, sabotage, attacks on Australia’s defence system or foreign interference, in particular could typically be reasonably expected to take steps to conceal their activities. In particular, such persons could typically be reasonably expected to practice counter-surveillance techniques in an attempt to limit the effectiveness of ASIO’s other special powers (search, computer access, surveillance device, and inspection of postal and delivery articles powers). Accordingly, compulsory questioning powers would be of relatively greater value for such investigations, where critical intelligence may exist only in the minds of persons involved.\textsuperscript{19}

3.27 The IGIS submitted that the extension of compulsory questioning (and detention) beyond terrorism offences to all parts of the definition of security was ‘one of the most striking features of ASIO’s proposed model’. The IGIS observed that the definition of security also encompasses carrying out Australia’s responsibilities to any foreign country in relation to any other aspect of the definition of security. This could result in ASIO compulsorily questioning a person in Australia about a matter in another country in circumstances where the equivalent intelligence agency in that country would not be able to do such a thing.\textsuperscript{20}

3.28 In response, the Department stated that

ASIO could only question a foreign person in Australia in relation to a security matter if the warrant threshold was met and if questioning would be consistent with the carrying out of Australia’s responsibilities to that foreign country. This would prevent ASIO from merely carrying out the collection requirements of a foreign country. Paragraph (b) is also limited by section 20 of the ASIO Act, which requires the Director-General to take all reasonable steps to ensure that the work of the Organisation is limited to what is necessary for the purposes of the discharge of its functions.

Noting these limitations, [the Department] considers it would be appropriate for a compulsory questioning power to be available to ASIO in relation to its function under paragraph (b) of the definition of security, to enable ASIO to compulsorily question a person located in Australia in appropriate circumstances. The fact that such powers would not be available to the intelligence agency of that foreign country in equivalent circumstances should not affect ASIO’s ability to protect Australia’s interests and to discharge its

\textsuperscript{19} Attorney-General’s Department, \textit{Submission 7.3}, pp. 4–5.

\textsuperscript{20} Inspector-General of Intelligence and Security, \textit{Submission 1.2}, p. 2.
responsibilities to other countries. This is an important consideration given Australians have been extensively affected by terrorist attacks overseas.21

3.29 The IGIS also advised:

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.

If ASIO’s most intrusive powers – compulsory questioning and detention – were to be available for all elements of security as defined, it would be necessary to reconsider what in those circumstances proportionality would involve.22

3.30 Responding to the IGIS’ observation, the Department submitted:

While threats to life will always remain a high priority, the protection of Australia’s national security extends well beyond the prevention of major terrorist attacks and must encompass longer-term threats posed by espionage (including cyber espionage) and foreign interference activities if Australia’s national interests are to remain secure. [The Department] considers questions of proportionality should be determined by application of a robust legislative framework available in respect to all heads of security, rather than by reference a hierarchy of threats. This approach is consistent with ASIO’s wider warrant regime.23

3.31 The Law Council did not oppose ASIO’s proposal but noted that such an expansion would necessitate the current constraints in the ASIO Act accompanying that reform,24 and the threshold test for getting such a

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21 Attorney-General’s Department, Submission 7.3, pp. 5–6.
22 Inspector-General of Intelligence and Security, Submission 1.2, pp. 2–3.
23 Attorney-General’s Department, Submission 7.3, p. 6.
24 Mr Tim Game SC, Committee Hansard, Canberra, 9 August 2017, p. 2.
warrant should not be weakened. The Law Council also noted that it would support an exemption from prosecution for those that cooperate in the questioning process.\textsuperscript{25}

3.32 Professor Williams did not support the proposal, suggesting that it would be inconsistent with the approach taken by the PJCAAD in seeing this as an extraordinary power justified only in respect of the threat posed by terrorism.\textsuperscript{26}

**Warrant issuing authority and emergency authorisations**

3.33 ASIO proposed that the Minister who issues other ASIO warrants (currently the Attorney-General) should issue ASIO’s QWs or QDWs. This would be a departure from the current provisions, which require ASIO to seek the Minister’s consent prior to applying to a judge for the issue of a warrant. ASIO also proposed new emergency authorisation provisions.\textsuperscript{27}

3.34 The limited involvement of a sitting judge in the issuing of QWs and QDWs has been criticised by submitters on the basis that, while it is the judge that issues the warrant, the decision about whether to make a QDW application rather than a QW application lies with a member of the executive (the Attorney-General).\textsuperscript{28}

3.35 INSLM Walker found that there was no justification in policy for the difference between the responsibility of the Attorney-General alone for deciding whether a QDW is appropriate and the shared responsibility of the Attorney-General and the issuing authority for the additional threshold that issuing the warrant ‘will substantially assist the collection of intelligence that is important in relation to a terrorism offence’.\textsuperscript{29}

3.36 Dr McGarrity and Professor Williams supported this finding, submitting that all criteria should be subject to strict, independent scrutiny by the

\textsuperscript{25} Law Council of Australia, *Submission 4.1*, p. 10.

\textsuperscript{26} Professor George Williams AO, *Committee Hansard*, Canberra, 16 June 2017, p. 13.

\textsuperscript{27} Australian Security Intelligence Organisation, *Submission 8.6*, p. 10.

\textsuperscript{28} Law Council of Australia, *Submission 4*, p. 7.

judicial officer, as such officers ‘can bring powers of reason and analysis to the matter that the Attorney-General may lack’.

3.37 On the judge’s role, INSLM Gyles observed:

The judge does not sit in an ordinary judicial capacity, making a decision based on evidence after hearing both sides. It is suggested, with some justification, that the involvement of a judge gives a veneer of respectability to the process. There is a point of view that the involvement of a sitting judge chosen by the executive as persona designata in a secret process of this kind could diminish respect for the judiciary. On the other hand, judicial issue of warrants occurs in state jurisdictions and under other Commonwealth statutes. There is discretion as to certain aspects of the form of the warrant (eg, whether appearance of the individual is required immediately or later, and the duration of the warrant). However, the issuing authority has no discretion, as it is bound by the form of the draft warrant. There are no statutory criteria in relation to these important matters, particularly a warrant for immediate attendance.

3.38 ASIO submitted that this multi-step warrant authorisation process does not permit the timely execution of a warrant, particularly where there is an imminent threat to public safety. INSLM Gyles observed that this multi-step process contrasts with the ACIC procedure that involves one external person, the examiner, filling all roles. Indeed, none of the other bodies with compulsory questioning powers has comparable external authorisation procedures. The procedure is also out of step with authorisation of the use of other ASIO special powers by the Minister, without involving any separate issuing authority.

3.39 In support of making the issuing officer the minister responsible for ASIO’s other warrants, ASIO argued that having one authority issue all of ASIO’s warrants is administratively appropriate and operationally effective.

3.40 The Department supported this proposal:

30 Dr Nicola McGarrity and Professor George Williams AO, Submission 5, p. 11.
33 Independent National Security Legislation Monitor, Certain Questioning and Detention Powers in Relation to Terrorism, 2016, p. 44.
34 Australian Security Intelligence Organisation, Submission 8.6, p. 9.
From a policy perspective, we consider it appropriate for the Attorney to balance all the considerations as he or she already does for other warrants under the ASIO Act. It is the minister responsible for national security but also the rule of law. Considering those and issuing a warrant for questioning warrants is something we consider appropriate from a policy perspective.\(^\text{35}\)

3.41 The Law Council similarly supported applications for questioning warrants being made to the Attorney-General.\(^\text{36}\)

3.42 The IGIS submitted that removing 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:

As far as I am aware none of the other 5-eyes countries has legislation authorising their intelligence services to conduct compulsory questioning but the UK and New Zealand have recently introduced, and the US and Canada already had, judicial or quasi-judicial authorisation for other powers including telecommunications interception. These changes reflect concerns in these countries that there be better protection of human rights. ASIO’s ‘streamlining’ proposal does not give weight to these concerns.\(^\text{37}\)

3.43 In response, the Department stated:

The proposed new Australian model does not include judicial approval for intelligence warrants, but shifts responsibility for issuing, or consenting to applications for, those warrants from the Minister responsible for the agency (as remains the case in the United Kingdom, New Zealand and Canada) to the Attorney-General in his or her capacity as the First Law Officer of the Crown and Minister responsible for the oversight and integrity of the intelligence services. This model can be distinguished from warrant authorisation frameworks in countries such as Canada and the United Kingdom, where the decision of the responsible Minister (not the Attorney-General) to issue a warrant is subject to judicial approval.

