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**Attorney-General's Department**

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# **Independent National Security Legislation Monitor**

## **Review of certain questioning and detention powers in relation to terrorism**

**Attorney-General's Department Submission**

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# Introduction

The Attorney-General's Department (AGD) is the policy department responsible for administering the *Australian Security Intelligence Organisation Act 1979* (ASIO Act), the *Australian Crime Commission Act 2002* (ACC Act) and Part IC of the *Crimes Act 1914* (Crimes Act).

The current national security and counter-terrorism environment requires our agencies to have effective, appropriate tools available to them to perform their functions. However, these must also be balanced with ensuring the protection of individual rights and freedoms.

While the ASIO Act and the ACC Act confer the power to coercively question a person, the power is not unique to those agencies. The ability to compel someone to answer questions has been given to a number of agencies across a range of subject matters. These include, for example, the Australian Competition and Consumer Commission<sup>1</sup> and the Australian Securities and Investments Commission.<sup>2</sup>

Australia's national security and law enforcement community is made up of a number of different agencies and bodies, each of which has a distinct but related role in keeping the community safe. While each agency has distinct functions, powers and priorities, it is appropriate and important that agencies work together, to ensure their operations are conducted in the most efficient, resource-effective way, and to ensure that the activities of one agency do not undermine the efforts of another.

AGD responds below to the questions asked by the INSLM in his letters of 2 and 9 May 2016. Where appropriate, questions have been consolidated to avoid repetition.

The contents of this submission are unclassified and suitable for public release.

## Questions

### ***Australian Security Intelligence Organisation Act 1979***

#### **Background**

Division 3 of Part III was inserted in the ASIO Act in 2003 following an internal review of Australia's legal and operational counter-terrorism capabilities in the aftermath of the terrorist attacks in the United States on 11 September 2001, and subsequently those in Bali on 12 October 2002. This review, which was directed by the (then) Secretary of the Attorney-General's Department, led to a number of legislative amendments, also including the establishment of Part 5.3 of the *Criminal Code Act 1995* (Criminal Code), which contains the terrorism specific offences and listing regime for terrorist organisations in Divisions 101-103. All reforms, including those in Division 3 of

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<sup>1</sup> *Competition and Consumer Act 2010*, Part XII.

<sup>2</sup> *Australian Securities and Investments Commission Act*, Part 3 Division 2.

Part III of the ASIO Act, were developed with an awareness of the need to protect the community from the threat of terrorism, without unfairly or unnecessarily encroaching on the individual rights and liberties that are fundamental to our democratic system.

Division 3 of Part III establishes a regime, comprising two types of warrants, under which ASIO may – subject to extensive safeguards – be authorised to exercise powers of compulsory questioning. The powers enable ASIO to obtain intelligence that is important in relation to a terrorism offence, including in situations where an offence has not yet occurred. The warrants were not designed as a law enforcement power or a punitive measure.

ASIO has a range of warrant-based intelligence collection powers available to it under Division 2 of Part III and in other acts, including to search premises, access computers, use surveillance devices, inspect postal articles and intercept telecommunications. However, other than the powers in Division 3, ASIO has no ability to question people who are unwilling to cooperate voluntarily. In certain situations, use of ASIO's other warrant-based powers will not be able to provide the same level or type of information about terrorism offences as the exercise of questioning powers under Division 3.

Accordingly, in order to prevent would-be perpetrators of terrorism offences from completing their crimes, the regime in Division 3 of Part III is necessary to enable the most effective gathering of intelligence in relation to terrorism offences. Without this power, ASIO would be dependent on the goodwill of a subject to answer questions in order to gather intelligence that may be essential in preventing the commission of a terrorism offence.

### **Legislative history**

Part III Division 3 of the ASIO Act was enacted in 2003 and has been considered and reviewed a number of times, including by:

- the Parliamentary Joint Committee on ASIO, ASIS and DSD (PJCAAD) in 2002<sup>3</sup>;
- the PJCAAD again in 2005<sup>4</sup>;
- the previous INSLM, in his 2011 and 2012 Annual Reports; and
- the Parliamentary Joint Committee on Human Rights, in the context of its review of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014<sup>5</sup>.

