



*Australian Council  
for Civil Liberties*

## **INSLM REVIEW**

# **CERTAIN QUESTIONING AND DETENTION POWERS IN RELATION TO TERRORISM**

**15<sup>th</sup> August 2016**

*A combined submission from:  
NSW Council for Civil Liberties  
Liberty Victoria  
Queensland Council for Civil Liberties  
South Australian Council for Civil Liberties  
Australian Council for Civil Liberties*

## **Introduction and Summary of CCLs position**

1. The Councils for Civil Liberties (“CCLs”)<sup>1</sup> are grateful for the opportunity to make this submission to the Independent National Security Legislation Monitor’s (INSLM) inquiry into certain questioning and detention powers (CQDPs) in relation to terrorism. Specifically, the review encompasses:
  - a. The Australian Security Intelligence Organisation (ASIO), under Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) (questioning and questioning/detention warrants);
  - b. The Australian Federal Police (AFP), under Part IC of the *Crimes Act 1914* (Cth) (investigation of Commonwealth offences, including detention powers); and
  - c. The Australian Crime Commission (ACC), under the *Australian Crime Commission Act 2002* (Cth) (coercive examination powers used in relation to terrorism).<sup>2</sup>
2. Consistent with our previously argued views, the CCLs maintain their opposition to detention warrants and recommend they be repealed.
3. Accepting that questioning warrants will be retained, the CCLs argue that the criteria for their issue should be tightened, that persons charged, suspected, or under investigation for a criminal offence should not be subject to coercive questioning, that further safeguards should be in place to restrict the potential use of answers given under a questioning warrant, and that there is a need to provide more effective access to legal advice and representation for persons subject to such warrants.

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<sup>1</sup> New South Wales Council for Civil Liberties, Liberty Victoria, Queensland Council for Civil Liberties, South Australia Council for Civil Liberties, Australian Council for Civil Liberties

<sup>2</sup> INSLM site <http://www.inslm.gov.au/current-review-work#review1>. The TOR explicitly exclude ‘powers contained in the Criminal Code (including preventative detention orders) or in Division 3A of Part 1AA of the Crimes Act 1914 (stop, search and seizure regime relating to Commonwealth places), although the existence of these powers will be taken into account’.

4. In relation to the AFP powers under the *Crimes Act 1914* (Cth), the CCLs adopt the position taken by the Law Council of Australia in its submission.
5. In relation to coercive questioning by the ACC, the CCLs recommend that persons charged, suspected, or under investigation for a criminal offence should not be subject to coercive questioning.

### **General Comments**

6. The CCLs acknowledge the important role that ASIO and the Australian Federal Police (AFP) play in countering Australia's terrorism threat. We acknowledge that security and law enforcement agencies must have appropriate powers to detect, prevent and prosecute terrorist activities.
7. However, the laws enacted by parliament must strike the right balance between protecting the Australian community from terrorist activities whilst preserving the individual freedoms that we as citizens in a free and democratic society rightly expect.
8. Any power conferred upon law enforcement agencies must be necessary and proportionate to the real threat that exists. They must not unduly impinge upon the rights and freedoms of individuals in the community, particularly those not suspected of having committed any criminal offence.
9. Where any power exists that does impinge upon the freedom or liberty of an individual, there must be a clear justification for the existence of the power. There must be appropriately tight criteria for its use. There must be adequate safeguards in place to protect against its misuse or improper use. There must be proper access to legal advice and, where possible, representation. In relation to coercive questioning, there must be tight controls on the use to which any information derived can be put.
10. Any power that significantly infringes upon fundamental rights can only be justified in extraordinary circumstances - for example to prevent a significant terrorist

threat to the nation - and cannot be justified simply to assist in the prosecution of an individual for a criminal offence.

11. The CCLs are of the view that the administrative detention of an individual upon executive action constitutes an erosion of the separation of powers and is an intolerable incursion upon fundamental rights. The CCLs are the view that in a free and democratic society no individual should be deprived of his or her liberty other than by a court of law, after evidence based determination, and after the individual has been afforded due process.
12. The CCLs are of the view that in relation to all forms of coercive questioning, greater distinction needs to be made between intelligence and evidence. While coercive questioning may be justified as intelligence gathering, it has the potential to infringe upon an accused person's right to a fair trial. The apparently simple distinction between direct use and derivative use - and the use immunity afforded - is often complex and problematic. In reality, there may be little difference between direct and indirect use of evidence obtained under coercive examination.
13. Where information is gained from a person through coercive questioning, there needs to be greater safeguards in place against the use - including derivative use - against that person in an investigation and/or prosecution for criminal charges<sup>3</sup>.
14. **CCLs Position**: The CQDP conferred upon ASIO, the AFP and the ACC in their current form constitute an unjustified and intolerable incursion upon the rights of individuals in the community, particularly those not suspected of having committed any criminal offence.