This model would bring the process for issuing questioning warrants into alignment with that of other ASIO warrants. As Justice Hope observed in 1976 ‘... in respect of matters such as issuing warrants, the minister will obviously be required to adopt an entirely non-partisan approach, an approach which, as the Attorney-General, he has to adopt in many of his other ministerial

\(^{35}\) Ms Anne Sheehan, Attorney-General’s Department, *Committee Hansard*, Canberra, 16 June 2017, p. 31.

\(^{36}\) Mr Tim Game SC, Law Council of Australia, *Committee Hansard*, Canberra, 9 August 2017, p. 3.

\(^{37}\) Inspector-General of Intelligence and Security, *Submission 1.2*, p. 6.
functions’. Further, it would more closely align ASIO with other Commonwealth bodies that have the ability to conduct compulsory questioning, such as the Australian Securities and Investments Commission (ASIC), the Australian Competition and Consumer Commission (ACCC) and the Commonwealth Ombudsman.38

3.44 Dr McGarrity and Professor Williams agreed that allowing the Minister to issue all warrants would make it simpler and quicker for ASIO to exercise its questioning powers. However, they argued that the judiciary should have a greater—rather than reduced—role in the warrant process due to the gravity of the questioning and detention powers.39 They added that the role of an independent body in the issuing process is crucial in light of the extraordinary nature of the questioning and detention powers.40

3.45 At a public hearing, the Committee sought ASIO’s views on whether the involvement of a judge in the warrant issuing process was likely to build public confidence in the exercise of these powers. The Acting Director-General of Security replied:

I am sure that would be the case. I would also argue that, in addition to it being consistent with the way all other special ASIO powers are authorised, that independent ministerial authorisation exceeds, if I am not mistaken—I can be corrected on that—other compulsory questioning regimes that exist in the Commonwealth.41

3.46 ASIO also proposed that the ASIO Act be amended to allow the issue of emergency warrants. ASIO submitted that, in the current security environment—where threats can emerge and develop quickly—it requires a mechanism for the Minister to give an emergency oral, rather than written, authorisation for compulsory questioning. Such an authorisation would be consistent with the authorisation of special intelligence operations under the ASIO Act.42

3.47 The Department supported this proposal, noting that there are a range of precedents for such emergency authorisation frameworks:

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38 Attorney-General’s Department, Submission 7.3, pp. 9-10.
39 Dr Nicola McGarrity and Professor George Williams AO, Submission 5, p. 6, p. 11.
40 Dr Nicola McGarrity and Professor George Williams AO, Submission 5.1, p. 1.
41 Ms Heather Cook, Acting Director-General of Security, ASIO, Committee Hansard, Canberra, 16 June 2017, p. 31.
42 Australian Security Intelligence Organisation, Submission 8.6, p. 10.
The ASIO Act contains two different forms of emergency authorisation. Under section 29, the Director-General of Security may issue an emergency warrant, lasting no more than 48 hours, authorising the use of ASIO’s special powers in limited circumstances where the Attorney-General is not available. Under section 35C, the Attorney-General may give oral, rather than written, authorisation for a special intelligence operation, in urgent circumstances. The *Intelligence Services Act 2001* contains a more detailed framework for emergency authorisations in relation to the Australian Signals Directorate, Australian Secret Intelligence Service and Australian Geospatial-Intelligence Organisation, allowing authorisation to be given by a range of different ministers and agency heads, in different circumstances.43

3.48 When asked for her views, the Inspector-General of Intelligence and Security, the Hon Margaret Stone, commented:

> Emergency authorisations always raise issues. I am not aware of what form ASIO is suggesting that that emergency authorisation should take. If it meant that we were not notified at the outset or were notified in such short time that it was impossible for us, in fact, to exercise the oversight that we presently have, I would have a concern about it.44

3.49 The Inspector-General subsequently advised the Committee that

> If some form of emergency questioning warrant regime is to be introduced, particularly one involving oral authorisation, the issue of effective notice to the IGIS will be more complex. Careful consideration also needs to be given to defining an ‘emergency’. The IGIS’ experience with emergency authorisations in other contexts demonstrates there can be differences of opinion about what constitutes an emergency and how long it continues. Clear guidance on what constitutes an emergency is necessary for effective oversight. Consideration could also be given to requiring that emergency authorisation not be used where other powers, such as the police power of arrest, are a more appropriate way to deal with the emergency.45

3.50 The Committee asked ASIO how it would engage with the IGIS if an emergency warrant was sought. The Acting Director-General of Security stated that ASIO would work with the IGIS to develop a protocol that

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43 Attorney-General’s Department, *Submission 7*, p. 20.


ensured the IGIS was alerted to the request for an emergency warrant and seek the Office of the IGIS’ availability to be present for questioning.\textsuperscript{46}

**Identified person warrant**

3.51 Identified person warrants, available under section 27C of the ASIO Act, allow the Attorney-General to provide conditional approval for ASIO to use multiple warrant-based powers—such as computer access, use of surveillance devices, and premises search—under the one warrant in respect of a specified person. The warrant can last for up to six months.

3.52 After an identified person warrant is issued and the Minister has provided conditional approval as to the powers that ASIO may deploy, the Director-General of Security or the Minister authorises the use of each specific power as the operational need arises (if certain additional legislative thresholds are met). This warrant type allows ASIO to use each conditionally approved power on multiple occasions over the life of the warrant, without requiring the Attorney-General’s authorisation on each occasion.

3.53 Identified person warrants have a high legislative threshold and can only be obtained against persons of security concern (being a person who is engaged in, or is reasonably suspected of being engaged in, or of being likely to engage in, activities prejudicial to security). Therefore, this warrant type cannot be issued against a non-suspect/person of interest.

3.54 ASIO proposed that its questioning power be available under this warrant type. This proposal would enable questioning powers to be included with the various other special powers available under the ASIO Act, which may be exercised under a single identified person warrant. The proposal, which would see questioning attached to a warrant that may continue for six months, contrasts with the existing limitation which prevents ASIO from questioning a person more than 28 days after the issue of the warrant.

3.55 ASIO justified its proposal as follows:

Extension of the identified person warrant regime to allow the Attorney-General to grant conditional approval for questioning an identified person would allow ASIO to select the most appropriate power for intelligence collection, available in the ASIO Act, at each point in time of an investigation, enhancing ASIO’s ability to respond quickly, efficiently and effectively to threats as they arise. As with the exercise of other special powers under an

\textsuperscript{46} Ms Heather Cook, Acting Director-General of Security, ASIO, *Committee Hansard*, Canberra, 16 June 2017, p. 24.
Identified Person Warrant, questioning would only take place under the warrant once further specific authorisation has been obtained from the Director-General or Attorney-General for such questioning, and provided he or she is satisfied the relevant thresholds have been met. Questioning under an identified person warrant would otherwise be subject to the same safeguards as under a questioning warrant.\textsuperscript{47}

3.56 ASIO further noted that the inclusion of compulsory questioning under the identified person warrant ‘would be a very useful inclusion that sits with other suggested adjustments as a streamlining measure’.\textsuperscript{48}

3.57 The Department advised the Committee that, if compulsory questioning was available under an identified person warrant, it would not support a lower threshold for requesting the power than what has been proposed for a revised questioning warrant power. The Department envisaged a requirement that the Minister ‘consider a higher threshold, or satisfy an additional limb’, in relation to a request for compulsory questioning under an identified person warrant. This would reflect the higher level of intrusion involved in exercise of a compulsory questioning power, when compared with existing powers that can be authorised under an identified person warrant.\textsuperscript{49}

3.58 The IGIS observed that to include compulsory questioning and administrative detention

in a routine warrant for a security agency because doing so would be ‘a useful inclusion’ and a ‘streamlining measure’ would certainly be an unusual if not unprecedented step. The identified person warrant scheme applies to search and surveillance powers that do not have the same level of intrusion into individual rights as questioning warrants. Although both powers can be used to obtain intelligence the differential levels of intrusion are recognised through the current questioning warrant scheme having higher thresholds and more safeguards than the identified person warrant scheme. There is no doubt that ASIO’s preferred approach would ‘streamline’ obtaining a questioning warrant for ASIO in that it would make obtaining the authority to exercise a compulsory questioning power much quicker and easier. When combined with a reduction in the thresholds for obtaining such a warrant and the

\textsuperscript{47} Australian Security Intelligence Organisation, Submission 8, p. 10.

\textsuperscript{48} Australian Security Intelligence Organisation, Submission 8.6, p. 24.