Questioning warrants (QWs) are available for conducting compulsory questioning of a person for the purpose of collecting intelligence that is important in relation to a terrorism offence.

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<sup>3</sup> Parliamentary Joint Committee on ASIO, ASIS and DSD, *An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002*, May 2002.

<sup>4</sup> Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO's Questioning and Detention Powers*, November 2005.

<sup>5</sup> Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44<sup>th</sup> Parliament*, October 2014.

Questioning and detention warrants (QDWs) are available to detain a person in order to conduct compulsory questioning for the same purpose. They can be issued only where there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained for the purpose of conducting questioning, he or she may tip off others, tamper with or destroy evidence, or fail to attend questioning. QDWs are available only as a last resort – that is, if the Attorney-General is satisfied there are reasonable grounds on which to believe that other means of collecting the intelligence would be ineffective.

Amendments were made to the regime in 2003, including the introduction of secrecy offences and provisions to reduce the risk of a subject leaving the country. Following a comprehensive review by the PJCAAD in 2005, significant amendments were introduced in 2006. These included amendments to clearly separate the QW and QDW regimes, to enhance safeguards relating to access to a lawyer and to clarify the role of the Prescribed Authority.

The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* repealed the last resort criterion for issuing a QW, introduced a new offence for destroying or tampering with a record or thing, and amended the provision authorising law enforcement officers to use force in the execution of a QW.

### **Issuing and Prescribed Authorities**

The ASIO Act requires the appointment of both Issuing Authorities (under s 34AB) and Prescribed Authorities (s 34B) who play distinct roles in authorising and overseeing the execution of a warrant.

An Issuing Authority is a current judge who is responsible for issuing a warrant under Division 3 of Part 3. AGD prepares instruments of appointment and maintains a register of Issuing Authorities who have consented to appointment and have been appointed by the Attorney-General. An Issuing Authority plays no ongoing role in the execution of a QW or QDW after the warrant has been issued.

Prescribed Authorities play a more active role in the context of the questioning and detention warrant regimes. AGD maintains a register of Prescribed Authorities, who are former judges of a superior court (although current judges or a President or Deputy President of the AAT may also be appointed in certain circumstances). If a QW or QDW is issued, AGD is responsible for identifying and contacting a Prescribed Authority who would be available to exercise the role, which includes overseeing questioning, ensuring a questioning subject is informed of his or her rights under the warrant; and making directions relating to detention, contact with other persons and questioning.

### **What is your department's view in relation to the use of the provisions of Division 3 of Part III of the ASIO Act (special powers relating to terrorism offences) since the review of those provisions by the previous Monitor?**

AGD has responsibility for administering the ASIO Act, including Part III Division 3, which contains the provisions relating to questioning warrants (QWs) and questioning and detention warrants

(QDWs). As the administering department, AGD works closely with ASIO to ensure that the Act enables ASIO to perform its statutory functions, which include to obtain, correlate and evaluate intelligence relevant to security. AGD and ASIO maintain a continuing dialogue aimed at refining and where necessary improving the operation of the Act. In addition to considering ASIO's requirements in the context of its functions, AGD also takes into account the civil liberties and rights of the individual. Ultimately, the aim is to strike the appropriate legislative balance between protection of the Commonwealth and the people of Australia and individual rights and freedoms.

The value of these provisions is that they enable ASIO to compulsorily question a person believed to have information that is important in relation to a terrorism offence, including in circumstances where an offence has not yet occurred. In contrast to the powers under the ACC Act (which focus on serious and organised crime investigations and special operations) and the powers in Part IC of the Crimes Act (which apply only once a person has been arrested in relation to a criminal offence), the powers in Part III Division 3 of the ASIO Act enable the compulsory questioning of (and potentially the short term detention of) an individual to obtain intelligence in particular circumstances. These include where information is needed to identify those involved in terrorist activity or the extent of the threats, especially where there is reasonable suspicion of terrorist activity but efforts to resolve it have been unsuccessful and those involved have refused to cooperate.