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<sup>3</sup> This perspective was strongly argued in a speech delivered by Terry O'Gorman, President Australian Council for Civil Liberties, to 30th Australian Legal Convention: "Right to Silence", 20 September 1997: <https://qccl.org.au/wiki/accl-speech-20sep97-right-to-silence/>

## ASIO Questioning and Detention Warrants

15. The CCL's main concerns in relation to detention warrants (QDW) under Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) (the *ASIO Act*) are the following:

- a. Administrative detention is an extraordinary departure from the expectation that the state will only deprive a citizen of his/her liberty either pending trial for a criminal charge or upon conviction for such an offence;
- b. The detention of a person not suspected of having committed a criminal offence cannot be justified in any circumstance;
- c. It is of particular concern that a child aged between 16-18 years may be subject to a detention warrant without regard for the best interests of the child;
- d. The Minister may consent to a request for a detention warrant if satisfied that (a) "there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a terrorism offence"<sup>4</sup> and (b) "that relying on other methods of collecting that intelligence would be ineffective"<sup>5</sup>. There are several concerns that flow from this criteria:
  - i. First, the issuing of a detention warrant is not limited to persons suspected of having committed a terrorist offence. They can extend to a person who may not be suspected of having committed any criminal offence;
  - ii. Secondly, although the criteria stated in (b) above places considerable restriction on the issuing of a detention warrant, there is nevertheless a concern that notions such as *substantially assist* and *important in relation to* are broad, imprecise and potentially malleable. They are open to subjective interpretation, and there is a risk that over time

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<sup>4</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s34F(4)(a)

<sup>5</sup> *Ibid* s 34F(4)(b)

there will be an expansion of the category of cases that justify their use’;

- iii. Thirdly, the term *a terrorist offence* places all terrorism offences into a single category. It should be noted that the suite of "terrorism offences" under Part 5.3 of the *Criminal Code Act 1995* (Cth) is now very broad and is capable of capturing a very broad range of conduct. It should not simply be taken as given that the investigation into a completed terrorist offence will justify the executive detention of an individual (who may or may not be a suspect for that offence) on the grounds that it will substantially assist the collection of intelligence that is important in relation to *a terrorism offence*; and
- iv. Fourthly, the threshold criteria does not limit the issuing of a detention warrant to the prevention of a terrorist act *prospectively*. It could include the collection of intelligence in relation to a terrorist offence already completed (where there is no immediate danger to the public). Again, it should not automatically be assumed that every "terrorism offence" will provide justification for executive detention, and such detention is harder to justify where there is no immediate threat to the public;
- e. A person detained under a detention warrant is not afforded sufficient access to legal advice or representation. There is insufficient guarantee that a person will have access to a lawyer. There is no right to privacy or lawyer-client privilege;
- f. There is no requirement that a person detained under a warrant is given any or sufficient information about the reason why they are detained or to what the questioning relates.
- g. The incursions upon rights and freedoms that QDWs constitute are not sufficiently linked to a demonstrated counter-terrorism purpose; and

- h. These powers are inconsistent with fundamental human rights, including freedom of movement and the notion that an individual should only be deprived of their liberty upon an evidence based determination by a court after the individual has been afforded due process.

### **Specific Concerns In Relation To Legal Representation**

16. In relation to detention warrants, the CCLs are greatly concerned that the provisions of sub-sections 34G(5) and (6) do not provide adequate assurance that a person the subject of a detention warrant will have access to legal advice:

- a. Sub-section 34G(5) states that the warrant “*may* identify someone whom the person is permitted to contact by reference to the fact that he or she is a lawyer of the person’s choice or has a particular legal or familial relationship with the person...”<sup>6</sup> There are several concerns with this provision:
  - i. First, the use of the word “*may*” suggests that this is discretionary, and that a detained person may not be permitted to contact any person whether lawyer or otherwise;
  - ii. Secondly, this seems to place the onus on the detained person to identify the lawyer, which may not always be practical. There is no onus on the person exercising authority under the warrant to provide the detained person with information or assistance in this respect; and
  - iii. Thirdly, if it is the intention of parliament that, subject to section 34ZO, a detained person has a right to speak to a lawyer, then this is not made tolerably clear. Further, given the nature of the power imbalance and the vulnerable position of the detained person, greater obligation should be placed on the authority to ensure that this right is given effect;

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<sup>6</sup> Ibid s34G(5)

- b. A person exercising authority under the warrant has an opportunity to request the prescribed authority to direct under section 34ZO that the person be prevented from contacting the lawyer;<sup>7</sup>
- c. There is no provision requiring a person exercising authority under the warrant to take all reasonable steps to ensure that the detained person has access to a lawyer;
- d. If the detained person *is* able to have access to a lawyer, there is no express provision requiring that this be done *before* the commencement of any questioning – or at any particular time;
- e. Section 34ZP states that ‘[t]o avoid doubt, a person before a prescribed authority for questioning under a warrant issued under this Division may be questioned under the warrant in the absence of a lawyer of the person’s choice’;
- f. Sub-section 34R(3)(b) expressly allows for an order to extend questioning from 8 hours to 24 hours to be made in the absence of a legal adviser;<sup>8</sup>
- g. Contact with a lawyer must be capable of being monitored by ASIO. There is no lawyer-client privilege;
- h. The lawyer is to be given a copy of the warrant, but like the detained person, is not told why the person is being detained or to what the questioning relates. The lawyer is not permitted to make submissions or ask questions;
- i. “The legal adviser must not intervene in questioning of the subject or address the prescribed authority before whom the subject is being questioned, except to request clarification of an ambiguous question”;<sup>9</sup>
- j. A lawyer may be removed from the questioning if “the prescribed authority considers the legal adviser’s conduct is unduly disrupting the questioning”;<sup>10</sup>

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<sup>7</sup> Ibid s34G(6)(b)(iii)

<sup>8</sup> Ibid s34R(3)(b)

<sup>9</sup> Ibid s34ZQ(6)



- k. The prescribed authority seems to have an unfettered discretion and there is no guidance on what might be deemed “unduly disruptive;”
  - l. By contrast – in relation to questioning warrants – sub-section 34E(3) states that the warrant “*must* specify that the person is (a) permitted to contact a single lawyer of the person’s choice at any time the person is appearing before a prescribed authority for questioning under the warrant”;<sup>11</sup> and
  - m. However, there is still no requirement that the person exercising authority under the warrant provide any information or assistance to the detained person in this respect. If the detained person is not able to name a “single lawyer” then it is not clear whether this right falls away.
17. Detention under a QDW arises on the basis of an assessment by the Attorney-General and not a court of law. Such executive detention is an extraordinary departure from fundamental rights. It constitutes an erosion of the separation of powers and is an intolerable incursion upon individual liberty.
18. The report of the previous INSLM review in 2012 recommended that detention warrants were not necessary as less restrictive means existed to achieve the same purpose.
19. Notwithstanding that the terrorism threat to Australia is said to have increased in recent years, it is our view that nothing has changed to alter the assessment of the INSLM in 2012. No case has been made for the existence of a scenario that would require the use of a QDW where no alternatives exist to achieve the intended purpose - such as conventional powers of arrest or attendance under a QW.
20. It is understood that ASIO has never applied for a QDW. Whilst the reason for this is not clear - and it is accepted that non-use does not automatically lead to the conclusion that they are not necessary - it does raise a serious question about

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<sup>10</sup> Ibid s34ZQ(9)

<sup>11</sup> Ibid s34E(3)(a)

whether the justification for their existence can be demonstrated - particularly in light of the significant incursion into fundamental rights that they constitute.

### **Recommendation 1**

**The CCLs recommend that, for the reasons outlined above, detention warrants cannot be justified and should be repealed.**

### **ASIO Questioning Warrants**

21. The CCLs have significant concerns in relation to the current regime for questioning warrants under Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth).
22. The CCLs are of the view that coercive questioning in any form constitutes a significant departure from long standing rights and protections. It has the potential to significantly limit a person's right to a fair trial, particularly by affecting the equality of arms and the privilege against self-incrimination.
23. The CCLs are also concerned that a regime of coercive questioning creates the circumstance where a person who refuses to answer questions or produce a document or thing – something that according to established criminal law principles is simply exercising rights afforded by law – commits a serious criminal offence punishable by imprisonment.
24. The arguments in relation to coercive questioning and its potential impact on the right to a fair trial are expanded upon below in paragraphs 30-40 under the section covering ACC questioning powers.