\textsuperscript{49} Attorney-General’s Department, Submission 7.3, pp. 7–8.
broadening of the power to all aspects of the definition of security it must be assumed that the resulting power would be used more often.\textsuperscript{50}

3.59 The IGIS advised that this proposal would challenge her ability to satisfactorily scrutinise ASIO’s use of its questioning powers:

Currently IGIS reviews a sample of ASIO warrants after the warrant has expired. If compulsory questioning is included in identified person warrants then, to maintain the current approach to reviewing questioning warrants, it would be necessary for IGIS to: examine the identified person warrant at the time (or before) it is issued; review the Director-General’s later decision to authorise questioning; potentially be present for compulsory questioning if it occurred; and then review other powers exercised under the warrant at the conclusion of the warrant period. This would greatly increase the extent of IGIS oversight of each identified person warrant, even where compulsory questioning is pre-authorised by the Minister but ultimately not used. This degree of oversight could not be achieved within the current resources of the IGIS.

Furthermore, to enable oversight of compulsory questioning it would be necessary for the ASIO Act to require ASIO to notify IGIS not only when it sought any identified person warrant which included questioning but also when the Director-General (or Minister) decided to authorise that activity. Even with ASIO providing such double notification it may not be possible for IGIS officers to attend questioning (as has occurred in the past) because of the speed with which internal Director-General authorisation can be obtained.\textsuperscript{51}

Legal thresholds and duration of questioning

3.60 Currently, a QW may be issued if ‘the issuing authority is satisfied that there are reasonable grounds for believing that that warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.’ ASIO proposed that this be amended by replacing ‘important in relation to a terrorism offence’ with ‘important in relation to security’.\textsuperscript{52}

3.61 The Law Council submitted that while it would not oppose a broadening of ASIO’s questioning power, as discussed above, it would not support a weakening of the threshold test:

\textsuperscript{50} Inspector-General of Intelligence and Security, \textit{Submission 1.2}, p. 3.

\textsuperscript{51} Inspector-General of Intelligence and Security, \textit{Submission 1.2}, p. 4.

\textsuperscript{52} Australian Security Intelligence Organisation, \textit{Submission 8.6}, p. 7.
...the threshold for the issuance of a summons should not be ‘is reasonable in the circumstances’ as per the Australian Criminal Intelligence Commission (ACIC) model. Rather, the threshold test should as a minimum be that the issuance of the summons ‘will substantially assist the collection of intelligence that is important in relation to ‘security’’ as defined in section 4 of the ASIO Act.53

3.62 Dr McGarrity and Professor Williams suggested that, rather than broadening the legal threshold as proposed by ASIO, the existing QW threshold ‘should be tightened by, for example, requiring the existence of a reasonable belief that issuing a questioning warrant would substantially assist in the prosecution or prevention of a terrorism offence.’54

Apprehension powers

3.63 At the Committee’s request, ASIO and the Department provided the Committee with a possible apprehension framework that would address ASIO’s concerns about a person absconding, destroying things, or alerting others.

3.64 Under this alternative mechanism:

1. the ASIO Act could contain a general power for police to apprehend a person where they suspect on reasonable grounds from anything said or done by the person that they intend not to comply with the warrant. In this situation, police officers would have the ability to enter premises to take the person into custody and to carry out a search of the person,55

2. the Minister may authorise one or more additional powers under a QW:
   a. conduct an ordinary search of the subject, and seize communications devices, seizable items (as defined in the ASIO Act), and items relevant to security,
   b. require the subject of the warrant to immediately accompany the police officer to the questioning location (with the police officer able to use reasonable force if necessary, including to enter premises to ensure compliance).

53 Law Council of Australia, Submission 4.1, p. 10.
54 Dr Nicola McGarrity and Professor George Williams AO, Submission 5.1, p. 2.
55 Australian Security Intelligence Organisation, Submission 8.6, pp. 10–11.
The Minister would have the option of authorising the above actions in circumstances where the Minister is satisfied that there are reasonable grounds for believing that, if those powers are not available, the person may:

a. not appear for questioning as required under the warrant,

b. alert a person involved in the security-relevant activity that there is an investigation in that activity, and/or

c. destroy, damage or alter a record or thing, or cause another person to destroy, damage or alter a record or thing, that has been requested to be produced in accordance with the warrant.

3 The presiding officer would retain the ability to direct the detention, or further detention, of the subject of the warrant.56

3.65 Dr McGarrity and Professor Williams did not support these proposals. They submitted:

We appreciate that there may be some circumstances in which it is necessary for a person to be detained pending questioning. However, a determination by the Minister that there are, for example, reasonable grounds for believing that a person may not appear for questioning is an insufficient justification for detention. Our view is that detention is only justified where there is a concrete (as opposed to generalised) risk of a person taking steps which might undermine the effective operation of a questioning warrant.57

3.66 Instead, they suggested that the ASIO Act make it an offence for a person to intentionally or recklessly inform a person involved in a terrorism offence that the offence is being investigated (or urge another person to do so); or destroy, damage or alter a record or thing that may be requested in questioning (or urge another person to do so). Where the AFP had reasonable grounds to believe a person had engaged, or attempted to engage, in that conduct, the Act would authorise immediate detention, with the person to be brought before a judge as soon as practicable to determine whether the AFP had reasonable grounds for their belief. The person would then be released or detained depending on the judge’s finding.58

3.67 The Law Council noted that the relevant provisions under the ACC Act—where a court issues a warrant for the apprehension of a person—could be adapted for the ASIO Act. It added:

57 Dr Nicola McGarrity and Professor George Williams AO, Submission 5.1, p. 5.
58 Dr Nicola McGarrity and Professor George Williams AO, Submission 5.1, pp. 5–6.
Deprivation of liberty is a serious matter and the power to detain someone in the absence of that person being suspected of committing an offence is an extraordinary one. Judicial oversight is thus an essential and important safeguard.\textsuperscript{59}

**Person searches**

3.68 ASIO proposed that police officers be able to search the person upon the person’s arrival at questioning to ensure they are not carrying dangerous items. ASIO explained that, presently, where a person presents for questioning as required under the warrant there is no ability to conduct a search of that person before they enter the building or room where questioning is to take place. In the current environment, this can present safety risks to those involved in the questioning process.\textsuperscript{60}

3.69 The Law Council did not oppose providing police with this search power, provided that there was a demonstrated need for such a power and the power was subject to appropriate limitations and safeguards.\textsuperscript{61}

**Presiding officer**

3.70 Presently, ASIO’s questioning is presided over by a ‘prescribed authority’, which is a former superior court judge with at least five years’ experience as a judge, who is appointed by the Attorney-General.

3.71 ASIO advised that it would prefer to adopt the ‘examiner’ model contained within the ACC Act, where statutorily appointed officers, who must have five years’ experience as a legal practitioner to be eligible for appointment, preside over questioning.\textsuperscript{62}

3.72 Other key elements of the ACC Act model include:

- that appointments are made by the Governor-General, following consultation by the Minister with the Inter-Governmental Committee,
- that an examiner may be appointed on a full-time or part-time basis for a period of up to five years,

\textsuperscript{59} Law Council of Australia, *Submission 4.1*, p. 8.

\textsuperscript{60} Australian Security Intelligence Organisation, *Submission 8.6*, p. 10.

\textsuperscript{61} Law Council of Australia, *Submission 4.1*, p. 12.

- a requirement for examiners to disclose interests in accordance with section 29 of the Public Governance, Performance and Accountability Act 2013
- a prohibition on full-time examiners engaging in outside employment, and a prohibition on part-time examiners engaging in outside employment that (in the Chief Executive Officer’s opinion) ‘conflicts or may conflict with the proper performance of his or her duties’, and
- provisions requiring the termination of the appointment of examiners in a range of circumstances, including the non-disclosure of interests or engagement in outside employment in contradiction with the above requirements.\textsuperscript{63}

3.73 The Department stated that the current prescribed authority model under the ASIO Act, which sees former judges presiding over questioning, had presented difficulties as

a significant number of appointees are unwilling or unable to serve in this capacity for an extended period of time, representing a significant barrier to the development of institutional expertise in controlling compulsory questioning.\textsuperscript{64}

3.74 The Law Council submitted that the method of appointing examiners under the ACC Act is seen as being transparent and formal.\textsuperscript{65} INSLM Gyles noted that the examiner holds a statutory office on terms likely to promote independence.\textsuperscript{66}

3.75 Dr McGarrity and Professor Williams did not support this proposal. They argued that having retired judges serve in this role was ‘appropriate and necessary’. They added:

There are provisions in the ASIO Act to enable alternative people to be appointed if there are insufficient retired Judges available. However, there is no evidence that this has ever been required.\textsuperscript{67}

**Questioning of minors**

\textsuperscript{63} Australian Crime Commission Act 2002, sections 46B–46J.

\textsuperscript{64} Attorney-General’s Department, Submission 7, p. 26.

\textsuperscript{65} Law Council of Australia, Submission 4, p. 10.