Where a person provides information voluntarily, there is no need for a warrant. The legislation contains extensive safeguards to ensure the powers are used appropriately and to protect the rights of questioned subjects. For example, the requirement that the Prescribed Authority (the person, usually a former judge, who supervises the questioning proceedings) explains to the subject of the warrant that they have a right to complain to the Inspector-General of Intelligence and Security (IGIS) about ASIO; and the ability of the IGIS to be present at the questioning or taking into custody of a person the subject of a warrant. ASIO has taken a judicious and careful approach, only seeking use of the powers when genuinely warranted and taking great care to ensure that legislative and other requirements are fully met.

It is also important to note that while detention may be ordered under the questioning and detention regime, detention and the use of force is not administered by ASIO. Rather, the authority to detain a person under the warrant, and any force needed to be employed in the execution of the warrant is only available to a law enforcement officer.<sup>6</sup> This is in contrast to other special powers under Part III (such as search warrants<sup>7</sup>), which do permit ASIO officers to use reasonable force.

Although some parts of the regime have not yet been utilised (for example, QDWs) it does not mean these provisions are not needed. It is appropriate that ASIO has adopted a responsible and measured approach to the use of the powers. It is clear that the threat level has not decreased since the powers were adopted in 2003 and it is likely that the threat environment will continue to evolve and change into the future.

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<sup>6</sup> ASIO Act section 34V.

<sup>7</sup> ASIO Act section 25(7)(a).

## **What continuing purpose (actual or potential) is being served by Division 3 of Part III of the ASIO Act in whole or in part?**

The ASIO powers are available to obtain information that is, or may be, important in relation to a terrorism offence. The regime enables ASIO to compel a person to attend questioning and answer questions. This enables ASIO to question a person who may have relevant information regardless of the person's willingness to cooperate. It is self-evident that many of the people who hold relevant information are unlikely to divulge this information willingly. AGD understands that questioning under Part III has yielded valuable intelligence in the past.

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. This ensures that ASIO has the ability to perform its functions regardless of whether a particular investigation is being or could be undertaken by another agency. The fact that an agency has the ability to conduct a particular investigation does not necessarily mean that the agency will do so (for instance because of different priorities or available resources). While there may be some overlap between the powers of different agencies, it is important for each agency to retain the ability to conduct its own investigations in order to perform its functions effectively.

## **Are the provisions of Division 3 of Part III of the ASIO Act, if continued, 'fit for purpose'? Does AGD have any suggestions for improving Division 3 of Part III of the ASIO Act, if continued?**

The questioning and detention powers were introduced in 2003, and have been subject to a number of reviews since their introduction, including by the INSLM in his 2012 Annual Report. The INSLM concluded that the questioning powers in Part III Division 3 were a valuable tool for ASIO in conducting terrorism investigations. AGD understands that these powers have previously been effective in yielding valuable intelligence.

It is important that ASIO retains the tools it needs to perform its functions and carry out intelligence-gathering operations to ensure the prevention and ultimately disruption of terrorist acts. While an assessment of whether the provisions are fit for purpose is a matter for government, AGD supports any amendments to Part III that would enhance the operational effectiveness of the provisions while maintaining appropriate safeguards and protections for individuals.

AGD also understands that, while the provisions have proven to be useful, in practice they lack some of the nuance that could make them more effective in the current threat environment. This is understandable, given the evolution of the terrorism threat since the provisions were initially drafted over 10 years ago. It may be possible to refine the regime and make the provisions more agile. There are a number of amendments that could be made to enhance the operational utility of the provisions in the current environment. These include:

- streamlining the authorisation process to enable warrants to be issued more quickly;
- clarifying that ASIO has the ability to question a person after they have been charged with a criminal offence;
- bringing the definition of a terrorism offence in the ASIO Act into line with the Crimes Act; and
- increasing the safeguards applicable when a Prescribed Authority orders the detention of a person under a QW.