25. Accepting that Questioning Warrants (QW) will remain, the CCLs support the recommendations of the previous INSLM in 2012 and in so far as they have not been implemented, Liberty supports their implementation.<sup>12</sup>

**Recommendation 2: The CCLs support the continuing relevance of the recommendations relating to questioning warrants made by the INSLM in 2012 and recommend they be implemented in full.**

26. Recommendation IV/7 of the previous INSLM in 2012 was that QW provisions should be amended to make clear that a person who has been charged with a criminal offence cannot be subject to questioning until the end of their criminal trial. The CCLs are of the view that this should be extended to persons reasonably suspected of having committed a criminal offence, or under investigation for a criminal offence:

- i. If there is sufficient justification for the above recommendation by the INSLM in 2012, limiting such an exemption to persons already charged with a criminal offence creates too great a scope for investigating or prosecuting bodies simply to wait until after coercive questioning has been conducted before charging the person;
- ii. Alternatively, investigating bodies could simply use coercive questioning as part of an investigation, creating precisely the vice sought to be prevented by the above recommendation;
- iii. To provide proper a safeguard for the right to a fair trial, any person who either is reasonably suspected of having committed a criminal offence, or is under investigation for a criminal offence should be exempt from coercive questioning;
- iv. Alternatively, greater limits could be placed on the sharing of information between agencies. It is one thing to justify coercive

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<sup>12</sup> Independent National Security Legislation Monitor: Declassified Annual Report 20<sup>th</sup> December 2012: Recommendations: IV/1-7. <http://dpmc-prod-s3.s3-ap-southeast-2.amazonaws.com/inslm/s3fs-public/publications/inslm-annual-report-2012.pdf>

questioning for intelligence and security purposes or to prevent a potential terrorist attack, it is another thing to use it to shift the balance in favour of the state in the prosecution of an individual in an accusatorial criminal justice system.

**Recommendation 3: The CCLs recommend that a person charged with an offence, reasonably suspected of having committed an offence or under investigation for a criminal offence cannot be subject to coercive questioning under these questioning powers.**

27. As stated at paragraph 16 above, there is no obligation under sub-section 34E(3) placed on the person exercising authority under the warrant to take any steps to ensure that the detained person has access to legal advice. The CCLs view is that a person detained under a QW should have an express right to access a lawyer, and the onus should be on the person exercising authority under the warrant to take all reasonable steps to ensure that this right is enabled.

28. In relation to this recommendation, a person the subject of a QW should have the right to challenge before a court or independent judicial body whether they should be exempt from questioning on the above basis.

**Recommendation 4: The CCLs recommend that a person detained under a questioning warrant should have an express right to access a lawyer, and the onus should be on the person exercising authority under the warrant to take all reasonable steps to ensure that this right is enabled.**

#### **The AFP: Part IC of the *Crimes Act 1914***

29. In relation to this part of the review, the CCLs share the concerns expressed by the Law Council of Australia (The Law Council) in its submission. In particular:

- i. The Law Council is concerned about extending periods of executive detention without trial, particularly in the absence of evidence offered to the public to support the claim that it is necessary and

proportionate. AFP CQDPs appear to have been used on a number of occasions in recent years (see above) and there does not appear to be evidence substantiating a claim of their ineffectiveness;

- ii. The Law Council recognises that there are inherent difficulties in investigating terrorism offences, which are often international in scope, and that there is a particular urgency attached to investigating such offences. Nonetheless, there is no prima facie reason to believe that the investigation of terrorism offences as they are broadly defined under the Crimes Act, warrant more complex investigation than, for instance, narcotics importation, serious organised crime, serious fraud or cyber-crime.
- iii. A lack of evidence to warrant an extended period of detention for terrorism offences runs counter to rule of law principles that no one should be arbitrarily deprived of his or her liberty. Australia is bound by this principle under articles 9 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights which both state that no one shall be subjected to arbitrary arrest or detention. It would seem highly arbitrary to detain a person suspected of a terrorism offence where there is no evidence to suggest distinct treatment is justified when compared to other serious offences which also involve international investigation and urgent investigation.<sup>13</sup>

### **Coercive Questioning By The ACC**

30. The powers conferred under the Australian Crime Commission Act 2002 have the potential to significantly limit an accused person's right to a fair trial. The CCLs are of the view that the coercive questioning of a person who is charged with, or

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<sup>13</sup> Law Council of Australia submission to INSLM Questioning and Detention Powers inquiry 2016 para 93-95.

suspected of, or under investigation for a criminal offence constitutes an erosion of an accused person's right to a fair trial in an accusatorial system of justice.