\textsuperscript{66} Commonwealth of Australia, Independent National Security Legislation Monitor, Certain Questioning and Detention Powers in Relation to Terrorism, 2016, p. 46.

\textsuperscript{67} Dr Nicola McGarrity and Professor George Williams AO, Submission 5.1, p. 2.
3.76 The ASIO Act allows ASIO to seek a QW or a QDW against a person as young as 16. However, a special threshold applies to any person between the ages of 16-18, so that a warrant can only be sought against a minor if that minor will commit, is committing or has committed a terrorism offence.

3.77 Special restrictions and safeguards also apply. For example, the minor must be permitted to contact a parent, guardian or other support person, with questioning of the minor not permitted to occur in the absence of that adult.68

3.78 There have been no QWs or QDWs issued in respect of a minor.69

3.79 ASIO proposed lowering the minimum age of a questioning subject to 14 years, arguing that the recent change in age profile of those involved in terrorism-related activities necessitated allowing questioning of persons as young as 14:

Since May 2015, three major terrorist attacks involving teenagers under the age of 18 have been disrupted by law enforcement, often with critical security intelligence being provided by ASIO. During this period one terrorist attack by a teenager was the murder of NSW Police employee Curtis Cheng in October 2015 by a 15-year-old male.70

3.80 ASIO also noted that:

The seriousness of threats posed by persons as young as 14 was recently recognised by the Commonwealth Parliament when it enacted amendments to the control order regime in the Criminal Code reducing the minimum age for those who can be subject to control orders from 16 to 14.71

3.81 The minimum age of a person subject to various compulsory questioning and counter-terrorism powers is as follows:

Table 3.1 Minimum age under various questioning and detention power regimes

<table>
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<tr>
<th>Power</th>
<th>Minimum age</th>
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68 See ASIO Act, s. 34ZE.
70 Australian Security Intelligence Organisation, Submission 8, p. 11.
71 Australian Security Intelligence Organisation, Submission 8, p. 11.
The Law Council accepted that there may be the need to question minors but argued that any compulsory questioning regime that may be available against minors must include a framework for dealing with the particular needs of minors, including the provision of legal assistance and a support person. The Law Council also suggested that, in line with the United Nations Conventions on the Rights of the Child, the framework should include a requirement that the best interests of the child be taken into account as a primary consideration in the issue of the warrant.

When asked at the public hearing whether the questioning of a 14 year old would change the way in which the IGIS oversaw questioning, the Deputy IGIS stated:

I could imagine that, if it was a person of particular vulnerability, including because of age, we would apply even more scrutiny. But it is hard to do more than the very close detailed scrutiny that was given to each of these warrants and the in-person attendance of the Inspector-General or senior staff member at each questioning.

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72 ASIO Act, s. 34ZE.
73 Criminal Code Act 1995 (Cth), s.104.28.
74 Criminal Code Act 1995 (Cth), s. 105.5.
75 Terrorism (Police Powers) Act 2002 (NSW), s. 25F.
76 Mr Tim Game SC, Committee Hansard, Canberra, 9 August 2017, p. 3.
77 Law Council of Australia, Submission 4.1, p. 11.
78 Mr Jake Blight, Deputy Inspector-General of Intelligence and Security, Committee Hansard, Canberra, 16 June 2017, p. 6.
3.84 ASIO also proposed that the questioning of minors be broadened to allow questioning in relation to all heads of security. ASIO advised the Committee:

Espionage and acts of foreign interference activity is not age dependant. Espionage and foreign interference activity through cyber means could be perpetrated by a minor. In addition, there are positions such as in Defence where individuals entering are minors and have access to privileged information.\(^{79}\)

3.85 ASIO further proposed that minors no longer be subject to a unique legislative threshold (as described above). That is, ASIO wishes to be able to question any minor who may possess the relevant information, and not be limited to only those who are suspects. ASIO provided the following to justify this proposal:

For example, if ASIO has a concern about a minor being engaged in activities prejudicial to security, it is possible that other friends, acquaintances or siblings who are also minors but who ASIO is not able to say are involved in those prejudicial activities, would nonetheless have information of intelligence value related to the target’s activities.\(^{80}\)

3.86 ASIO acknowledged that ‘the compulsory questioning of persons as young as 14, particularly in circumstances where they may not necessarily be a target themselves, is a significant step’.\(^{81}\)

3.87 The Department’s view was that if the scope of a questioning warrant is broadened to encompass all heads of security under the ASIO Act, questioning should be limited to where the minor is the targeted individual.\(^{82}\)

Where minors are concerned, we have suggested that an additional safeguard be put in place and that the person being questioned should be themselves reasonably believed to be engaged in activities prejudicial to security, to make sure that they are the target of the investigation, the person actually conducting the activities, rather than that kind of circle that is described in

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\(^{80}\) Australian Security Intelligence Organisation, *Submission 8.6*, p. 16.

\(^{81}\) Australian Security Intelligence Organisation, *Submission 8.6*, p. 16.

\(^{82}\) Attorney-General’s Department, *Submission 7*, pp. 22–23.
other contexts, so you do not have somebody’s children being questioned about their activities.\textsuperscript{83}

**Post-charge questioning**

3.88 The ASIO Act is silent on whether ASIO may question a person after that person has been charged with an offe

3.89 Recent High Court authority has made it clear that post-charge compulsory questioning will only be permissible where legislation clearly allows it by express words or necessary intendment.\textsuperscript{85}

3.90 ASIO proposed that the ASIO Act be amended, in line with the provisions in the ACC Act, to expressly authorise a questioning warrant to be issued following the laying of charges against the person who is the subject of questioning or where charges are imminent against that person, and would allow the questioning to cover matters that are the subject of those charges. The presiding officer would be empowered to give a direction in regard to disclosure of information obtained under the warrant in order to protect the subject’s fair trial.\textsuperscript{86} ASIO submitted:

The inability to compulsorily question a person following the laying of charges has the potential to give rise to critical gaps in intelligence as there are circumstances where, notwithstanding the arrest and charging of a person by law enforcement, ASIO requires information from the person to assess ongoing security threats and to minimise risks to the community. This is particularly so given existing links between criminal and ideologically motivated persons. ASIO submits that it should not be constrained by law enforcement developments in continuing to gather security intelligence information relevant to current threats.\textsuperscript{87}

\textsuperscript{83} Ms Tara Inverarity, Attorney-General’s Department, Committee Hansard, Canberra, 16 June 2017, p. 34.

\textsuperscript{84} Attorney-General’s Department, Submission 7, p. 23.

\textsuperscript{85} See, for example, \textit{X7 v Australian Crime Commission} [2013] HCA 29.

\textsuperscript{86} Australian Security Intelligence Organisation, Submission 8.6, pp. 16–17.

\textsuperscript{87} Australian Security Intelligence Organisation, Submission 8, pp. 18–19.
3.91 The Department advised that no QWs have been issued in relation to a person who had, at the time the warrant was issued, been charged with a terrorism offence. Nonetheless, the Department submitted that it is foreseeable that a person charged with an offence could be in a position to provide important intelligence in relation to a security matter. For example, in relation to a terrorist plot involving a person charged with an offence, the person is likely to have valuable intelligence information about other persons associated with terrorist activity or about capabilities and methodologies of terrorist groups. This is particularly so in the current environment, where plans are carried out quickly and law enforcement agencies are forced to act, potentially including by laying charges, at an earlier stage in order to disrupt or prevent an attack.  

3.92 In 2012, INSLM 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:

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.  

3.93 In his 2016 review, INSLM Gyles noted the concerns of some submitters to his review about the ACC Act’s approach to post-charge questioning (which allows post-charge questioning, though disclosure of examination material to prosecutors can only occur with the leave of a court); however, he reasoned that the ACC Act provisions had recently been the subject of close parliamentary scrutiny and there was no reason to restrict ASIO’s ability to collect intelligence more than that of the ACIC. On that basis, he recommended ASIO adopt the post-charge provisions contained within the ACC Act model.  

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88 Attorney-General’s Department, Submission 7, p. 23.