### **Streamlined authorisation process**

QWs and QDWs are intended to be used in situations where a person has information relevant to a terrorism offence. In these circumstances, particularly given the current threat environment where actors can move from planning to action quite rapidly, authorities need to be able to investigate within very short timeframes when they become aware of a threat. The process for obtaining QWs and QDWs is not currently agile enough to enable this to happen quickly.

In practice, the requirements for issuing a QW or QDW are cumbersome and resource intensive, resulting in considerable delay that can directly impact on operational outcomes and potentially on public safety. Amendments to Part III to enable warrants to be issued more quickly and efficiently may enable ASIO to respond in a more agile manner to specific threats as they arise.

Experience has shown that these powers are subject to significantly more detailed oversight and protection than other special powers under Part III. Given the extent of oversight of the execution of warrants, it may be appropriate to remove some of the steps required to obtain a warrant.

Streamlining the authorisation process – for example, by removing the requirement for an Issuing Authority to authorise the issue of a QW – would bring the requirements for warrants issued under Division 3 into line with other warrants under Part III. It would also remove a time consuming step in the process for obtaining a warrant and enable an investigation to proceed more quickly where appropriate.

### **Post-charge questioning**

As outlined below, the question of whether Part III allows the questioning of a person who has been charged with a criminal offence is unresolved.

It is foreseeable that a person charged with a terrorism offence could be in a position to provide critical intelligence in relation to a terrorist plot involving, for example, other persons with whom they are associated. This is particularly so in the current environment, where plans are carried out quickly and law enforcement is forced to act – and therefore lay charges – at an earlier stage in order to prevent an attack.

No QWs or QDWs have been issued in relation to a person who had been charged with a terrorism offence at the time of the warrant. The judicious application of the powers by ASIO to date lends



support to the argument that careful consideration would be given to the issuing of a post-charge QW if such circumstances were to arise.

The use immunity in subsection 34L(9) already provides a safeguard to ensure that information given, or records or things produced, by a person before a Prescribed Authority cannot be used directly in evidence in a criminal prosecution. The INSLM may consider it appropriate to introduce further mechanisms to strengthen the protections of a person's right to a fair trial in situations where a person is questioned about an offence for which they have already been charged. However, allowing for post-charge questioning could serve a useful role in resolving and mitigating ongoing terrorist threats.

### **Definition of a terrorism offence**

The powers in Part III are available for the collection of intelligence important in relation to a 'terrorism offence'. Section 4 of the ASIO Act currently defines a terrorism offence as an offence against Subdivision A of Division 72 of the Criminal Code (International terrorist activities using explosive or lethal devices) or an offence against Part 5.3 of the Criminal Code (Terrorism). This is a narrower definition of the term than that contained in subsection 3(1) of the Crimes Act, and it does not include the foreign incursions and recruitment offences in Part 5.5 of the Criminal Code or the terrorism financing offences in the *Charter of the United Nations Act 1945*.

Offences such as the foreign incursion offences have high penalties and contribute to violent terrorist activities. For consistency, and to ensure that ASIO has power to investigate the full range of serious terrorist acts that impact on security, the INSLM may wish to consider amendments to the definition of a terrorism offence to include other serious criminal terrorist acts.

### **Detention safeguards**

A warrant issued under section 34G authorising a person's detention **must** permit the person to contact identified persons at specified times when the person is in custody or detention authorised by the warrant. By contrast, if a Prescribed Authority makes a direction under section 34K(1) to detain a person subject to a QW, they **may** also make a direction permitting a person to contact an identified person, but there is no requirement to allow such contact.

Similarly, an Issuing Authority must take account of any previous detention under an earlier warrant in deciding whether to issue a QDW. The Issuing Authority may only issue a QDW where it is justified by additional or materially different information that has come to the Director-General's knowledge. There is no equivalent requirement for a Prescribed Authority to consider these factors when making an order under section 34K to detain a person subject to a QW.