31. The Act confers power on the ACC to conduct examinations pre-charge or post-charge, pre-confiscation application or post-confiscation application.<sup>14</sup> The ACC has the power to summon a person to appear, to give evidence, to produce any document or thing.<sup>15</sup> An examiner may regulate the conduct of proceedings at an examination as he or she thinks fit.<sup>16</sup> The privilege against self-incrimination does not apply. Any information gained by the ACC, and derivative material, can be shared widely with investigative and prosecutorial bodies.<sup>17</sup> Such sharing can occur pre-charge or post-charge. It should also be noted that an accused person may not be given access to the transcript of their own examination, whereas prosecuting bodies may be given such access.<sup>18</sup>

32. The CCLs are of the view that these powers, in their current form, constitute far too great an infringement upon a person's right to a fair trial. The CCLs view is that while there is a "use immunity" provided by sub-section 30(5) of the Act, the distinction between direct use and derivative use of information gained through coercive examination can be small or artificial in practice. The coercive questioning powers of the ACC can have the effect of compelling a person to participate in their own prosecution. They are a departure from the longstanding accusatorial nature of the criminal trial.

33. The abiding principle of criminal law in this country has been that the system is accusatorial, rather than inquisitorial. The orthodox understanding of that foundational principle of criminal law was explained by Murphy J in *Hammond v Commonwealth*:<sup>19</sup>

[E]ach of the states... has adopted a code of criminal procedure calculated to protect accused persons from self incrimination... They are founded on

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<sup>14</sup> *Australian Crime Commission Act 2002* section 24A(2)

<sup>15</sup> *Ibid* s28(1)(a)-(d)

<sup>16</sup> *Ibid* s25A(1)

<sup>17</sup> *Ibid* s25B(3), s25C and s25D

<sup>18</sup> *Ibid* s25E

<sup>19</sup> (1982) 152 CLR 188

the traditional accusatorial procedure and represent consistent adherence to the form of criminal justice considered to best preserve a balance between individual and societal interests in civil liberty and societal interest in the enforcement of the criminal law. These laws deliberately eschew inquisitorial methods, the abuse of which so offended the British notion as to cause it to revolt and eradicate them.<sup>20</sup>

34. That orthodoxy – that our criminal justice system is accusatorial rather than inquisitorial – is fundamentally undermined by the creation of investigative bodies that possess the power to compel persons suspected or accused of wrongdoing, to answer questions about those allegations. The potential for such bodies to alter the reality of criminal procedure was recognised by Hayne and Bell JJ, when considering the examination powers of the Australian Crime Commission, in *X7 v Australian Crime Commission*:<sup>21</sup>

If these provisions were to permit the compulsory examination of a person charged with an offence about the subject matter of the pending charge, they would effect a fundamental alteration to the process of criminal justice.<sup>22</sup>

35. The submission that might be expected from those who favour compulsory questioning has perhaps three premises: (i) that there are some circumstances in which the power to mandate a suspect or accused person to answer questions is a necessary alteration of the accusatorial process; (ii) that legislation can be drafted that places sufficient limits on the use and safeguards against the misuse of such power; and (iii) that those entrusted with the power can be trusted to be diffident in its exercise, and subject to appropriate oversight.