3.94 The Law Council disagreed with INSLM Gyles’ recommendation, suggesting that the ACC Act’s post-charge questioning provisions may not be constitutionally valid as they effectively take away from courts the discretion in respect of exclusion of evidence of post-charge questioning.\(^{91}\) On that basis, the Law Council recommended, in the ASIO context, that the examination of a person charged with an offence should be deferred until after the disposition of any charges. It stated:

there remains a real risk that a person who is examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice his or her defence. An accused person should not be forced to divulge his or her position prior to trial or to assist law enforcement officers in gathering supplementary information to aid in his or her prosecution.\(^{92}\)

3.95 The Law Council suggested that, should the Committee not accept the Law Council’s recommendation, then as an alternative to ASIO’s adoption of the ACC Act provisions, it would be appropriate to require authorisation from a Federal Court judge before a warrant is issued in relation to a person who is subject to criminal proceedings, and for that judge to prescribe limitation on the matters which may be covered by the questioning. The Law Council explained:

If an examination is permitted to occur prior to the resolution of the witness’s pending charges, there should be strict regulation of who is present at the examination, what use can be made of the information obtained, and the subject matter able to be covered.\(^{93}\)

Access to legal representation

3.96 A number of submitters and witnesses raised issues in relation to a person’s access to legal representation under the questioning and detention powers framework, contending that the framework needed to be amended to ensure a lawyer can adequately represent their client’s interests.\(^{94}\)

3.97 Issues raised included that:

- there is a limit on contact with the subject’s lawyer of choice,

\(^{91}\) Mr Tim Game SC, Committee Hansard, Canberra, 9 August 2017, p. 4.
\(^{92}\) Law Council of Australia, Submission 4, p. 11.
\(^{93}\) Law Council of Australia, Submission 4, p. 12.
\(^{94}\) See, for example, Law Council of Australia, Submission 4, p. 9.
contact between the subject and the lawyer can be monitored, restricting legal professional privilege,

- a lawyer cannot intervene in questioning or address the prescribed authority during questioning, except to request clarification of an ambiguous question or, with leave, address the prescribed authority on a matter during a break in questioning.

3.98 Dr McGarrity and Professor Williams noted that ‘these restrictions may inhibit full and frank communication between the person and their lawyer. They create a real risk that the person will not understand their legal rights or obligations’.  

3.99 ASIO proposed retaining the existing provisions relating to legal representation. ASIO stated that adoption of the relevant provisions of the ACC Act (as recommended by INSLM Gyles and the Law Council), including that the lawyer be involved in the questioning process, would not be preferable because:

If the lawyer were to have a more active role in the questioning, this would change the nature of the process to an adversarial one and would interrupt the flow of questioning and the elicitation of vital intelligence.  

3.100 The Department, however, submitted that it ‘is of the view that the model under the ACC Act is transferable to the ASIO context’.  

3.101 The Committee asked the Law Council to provide a series of relevant safeguards that should be adopted should the questioning and detention powers be amended. The Law Council offered:

An examinee should have a general right to independent legal representation under any revised ASIO questioning and detention power regime. The Law Council considers that any person compelled to answer questions pursuant to a summons or warrant must be entitled to access an independent lawyer at all stages of the questioning process without that communication being monitored or otherwise restricted. Such access is necessary to ensure the person subject to the summons can exercise their right to challenge the legality of the detention, the conditions of detention and any ill-treatment occurring during the questioning and/or detention process. All communications between a lawyer and his or her client should be recognised as confidential and adequate.

95 Dr Nicola McGarrity and Professor George Williams AO, Submission 5, p. 13.

96 Australian Security Intelligence Organisation, Submission 8.6, p. 20.

97 Attorney-General’s Department, Submission 7, p. 29.
facilities should be provided to ensure the confidentiality of communications between lawyer and client.\textsuperscript{98}

\section*{Secrecy provisions}

3.102 Division 3 of Part III provides that during the life of a warrant the person and their lawyer must not, on a strict liability basis, disclose the existence of the warrant, the fact of the questioning or detention, or any operational information. In the two years following the expiry of the warrant, the person and lawyer also must not, on a strict liability basis, disclose any operational information obtained as a result of the questioning. The penalty for either offence is five years imprisonment.\textsuperscript{99}

3.103 The secrecy provisions were criticised by several submitters. The Australian Lawyers Alliance noted that, for either of the above offences, there need be no intention to disclose the information, no risk to national security, or to the safety of any person or property, before severe penalties can ensue as a result of disclosing information about a QW or QDW. As such, under this legislation, people who are not suspected or accused of any crime could be liable to five years in prison, for simply telling their boss why they were not able to come to work, or a family member why they could not come home, as noted by the INSLM.\textsuperscript{100}

3.104 The Lawyers Alliance therefore contended that the secrecy provisions could not be considered reasonably appropriate or adapted to a legitimate purpose. They suggested that ‘it is thus likely to conflict with the Constitutional freedom of political communication’.\textsuperscript{101}

3.105 Professor Williams agreed with that submission. He noted that concerns about the constitutionality could arise because of the prevention of information being made public that may well be in the public interest, such as revealing misuse.\textsuperscript{102}

3.106 Given these concerns, Dr McGarrity and Professor Williams recommended that the provisions be more closely tailored to their counter-terrorism

\textsuperscript{98} Law Council of Australia, \textit{Submission 4.1}, p. 8.

\textsuperscript{99} See ASIO Act, s. 34ZS.

\textsuperscript{100} Australian Lawyers Alliance, \textit{Submission 6}, p. 7.

\textsuperscript{101} Australian Lawyers Alliance, \textit{Submission 6}, p. 9.

\textsuperscript{102} Professor George Williams AO, \textit{Committee Hansard}, Canberra, 16 June 2017, p. 13.
purpose, such as by prohibiting only those disclosures which could prejudice national security or including a broad defence for innocent or innocuous disclosures.\textsuperscript{103}

3.107 ASIO proposed that the length of time that secrecy obligations remain in force be extended as follows:

- the length of time in which the existence of a warrant be kept secret should be extended from the current 28 days to five years, and
- the length of time in which operational information, obtained as a result of questioning, be kept secret extended from the current two years to five years.\textsuperscript{104}

3.108 ASIO justified this proposal as follows:

Given that ASIO intelligence investigations often continue for several years, a disclosure as to the existence of a QW/QDW or related operational information could potentially jeopardise an investigation at any stage during that period. A five-year time frame for secrecy offences to apply from the issue of the warrant would be consistent within the time frames for when secrecy obligations are imposed regarding ACIC examinations.\textsuperscript{105}

3.109 Dr McGarrity and Professor Williams questioned the appropriateness of this proposal:

Our view is that the disclosure offences – as they currently stand – are already overbroad. In the first place, they are inadequately tailored to the counter-terrorism purpose of the ASIO Act. They should prohibit only those disclosures which have the potential to prejudice national security or, at the very least, include a defence for innocent disclosures. Second, the penalties are excessively long. The former Independent Monitor of National Security Legislation, Bret Walker SC, recommended that the penalty for breaching s34ZS should be reduced from five years to two years imprisonment. Finally, the application of the operational information offence for two years after the expiry of a warrant makes it difficult to test the legality of a particular warrant in court or in the public domain. ASIO’s proposal would exacerbate this problem by making it an offence to not only disclose operational information for up to five years after the expiry of a warrant but also the mere existence of a warrant as well.\textsuperscript{106}

\textsuperscript{103} Dr Nicola McGarrity and Professor George Williams AO, Submission 5, p. 15.

\textsuperscript{104} Australian Security Intelligence Organisation, Submission 8.6, p. 21.

\textsuperscript{105} Australian Security Intelligence Organisation, Submission 8.6, pp. 21–22.

\textsuperscript{106} Dr Nicola McGarrity and Professor George Williams AO, Submission 5.1, p. 3.
Oversight and accountability

3.110 In addition to the IGIS’s general function contained within the Inspector-General of Intelligence and Security Act 1986 of inquiring into the legality and propriety of ASIO’s activities, Division 3 of Part III also contains provisions relating to the IGIS’s oversight of the use of the questioning and detention powers. These include:

- the requirement that the Director-General of Security consult the IGIS in the development of a written statement of procedures to be followed in the exercise of authority under the warrants,107
- the requirement that the prescribed authority explain to the subject of the warrant that they have a right to make a complaint to the IGIS in relation to ASIO,108
- clear exceptions to the secrecy offences to allow persons to make complaints to the IGIS,109
- the ability of the IGIS to be present at the questioning or the taking into custody of a person,110
- the ability of the IGIS to raise concerns with the prescribed authority about any impropriety or illegality in connection with the exercise of powers under a warrant, and the requirement that the prescribed authority consider those concerns,111
- the requirement that the Director-General of Security provide to the IGIS copies of any draft requests for warrant, issued warrants, video recordings of the questioning of subjects; and statements containing details of any seizure, taking into custody or detention, and describing any action the Director-General of Security has taken as a result of concerns raised by the IGIS,112 and
- the requirement for the IGIS to inspect and report on any requests for multiple warrants relating to detention of an individual.113