In practice, this means that a person subject to detention under a QW may have fewer protections than someone detained under a QDW. There may be scope to reform these provisions to ensure that safeguards are in force to protect the rights of a person detained under Part III, regardless of which type of warrant is in force, while retaining the Prescribed Authority's discretion to make orders (including as to who may be contacted).

## **What is the current AGD position as to the recommendations made by the previous Monitor in the Annual Report dated 20<sup>th</sup> December 2012?**

A number of recommendations made by the previous INSLM in his 2012 Annual Report have been accepted and implemented by the government. These include:

- implementing the INSLM's recommendation to remove the last resort requirement for QWs, and replacing it with a requirement for the Attorney-General to be satisfied that it is reasonable in all the circumstances for the warrant to be issued (Recommendation IV/1);
- removing the ability to use lethal force in taking a person into custody (Recommendation IV/3); and
- introducing an offence of destroying or tampering with a record or thing with the intent to prevent it from being produced or from being produced in a legible form (Recommendation IV/6).

In respect of the other recommendations made by the previous INSLM in his 2012 Annual Report, noting that any amendments to Part III are a matter for government, AGD makes the following comments.

### **Recommendation IV/1: Requiring Issuing Authority to be satisfied of all issuing criteria and removal of last resort criterion**

The government did implement that part of the INSLM's recommendation IV/1 in relation to removing the last resort requirement for QWs (see above). The previous INSLM also recommended that the Issuing Authority as well as the Attorney-General should be required to consider all the prerequisites for the issue of a QW, rather than the Issuing Authority taking the consent of the Attorney-General as conclusive of some of them. AGD notes that before consenting to the making of the request for a QW, the Attorney-General must be satisfied that (relevantly):

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

In contrast, the Issuing Authority is required to be satisfied in respect of a) as outlined above but not b), as well as being satisfied that the Director-General has requested the warrant in the terms outlined in the relevant provisions, which include that the Attorney-General has consented to the making of the request.

The Attorney-General has portfolio responsibility for ASIO, is regularly briefed on its operations, approves other types of special powers warrants, and is well-placed to decide whether the use of a QW or QDW is appropriate in all the circumstances. To enable an Issuing Authority to make a similarly well-informed decision about the effectiveness of other intelligence collection methods, it would be necessary to explain ASIO's various practices and capabilities. This may be time and resource intensive, and may risk further exposure of sensitive methodologies and capabilities.

AGD notes that the involvement of the Issuing Authority in any aspect of the warrant approval process is already an additional requirement when compared with other warrants issued under Part 3. The three-stage approval process for QWs and QDWs (involving a request by the Director-General, consent from the Attorney-General and the approval of an Issuing Authority) is already more demanding than the process required for other special powers warrants, which are issued directly by the Attorney-General.

#### **Recommendation IV/2: Extensions of questioning time to accommodate the use of interpreters**

The provisions for granting extensions of time for questioning already contain significant safeguards. However, it may be reasonable to include a specific requirement to provide assurance that any extension of time granted by the Prescribed Authority due to the use of an interpreter is no more than is reasonably attributable to the use of an interpreter.

#### **Recommendation IV/4: Penalties for offences against Subdivision B (ss34ZF – breaching safeguards and 34ZS – secrecy offences) should be the same**

The Commonwealth Guide to Framing Commonwealth Offences<sup>8</sup> sets out general considerations for setting an appropriate penalty. These include the gravity of harm that could be caused and the level of deterrence required. There is a very significant difference in the level of deterrence required for the offences of breaching safeguards (maximum penalty 2 years imprisonment) and those that apply in the context of the secrecy offences (maximum penalty 5 years imprisonment), which suggests that it is not appropriate to have the same penalties for each of these offences.