36. It is submitted that each of these propositions is problematic:

i. A fundamental problem with the first proposition is that any person being questioned about a matter serious enough to warrant the use of such a

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<sup>20</sup> Ibid at 200-201

<sup>21</sup> (2013) 248 CLR 92

<sup>22</sup> Ibid at [118]

power is most likely to refuse to answer questions on the basis that they will elect punishment for the lesser charge of contempt or perjury;

ii. Whilst those advocating for extraordinary powers usually do so by reference to exceptional situations, the experience of lawyers in courts interpreting such legislation is that it is notoriously difficult to draft legislation in terms that limit the use of such powers only to exceptional cases and not to catch situations that may never have been intended by Parliament; and

iii. It is also the experience of lawyers that prosecutorial and investigative bodies will test the limits of such legislation by taking an expansive approach to the powers conferred upon them. Over time, the normalisation of the use of such powers, and the consequent normalisation of the infringement upon fundamental rights can lead to an expansion of the categories of cases determined to fit within a legislatively prescribed category.<sup>23</sup> As Harper JA explained in *Chief Examiner v Mary Brown*:<sup>24</sup>

Power, as John Dahlberg, 1st Baron Acton, acutely observed in a letter to Bishop Mandell Creighton on 3 April 1887, tends to corrupt. Not necessarily – or even most often – by direct involvement in corruption of the criminal kind, but also by something much more subtle. Lord Acton’s epigram has echoed down the ages because he spoke of power’s tendency to corrupt before adding ‘and absolute power corrupts absolutely.’ His truth therefore embraces far more than the kind of corruption with which anti-corruption agencies are properly concerned. It encompasses also the very different exercise of power which is at issue in this appeal: the exercise, that is, of official authority by those who have powers conferred upon them for impeccable

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<sup>23</sup> For example, in Victorian courts, the use of the post sentence detention and supervision under the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) was initially justified by reference to exceptional cases. But the experience of those involved in the operation of this legislation is that there has been a gradual but significant increase in the number and type of cases the subject of applications by prosecutorial bodies and determination by the court to fit within legislated criteria.

<sup>24</sup> [2013] VSCA 167, [2]-[3] (emphasis added).



reasons, who by no means consciously intend to abuse that power, but who succumb to the very human tendency (something which none of us can entirely avoid – hence the wisdom and insight behind the epigram) to use their positions without a finely honed appreciation of the proper boundaries within which its use should be confined.

Such officials may have an acute appreciation of the valid reasons why power has been conferred upon them. A similarly acute appreciation of the proper limits of that power is not so readily grasped, because the prospect and actuality of the exercise of power itself tends to dull the imaginative appreciation of its true purpose, and of the effects of its misuse or misapplication. We are too easily duped into an overweening sense of the importance of who we are and what we do. But unless those with whom power has been entrusted are as alert to the dangers of its unwarranted extension – and thus to the tendency of power to corrupt – as they are to the benefits which that exercise is designed to bring, the tendency towards corruption – in the limited sense about which I speak – will become its actuality. Officials such as the Chief Examiner and his or her authorised delegates, being trustees of powers conferred upon them by the public through Parliament, have a duty to be diffident in their exercise. While not entirely absent, that diffidence was not sufficiently in evidence in either this case or in some of the others, discussed by Tate JA, in which the office of the Chief Examiner has been involved.

37. The exercise of compulsory examination powers in respect of a suspect or accused person should be seen for what it is: a fundamental alteration of the criminal justice process and a departure from the principles of the accusatorial system and the protections it affords.

38. We note that others have recommended that the coercive questioning of a person currently charged with a criminal offence should be deferred until after the conclusion of those criminal proceedings. Whilst the CCLs support this recommendation as a bare minimum, we are of the view that this does not go far enough. There is too great a risk that prosecuting bodies will simply delay the laying of charges until after coercive questioning has been used as part of an investigation. This tactic would simply frustrate the protection that is sought to be safeguarded by this recommendation.

**Recommendation 5: The CCLs recommend that, consistent with the accusatorial criminal justice system, and the principle that it is the prosecution that carries the onus of proof, and that no accused person should be compelled to participate in their own prosecution - the ACC should not be authorised to compel the questioning of any person who is either charged with a criminal offence or suspected of having committed a criminal offence, or is under investigation for a criminal offence.**

**Alternatively, greater limits could be placed on the sharing of information between agencies. It is one thing to justify coercive questioning for intelligence and security purposes or to prevent a potential terrorist attack. It is another thing to use it to shift the balance in favour of the state in the prosecution of an individual in an accusatorial criminal justice system.**

### **Concluding comments**

The CCLs hope these comments are of assistance to the INSLM in this important review process. The submission was written by Stewart Bayles from Liberty Victoria on behalf of the joint CCLs with assistance from other members of Liberty Victoria and Dr Lesley Lynch V-P NSWCCCL.

Yours sincerely



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15/8/16

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