3.111 ASIO supported retention of these provisions.114

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107 ASIO Act, s. 34C(2).
108 ASIO Act, s. 34J(1)(e).
109 ASIO Act, s. 34ZS.
110 ASIO Act, s. 34P.
111 ASIO Act, s. 34Q.
112 ASIO Act, s. 34ZI.
113 ASIO Act, s. 34ZJ.
3.112 Commenting on any possible increase in the use of the questioning powers, the IGIS advised the Committee:

As the Committee is aware, the IGIS office is small and decisions as to resourcing must be made judiciously. The use of coercive questioning powers is an area that has been closely monitored in the past, and we consider that this would continue to be the case if the current or any new questioning powers were exercised in future. Oversight of the use of any such [power] is likely to be resource intensive, particularly if the IGIS or IGIS staff attends questioning. The current questioning powers have not been used since 2010. An increase in the use of ASIO questioning powers would impact on IGIS resources. If the increase was significant, we would need to consider whether current resourcing levels continue to be adequate to provide effective oversight of the use of these powers as well as all other areas of oversight of the six Australian intelligence agencies.¹¹⁵

3.113 Section 34C of the ASIO Act provides that the Director-General of Security may prepare a written statement of procedures to be followed in the exercise of authority under warrants. The statement, which is drafted in consultation with the IGIS and the Commissioner of the AFP, is approved by the Minister and contains a number of clauses aimed at ensuring a person is treated with dignity and respect during the execution of a warrant. The current statement includes clauses relating to:

- transportation of the person to custody,
- questioning procedures, including the manner in which a person is to be treated,
- detention arrangements,
- video recording of procedures, and
- health and welfare arrangements, including food, sleeping, and personal hygiene.¹¹⁶

Committee comment and findings

¹¹⁴ Ms Heather Cook, Acting Director-General of Security, ASIO, Committee Hansard, Canberra, 16 June 2017, p. 24.

¹¹⁵ Inspector-General of Intelligence and Security, Submission 1, p. 10.

3.114 The Committee has signalled its in-principle support for an ongoing compulsory questioning power for ASIO and implementation of an apprehension framework to ensure attendance at questioning.

3.115 The Committee has also recommended that the Government develop amendments to Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* to give effect to a compulsory questioning framework based on the findings of the Committee as outlined below.

3.116 One suggestion for a future ASIO compulsory questioning framework was that a model based on the ACC Act be adopted. The Committee can see a number of benefits to the ACC Act model. It is, as INSLM Gyles suggested, a known and tested model. However, the wholesale adoption of that framework would see the removal of existing ASIO Act safeguards. The Committee notes that ASIO has requested retention of many of these safeguards, such as the special safeguards for minors, which do not exist in the ACC Act. In its proposed model, ASIO also made a number of recommendations for provisions that are, in the Committee’s view, stronger and fairer than the equivalent provisions under the ACC Act, such as providing automatic direct use immunity for subjects of warrants.

3.117 The Committee notes that Division 3 of Part III was specifically designed for ASIO, its intelligence functions, and its oversight arrangements. It contains, as INSLM Gyles noted, ‘heavy duty safeguards’ that place necessary limitations on the use of the powers by an intelligence organisation that must operate in secret. Noting ASIO’s preference to retain and modify the existing framework and that adoption of the ACC Act provisions would remove some existing safeguards, the Committee believes that the preferable approach is that the Government modify the existing framework and retain some of these important provisions.

3.118 Nevertheless, the Committee acknowledges that the ACC Act regime also offers some mechanisms that merit consideration in the development of a future questioning model.

3.119 The Committee sets out its specific findings below.

**Issuing authority**

3.120 The Committee accepts that ASIO requires an agile framework in the current threat environment. The Committee notes ASIO’s evidence that it considers the current multi-step authorisation process to be inefficient and to impede

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timely and effective operations. The Committee also observes that other comparable compulsory questioning frameworks do not have multi-step authorisation processes.

3.121 The Committee recognises that removing the issuing authority from the warrant issuing process may be viewed as reducing independent scrutiny.

3.122 However, the Committee notes that the issuing of warrants by the Attorney-General would be a higher level of authorisation than that required for some other domestic compulsory questioning regimes, some of which provide for internal authorisations.\(^{118}\)

3.123 The Committee finds it appropriate that a questioning warrant be authorised by the Attorney-General.

3.124 In addition, the Committee finds it appropriate that the Attorney-General be able to separately authorise apprehension when this may be required.

**Scope of questioning**

3.125 The questioning and detention powers were introduced as a direct reaction to the growing threat from terrorism after 11 September 2001. They were an emergency power designed to respond to an emergency situation.

3.126 In proposing to broaden the questioning power to all heads of security, ASIO is seeking to expand this emergency counter-terrorism power to a purpose more suited to the current range of security threats.

3.127 The Committee notes comments from ASIO that the threat from espionage and foreign interference to Australian interests is ‘extensive, unrelenting and increasingly sophisticated’.\(^ {119}\)

3.128 The Committee notes that this is a matter that could be considered by Government in the development of legislation for an amended compulsory questioning framework.

**Apprehension framework**

3.129 The Committee accepts ASIO’s concerns about a person failing to attend questioning, tipping off others, or destroying relevant material.

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\(^{118}\) For example, under the *Crime Commission Act 2012* (NSW), the Commissioner or Assistant Commissioner of the NSW Crime Commission may issue a summons requiring a person to attend compulsory questioning. ACIC examiners—officials of the ACIC—may issue compulsory questioning summonses under the ACC Act.

The Committee notes that a number of other questioning regimes provide for immediate attendance to prevent the commission of an offence, loss of evidence, or serious prejudice to investigations, or allow the pre-emptive arrest of a person where specific concerns exist as to a person’s likely non-appearance for questioning.

The Committee acknowledges the IGIS’s observation that providing police officers with the power to use force to ensure the person accompanies them to questioning does amount to detention.

The Committee supports, in principle, an alternative apprehension framework, possibly with a separate authorisation framework, to ensure attendance at questioning and prevent contact with others or the destruction of information.

The Committee finds that any apprehension or compulsory attendance power should be limited to the power to compel the subject of a warrant to attend questioning under the warrant.

The Committee does not support the presiding officer being able to direct the detention, or further detention, of the subject of a warrant. In reaching this conclusion, the Committee has taken the views of the two former INSLMs into account.

The Committee considers that any ongoing detention power must be subject to the discretion of the courts (as is the case under the ACC Act model).

Identified person warrants

The Committee does not support a compulsory questioning power being available under an identified person warrant.

Making compulsory questioning available under an identified person warrant would place questioning on par with other ASIO special powers, such as the use of listening devices or access to computers.

However, the Committee considers compulsory questioning to be a more intrusive power because it restricts an individual’s personal liberty, carries the compulsion to answer questions or face prosecution, and entails enhanced secrecy. As such, it should not be considered the equivalent of, or

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120 For example, Crime Commission Act 2012 (NSW), s. 24.
121 See, for example, Independent Commission Against Corruption Act 1988 (NSW), s. 36; Crime Commission Act 2012 (NSW), s. 36; Australian Crime Commission Act 2002 (Cth), s. 31.
122 Inspector-General of Intelligence and Security, Submission 1.2, p. 6.
be as readily accessible as, ASIO’s other special powers, and it would be wholly inappropriate for it to be subject to ‘streamlined inclusion’ in an identified person warrant.

3.139 As the IGIS observed, identified person warrants in effect allow for decision making to be devolved from the Minister to the Director-General of Security, as although the Minister approves a range of special powers that can be used against a person under the warrant, it is the Director-General who decides if and when a power is used.\textsuperscript{123} Identified person warrants also allow each special power authorised under the warrant to be used on multiple occasions during the life of the warrant. The Committee notes that this proposal would potentially allow the Director-General of Security to authorise multiple uses of the questioning power over the six month period of the warrant.

3.140 The Committee is of the view that the Attorney-General, when considering the authorisation of a questioning warrant, should be in a position to press ASIO as to the specific requirements and arrangements for questioning a person. Such intrusive powers should not be requested, nor authorised, until a clear operational need has arisen and a specific case for their use at that particular time has been demonstrated. A questioning warrant should not be issued on a speculative or multi-use basis.

**Emergency authorisations**

3.141 The Committee acknowledges that emergency authorisations are available for other powers in the ASIO Act and IS Act, subject to certain safeguards. The Committee has previously supported emergency authorisations under national security legislation, subject to close oversight by the IGIS,\textsuperscript{124} and accepts the rationale for providing the Minister with the ability to issue warrants orally in an emergency.

3.142 The Committee finds that ASIO should, in emergencies, be empowered to apply to the Attorney-General for the issue of a warrant in a manner other than in writing. The Attorney-General should then be permitted to provide authorisation for the warrant in a manner other than in writing.