#### **Recommendation IV/5: Penalties for offences against secrecy obligations should be reduced from 5 years to 2 years imprisonment**

Persons who are the subject of a QW may obtain information about ASIO's sources, methodologies and capabilities as a result of the questioning process. The unauthorised disclosure of such information could have very grave consequences, including putting lives at risk. Disclosure of such information by an ASIO employee, affiliate or associate is punishable by up to 10 years imprisonment. A maximum penalty of five years for disclosure by a QW subject reflects the fact that the person is not subject to the same strict obligations as ASIO 'insiders'.

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<sup>8</sup> Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011.

In addition, individuals who are the subject of a QW may have little incentive not to disclose such information, so a strong penalty for the unauthorised disclosure offences may be necessary to provide a deterrent. There are exemptions to allow for legitimate disclosures, such as seeking legal advice. Unlike other secrecy offences under the ASIO Act, the secrecy obligations in section 34ZS are not perpetual and only operate during the time that the warrant is in force, and in the two years after the expiry of the warrant.

**Recommendation IV/7: Use of QW where a person has been charged and is awaiting trial – QW provisions should be amended to make clear that a person cannot be questioned once they’ve been charged with a criminal offence**

No QWs have been issued in relation to a person who has already been charged with a terrorism offence. ASIO has demonstrated restraint in its use of QWs and QDWs to date. It is foreseeable that a person charged with a terrorism offence could be in a position to provide critical intelligence in relation to a terrorist plot; for example, where a person has been charged but their associates, who are also involved in the plot, are not yet known to authorities.

The existing use immunity in section 34L provides a safeguard to ensure information, records and things produced during questioning cannot be used directly in evidence against the person. A prohibition on the use of QWs after a person has been charged may risk creating a gap in the intelligence gathering tools available for use in resolving and mitigating ongoing terrorist threats.

**Recommendation V/1: Repeal QDW regime**

There is a realistic possibility that circumstances could arise in which immediate action is required to detain a person in order to prevent an imminent terrorist act. For example, while not directly involved in the act, the person may have valuable intelligence that could lead to the prevention of the act but be unwilling to provide that information voluntarily. In those circumstances, there may not be sufficient time available to bring a person before a Prescribed Authority to seek authority to detain the person. While there are powers available to other agencies to detain a person, they do not allow for coercive questioning and only apply in respect of a person who is personally a suspect.

In addition, there may be circumstances that make it impossible for a warrant to be served upon a person by a police officer. Section 34U, for example, provides that a police officer may use force to enter premises (including a vehicle) to take a person into custody, subject to the safeguard that a police officer may only enter a dwelling house between 6am and 9pm, in most circumstances. However, this only applies to QDWs, or QWs where the person has already appeared before the Prescribed Authority and the Prescribed Authority has made a direction to detain the person.

The fact that a QDW has not yet been utilised indicates the level of discipline applied in determining when to seek such a warrant, and it is not necessarily indicative that the power will not be needed in the future to prevent a terrorist act. Further, as outlined above, streamlining the authorisation process to increase the timeliness of obtaining a QDW would make it more likely that a QDW can be utilised in very urgent circumstances.

## **Recommendation V/2: Consequential amendments to the QW regime**

The previous INSLM recommended that the QW regime should be amended to allow a police officer to arrest if, when the warrant is executed, the person says or does something to indicate they are not going to comply with the warrant. The previous INSLM also recommended the QW regime should be amended to enable the Prescribed Authority to direct detention after service of a QW but before the specified time of attendance if it appears on reasonable grounds that there is an unacceptable risk of the person tipping off another person involved in terrorism, failing to attend, or destroying or tampering with evidence.

The nature of the terrorist threat in Australia is enduring and ongoing, and, in light of ongoing discussions with ASIO and future recommendations made by the INSLM and the Parliamentary Joint Committee on Intelligence and Security (PJCIS), AGD will continue its consideration of whether it is appropriate to amend the QW regime, noting again that any amendments to the QW and QDW regimes are a matter for government.

## **What, if any, implications are there for Division 3 of Part III of the ASIO Act from the following decisions of the High Court:**

- ***X7 v Australian Crime Commission (2013) 248 CLR 92***
- ***Lee v NSW Crime Commission (2013) 251 CLR 196 and***
- ***Lee v R (2014) 88 ALJR 656***

The previous INSLM recommended that the ASIO Act be amended to make it explicit that QWs or QDWs are not available to question a person in relation to an offence for which they have already been charged. Since the INSLM's report, the High Court has handed down decisions in *X7 v Australian Crime Commission (2013) 248 CLR 92 (X7)*, *Lee v NSW Crime Commission (2013) 251 CLR 196 (Lee No 1)* and *Lee v R (2014) 88 ALJR 656 (Lee No 2)*.

The legal implications of these decisions for Part III of the ASIO Act are uncertain. In *X7* and *Lee No 1*, the issue of post-charge questioning was a matter of statutory interpretation. It is not possible for AGD to predict whether a court would interpret the provisions of Part III as allowing for post-charge questioning. It remains a matter for government to decide whether to amend the legislation to make this explicit. While the ACC Act was amended in 2015 to clarify that post-charge questioning is permitted, no decision has been made as to whether the ASIO Act should similarly be amended.

In *Lee No 2*, the Court unanimously held that the *New South Wales Crime Commission Act 1985* did not permit the dissemination of examination material to the prosecution for the purposes of anticipating possible defences.

## Issues raised in public submissions

A number of issues raised in the public submissions to the INSLM support the previous INSLM's recommendations in his 2012 report and have been addressed above. However, AGD makes the following comments to address additional concerns raised by the Law Council of Australia and the Gilbert & Tobin Centre of Public Law in their public submissions.

### Repeal of Detention Warrants

In its 2005 report, the PJCAAD noted that Part III Division 3 was initially thought of as primarily a detention regime.<sup>9</sup> The regime initially contained only one type of warrant, which would allow ASIO either to question, or to question and detain, a person. However, in its 2005 report, the PJCAAD raised concerns about the lack of clarity in the legislation and the confusion between the provisions relating to QWs and those relating to QDWs. The PJCAAD recommended that the legislation be amended to distinguish more clearly between the QW and QDW regimes. This recommendation was implemented by the *ASIO Legislation Amendment Act 2006*, which amended the structure and language of Division 3 to clearly separate the two regimes.

The QDW regime contains additional safeguards to reflect the gravity of detention. For example, a QDW is a method of last resort and may only be requested where the Attorney-General is satisfied that relying on other methods of collecting the intelligence would be ineffective (section 34F(4)(b)).

It is also important to note that, under Division 3, ASIO officers have no ability to use force. If the authority to detain a person were to be left to a Prescribed Authority, arrangements would need to be in place to ensure that law enforcement officers are available for the duration of questioning before the Prescribed Authority, to enable them to carry out a direction to immediately detain the person.

### Amending the issuing criteria for QDWs

The Gilbert & Tobin Centre submission recommends that, in applying for a QDW, ASIO should be required to demonstrate that detention is reasonably necessary and appropriate to protect the public from a terrorist act. The submission contrasts the current detention criteria with those for Control Orders. However, AGD notes that Control Orders are a law enforcement tool, and ASIO's intelligence collection role is distinct from that of law enforcement. Part III Division 3 is aimed at enabling ASIO to gather intelligence relevant to a terrorism offence, and the detention powers are directed at preserving this ability, in order to prevent terrorist acts from occurring.

The intelligence sought may, for example, be important in determining who is planning an attack, or where and how an act will be carried out. The ability to detain a person to ensure that they will appear for questioning, or will not destroy evidence or alert a person involved in a terrorism offence that the offence is being investigated, protects ASIO's ability to effectively collect intelligence. If a person is alerted to the fact that an offence is being investigated, it may result in the potential act

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<sup>9</sup> Parliamentary Joint Committee on ASIO, ASIS & DSD, *ASIO's Questioning and Detention Powers*, November 2005 [2.40]

being postponed or redirected rather than prevented. However, the direct intervention in activities to prevent a particular act is a law enforcement function.