3.143 In reaching this conclusion, the Committee also finds that:

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\textsuperscript{123} Inspector-General of Intelligence and Security, *Submission 1.2*, p. 3.

the provisions should clearly describe the circumstances in which an emergency application may be made,
- the Director-General must be required to ensure that all reasonable steps are taken to alert the IGIS as to ASIO’s intention to obtain a warrant prior to ASIO seeking the oral authorisation,
- the Director-General must be required to ensure that a written record of an urgent oral warrant application is made and provided to the Attorney-General as soon as practicable and to the IGIS within 48 hours of the warrant being issued,
- the Director-General’s annual report, as provided for under section 94 of the ASIO Act, should include details on the number of emergency warrants requested and issued during the reporting period, and
- the provision should be supported by a protocol between ASIO and the IGIS.

Prescribed authority

3.144 The Committee accepts that the current prescribed authority model—which relies on retired judges to fill the positions—may lead to a shortage of persons willing and able to serve in the role.

3.145 The Committee received evidence on several different models, including creation of a permanent statutory examiner based on that in the ACC Act. This model could be appropriate for several reasons. The Committee notes the requirement in the ACC Act that a person must have five years’ experience as a legal practitioner to be eligible for appointment as an examiner. Further, the examiner is a statutorily appointed officer, with strict requirements relating to the disclosure of interests and any engagement in outside employment.

3.146 The Committee finds that, as a minimum requirement, an examiner must hold a current practicing certificate or be a retired judicial officer of a State Supreme Court, the Federal Court of Australia or the High Court of Australia.

3.147 The Committee expects that in the ASIO context an appointed officer should have substantially more than five years’ experience as a legal practitioner and would be a person of some eminence.

3.148 Any proposal to create a permanent statutory examiner must address the examiner’s independence. The Committee considers that prior to the appointment of a person as an examiner, consideration should be given to the person’s current employment and any other positions held to ensure any
perceived conflicts of interest are avoided. Similarly, the Committee considers it is essential that the examiner not be subject to directions from, nor have his or her decisions overruled by, the Director-General of Security or the Minister.

**Questioning of minors**

3.149 The Committee notes ASIO’s evidence detailing the changing age profile of terrorism suspects, including recent attacks and plots in Australia involving young persons. This evidence demonstrates that some capacity is required to investigate, and potentially question, minors involved in such activities.

3.150 The Committee notes the concerns raised by submitters about the proposed questioning of minors by ASIO. It is a grave matter and one which the Committee has considered closely.

3.151 The Committee is of the view that, in principle—and with appropriate safeguards—lowering the minimum age of a questioning subject to 14 may be a necessary measure for protecting the community from terrorism.

3.152 However, the Committee maintains that these are extraordinary powers and the need for their use in regard to minors must be clearly evidenced.

3.153 The Committee notes that the inability to question a minor under a questioning warrant would not preclude ASIO from conducting a voluntary interview with a minor or from seeking a warrant for the use of ASIO’s other special powers (such as telecommunications interception or use of listening devices) against that minor.

3.154 Further, the Committee considers additional oversight and safeguards are essential in relation to the questioning of minors.

3.155 The Committee makes the following findings:

- any compulsory questioning of minors must be limited to those who are themselves the subject of investigation. It is not a proportionate response to compulsorily question a 14 year old who is not the subject of suspicion in relation to the unrelated activities of that minor’s friends or family members,
- apprehension should not be available in relation to minors,
- any minor that is the subject of a questioning warrant must have a legal representative present at all times,
- any minor that is the subject of a questioning warrant must have had an assessment conducted prior to the Attorney-General’s approval of the
warrant as to whether the interests of the child are appropriately protected, and
• to the greatest extent possible, the interests of the child should be protected.

Post-charge questioning

3.156 The Committee considers that the question of whether post-charge questioning should be allowed under the questioning regime requires careful consideration. While it is possible that a person charged with an offence may hold critical information about a security threat that they are unwilling to provide on a voluntary basis, compulsory questioning of such a person may imperil their ability to receive a fair trial.

3.157 The Committee considers it is beyond the scope of this review to make a definitive finding on this matter.

3.158 The Committee considers however that, if the Government were to bring forward such a power in revised legislation, it must be attended by adequate safeguards. The Committee notes that the provisions contained within the ACC Act require an examiner to issue directions restricting the use or disclosure of examination material if the failure to do so would reasonably be expected to prejudice the examinee’s fair trial. The provisions also prevent post-charge examination material being disclosed to prosecutors unless on court order, which may only occur if the court is satisfied that such a disclosure is required in the interests of justice. The provisions also do not restrict a court’s power to make any orders necessary to ensure the person’s fair trial is not prejudiced. The Committee considers it is critical that, at a minimum, such conditions and restrictions are similarly provided for in the ASIO context.

Access to lawyers and legal professional privilege

3.159 The Committee acknowledges the concerns of some submitters about the limitations the ASIO Act places on a person’s ability to obtain adequate, and private, legal advice.

3.160 The Committee considers that any person subject to compulsory questioning should be afforded appropriate access to legal counsel. This is particularly important given the secrecy in which ASIO’s questioning takes place, the availability of questioning against innocent persons, and the gravity of the offences for non-compliance.
3.161 The Committee notes that the Law Council of Australia and INSLM Gyles considered that the provisions under the ACC Act offer a fair and workable framework for access to legal representation. The adoption of those provisions would address some of the criticisms aimed at the existing ASIO Act provisions, and has been supported by the Department.\textsuperscript{125}

3.162 The Committee’s view is that the existing provisions in the ASIO Act should be repealed and replaced with provisions consistent with those relating to legal representation in the ACC Act.

**Ability of subject or subject’s lawyer to contact third party**

3.163 Suitably strong and effective secrecy provisions are required to protect ASIO’s methodologies, capabilities and sources of information, as well as the identities and reputations of individuals investigated by ASIO who may be shown to pose no risk to security.

3.164 The Committee finds that restrictions on the disclosure of information obtained as a result of the warrant should continue.

3.165 However, the Committee acknowledges the concerns of many submitters as to the inability of a person, subject to questioning, to advise family, friends, and work colleagues as to their absence. Strict liability applies to any disclosures. While the prescribed authority has the capacity to make a direction permitting such disclosures, the direction must be consistent with the terms of the warrant, or otherwise have been approved in writing by the Minister.\textsuperscript{126}

3.166 The Committee believes it is appropriate for the presiding officer to take into account the personal circumstances of the subject of the warrant and allow that person to make certain disclosures to specified family members, employers, and others in order to explain, and make arrangements for, their absence. This is particularly appropriate given the person being questioned may not, themselves, be the subject of any suspicion and may be apprehended, in secret, without being able to notify any person.

3.167 The Committee finds that the subject of a warrant (or their legal representative) should be able to request permission from the examiner to contact specified persons. ASIO and the subject of the warrant (or their legal representative) should be given an opportunity to make representations to

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\textsuperscript{125} Attorney-General’s Department, Submission 7, p. 29.

\textsuperscript{126} ASIO Act, s. 34K.
the examiner as to the appropriateness of allowing a disclosure to those specified persons.

3.168 The discretion of the presiding officer to authorise disclosures should not be capable of being overridden by the Minister or the Director-General of Security.

Secrecy offences

3.169 The Committee notes ASIO’s proposal that the application of the secrecy offences should be increased from two to five years following the issue of the warrant. While it is true, as ASIO suggested, that the proposed amendment would be comparable with provisions in the ACC Act, the five years provided in the ACC Act is the maximum possible period; if no evidence of an offence has been obtained, a decision is made to not prosecute the examinee, or criminal proceedings are commenced against the examinee, then the secrecy provisions of the ACC Act cease applying.127

3.170 The Committee does not support extending the length of time that secrecy obligations remain in force.

Person searches

3.171 The Committee notes that in 2013, when ASIO requested the ASIO Act be amended to allow a person search to be undertaken independently of a premises search, the Committee did not support ASIO’s proposal. The Committee noted at the time:

The Committee is very mindful of the importance of maintaining the clear distinction between intelligence and law enforcement. ASIO is not a law enforcement agency; it is an intelligence agency. Its statutory charter makes this clear. The Committee has serious misgivings about whether this power would take ASIO into the realm of law enforcement and policing.128

3.172 The Committee notes that current proposal is primarily for officer safety—not intelligence collection—and the proposed person search would be carried out by police officers, not ASIO officers.

3.173 The Committee considers that this matter should be brought forward for consideration in any proposed legislation amending the questioning framework.

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127 ACC Act, s. 29B(5) and s. 29A(4).

Accountability arrangements

3.174 INSLM Gyles noted in his 2016 review that the present questioning power is ‘heavy duty with heavy duty safeguards’. The Committee agrees with that proposition and ASIO’s assertion that the accountability arrangements provided under the questioning and detention powers are among the highest imposed on bodies with coercive powers in Australia.

3.175 The Committee considers it is appropriate and necessary for these intrusive powers, which have limited judicial oversight and operate in secret, to be restrained and subject to a comprehensive system of oversight in order to foster public confidence in their use and operation.

3.176 The Committee notes that ASIO has supported the retention of existing oversight provisions.

3.177 The Committee therefore finds that all existing provisions contained in the Australian Security and Intelligence Organisation Act 1979 and the Inspector-General of Intelligence and Security Act 1986 relating to the Inspector-General of Intelligence and Security’s oversight of Division 3 of Part III should be retained.

3.178 The Committee further finds that all existing accountability and safeguard provisions contained within Division 3 of Part III should be retained. This includes:

- the written statement of procedures (section 34C),
- availability of, and access to, complaint mechanisms (sections 34K and 34ZG),
- offences for contravention of safeguards (section 34ZF),
- access to an interpreter (sections 34M and 34N),
- requirement to treat the person humanely (section 34T),
- obligation to video record questioning (section 34ZA),
- reporting to the Minister (section 34ZH), and
- provision of financial assistance (section 34ZX).

3.179 The Director-General of Security’s annual reporting requirements (section 94) should also be retained.

3.180 The Committee supports the continuation of a written statement of procedures as currently required under section 34C of the ASIO Act, which establishes, and provides public awareness of, the obligation on ASIO and police officers when executing a warrant to treat persons with respect and dignity. A new statement of procedures should be developed for any revised questioning framework in consultation with the Inspector-General of
Intelligence and Security and the Commissioner of the Australian Federal Police.

3.181 ASIO should also develop a set of internal procedures and protocols to govern the amended questioning warrant framework.

3.182 Finally, the Committee notes the recommendation of INSLM Gyles that a protocol be developed between ASIO, the ACIC and other bodies that share information obtained via compulsory questioning, to avoid oppression by successive examinations. The Committee, in principle, supports this recommendation, but did not give close consideration to the matter. The Committee expects the government to consider this recommendation.

**Retention of existing provisions**

3.183 As noted earlier, ASIO has sought to retain a number of existing provisions within Division 3 of Part III of the ASIO Act.

3.184 The Committee finds that, subject to its findings in relation to minors, a questioning warrant should continue to be able to be issued against any person, whether a target of ASIO investigation or a third party.

3.185 The Committee notes that ASIO has not proposed reducing the legislative threshold for obtaining a QW. ASIO has however sought to remove the existing link to a criminal offence. The Committee is of the view that the intrusive and extraordinary nature of these powers means that the powers should not be readily accessible, and ASIO’s use of the powers should continue to be judicious and sparing. The legislative threshold should not be reduced.

3.186 ASIO has supported retention of existing timeframes that apply to the operation of questioning warrants, including the maximum 28 day period in which a warrant may be in force and maximum questioning times currently permitted under section 34R. It is the Committee’s expectation that these existing timeframes, where applicable, would continue under an amended questioning regime.

3.187 Similarly, the Committee finds that actions authorised under the warrant in section 34E, including that a person subject to the warrant appear for questioning immediately, or at a time specified in the warrant, and that the subject be required to give information and/or produce records or things be continued. ASIO should also continue to be able to question a subject and make copies and/or a transcript of anything said or produced.
3.188 The Committee notes that ASIO has sought to retain the current availability of judicial review, automatic direct-use immunity in regard to information provided under a questioning warrant, and existing offences for the contravention of safeguards by ASIO or law enforcement officers. The Committee supports, in principle, retention of these provisions, subject to review of specific provisions in the revised legislation.

**Continuation of the legislation and Committee review**

3.189 The Committee considers that any proposed legislation should include an appropriate sunset clause. The Committee is also of the view that it would be appropriate to require the Committee to conduct a further review of the compulsory questioning framework prior to the sunset date. In such a review, the Committee would consider the powers and safeguards to ensure they are operating as intended. The Committee notes that the INSLM is already empowered to conduct further reviews of the provisions under the *Independent National Security Legislation Monitor Act 2010*.

Mr Andrew Hastie MP  
Chair  
March 2018
A. List of submissions

1 Inspector-General of Intelligence and Security
   ▪ 1.1 Supplementary
   ▪ 1.2 Supplementary
2 Castan Centre for Human Rights Law
3 Dr Dianne F QU, SHS Law
4 Law Council of Australia
   ▪ 4.1 Supplementary
   ▪ 4.2 Supplementary
5 Dr Nicola McGarrity and Professor George Williams AO
   ▪ 5.1 Supplementary
6 Australian Lawyers Alliance
7 Attorney-General’s Department
   ▪ 7.1 Supplementary
   ▪ 7.2 Supplementary
   ▪ 7.3 Supplementary
8 Australian Security Intelligence Organisation
   ▪ 8.1 Supplementary
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   ▪ 8.3 Supplementary
   ▪ 8.4 Supplementary
   ▪ 8.5 Supplementary
   ▪ 8.6 Supplementary
   ▪ 8.7 Supplementary
8.8 Supplementary

9 Attorney-General's Department and Australian Security Intelligence Organisation
B. Witnesses appearing at public hearings

Wednesday, 14 June 2017 – private hearing

Parliament House, Canberra

*Private capacity*

- Hon Roger Gyles QC AO, former Independent National Security Legislation Monitor

Friday, 16 June 2017 – public hearing

Parliament House, Canberra

*Australian Lawyers Alliance*

- Ms Anna Talbot, Legal and Policy Advisor

*Attorney-General’s Department*

- Ms Anne Sheehan, A/g First Assistant Secretary, Intelligence and Identity Security Division
- Ms Tara Inverarity, A/g Assistant Secretary, Communications Security and Intelligence Branch
- Mr Parker Reeve, A/g Director, Security and Intelligence Law Section

*Australian Security Intelligence Organisation*

- Ms Heather Cook, A/g Director-General of Security
- Dr Wendy Southern, Deputy Director-General
Australian Criminal Intelligence Commission

- Ms Nicole Mayo, National Manager, Legal Services and General Counsel
- Ms Catherine Deakin, National Legal Practice Manager
- Mr David Kimber, Head of Determinations

Inspector-General of Intelligence and Security

- Hon Margaret Stone, Inspector-General
- Mr Jake Blight, Deputy Inspector-General

Private capacity

- Dr Nicola McGarrity
- Professor George Williams AO

Friday, 16 June 2017 – private hearing

Parliament House, Canberra

Attorney-General's Department

- Ms Anne Sheehan, A/g First Assistant Secretary, Intelligence and Identity Security Division

Australian Security Intelligence Organisation

- Ms Heather Cook, A/g Director-General of Security
- First Assistant Director-General, North
- First Assistant Director-General, Office of Legal Counsel
- ASIO officer

Australian Criminal Intelligence Commission

- Ms Nicole Mayo, National Manager, Legal Services and General Counsel
- Ms Catherine Deakin, National Legal Practice Manager
- Mr David Kimber, Head of Determinations
Wednesday, 9 August 2017 – public hearing

Parliament House, Canberra

*Law Council of Australia*

- Mr Tim Game SC, Co-Chair, National Criminal Law Committee
- Dr Natasha Molt, Senior Legal Adviser, Legal Policy Division

Thursday, 10 August 2017 – private hearing

Parliament House, Canberra

*Commonwealth Counter-Terrorism Coordinator*

- Mr Tony Sheehan, Commonwealth Counter-Terrorism Coordinator

Thursday, 7 September 2017 – private hearing

Parliament House, Canberra

*Australian Security Intelligence Organisation*

- Ms Heather Cook, A/g Director-General of Security
- First Assistant Director-General, Office of Legal Counsel
- First Assistant Director-General, North
- Assistant Director-General, Global

*Attorney-General’s Department*

- Ms Anna Harmer, First Assistant Secretary, Intelligence and Identity Security Division
- Mr Parker Reeve, A/g Director, Electronic Surveillance Section

Monday, 23 October 2017 – private hearing

Parliament House, Canberra

*Australian Security Intelligence Organisation*

- Ms Heather Cook, Deputy Director-General
- Deputy Director-General
- First Assistant Director-General, Counter Espionage and Interference
- ASIO Officer
Attorney-General’s Department

- Ms Anna Harmer, First Assistant Secretary, Intelligence and Identity Security Division
- Ms Anne Sheehan, Assistant Secretary, Communications Security and Intelligence Branch