### **Narrowing the issuing criteria for QWs**

The Gilbert & Tobin Centre suggests that the criteria for issuing a QW should be amended to require a “reasonable belief that issuing the warrant will substantially assist the prosecution or prevention of a terrorism offence”. AGD suggests that this would not be an appropriate test in the context of ASIO’s functions. ASIO’s role is to gather intelligence, including intelligence that informs a broader awareness of the context in which terrorism occurs. Adopting this test may require ASIO to have a specific offence in mind (e.g. a particular attack that is being planned) and would impair ASIO’s ability to conduct intelligence-gathering at an earlier stage. In addition, gathering evidence to assist a prosecution for a terrorism offence is a law enforcement function, and does not fall within ASIO’s functions. This is reflected in the use immunity in section 34L(9).

The Gilbert & Tobin Centre submission also suggests that all issuing criteria should be scrutinised by the Issuing Authority as well as the Attorney-General. The ‘last resort’ criterion and the role of the Issuing Authority are addressed in the consideration of the former INSLM’s recommendation IV/1, discussed above.

### **Human rights safeguards – access to a lawyer and use immunity**

The Gilbert & Tobin Centre submission raises concerns about the safeguards applicable to QWs and QDWs. These include concerns around inadequate access to legal representation and inadequate oversight.

#### *Legal representation*

The Gilbert & Tobin Centre’s submission raises concerns around the ability of a subject to access legal advice. A number of changes were made to the regime in 2006<sup>10</sup> to address the PJCAAD’s concerns surrounding a person’s access to legal representation. In addition to personal legal representation, questioning is overseen by an independent Prescribed Authority, who is a former senior judicial officer and has primary responsibility for ensuring that questioning is carried out appropriately and fairly. A person can only be denied access to their lawyer of choice in specific circumstances – for instance where contact with the lawyer may result in a person involved in a terrorism offence being alerted to the investigation, or a record or thing may be destroyed, damaged or altered.<sup>11</sup>

The ASIO Act does not require a lawyer to be present during questioning proceedings,<sup>12</sup> which reflects the fact that questioning may be time-critical. However, if a legal adviser is present, the Prescribed Authority must provide a reasonable opportunity for the legal adviser to advise the

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<sup>10</sup> *ASIO Legislation Amendment Act 2006*.

<sup>11</sup> Section 34ZO(2).

<sup>12</sup> Section 34ZP(1).

subject and consider requests by the legal advisor to address the Prescribed Authority during breaks in questioning.<sup>13</sup>

### *Oversight*

The Gilbert & Tobin Centre note that the questioning and detention powers should be held to the “highest possible standards of accountability and oversight”. This is already the case: ASIO is subject to significant oversight in all of its activities, and the execution of QWs and QDWs is subject to even more scrutiny than other activities. This scrutiny includes supervision of the questioning by a Prescribed Authority, who is generally a retired superior court judge, and rigorous oversight by the IGIS, which is set out in detail in the IGIS’s submission to the INSLM. This is in addition to the usual oversight of the PJCIS, accountability frameworks including the Attorney-General’s Guidelines and ministerial reporting, a person’s right to complain to the IGIS about ASIO’s conduct (and to the Ombudsman in relation to the ACIC or AFP), and the ability to seek judicial remedy.

### **Secrecy provisions**

A further concern raised in the Gilbert & Tobin Centre’s submission relates to the restrictions on communicating information imposed by the secrecy obligations in section 34ZS of the ASIO Act. As discussed above, persons who are questioned under a warrant may obtain information about ASIO’s sources, methodologies and capabilities as a result of the questioning process. The unauthorised disclosure of such information could have very grave consequences, including putting lives at risk. Limiting the prohibition to those disclosures which could prejudice national security would be ineffective, as persons who are the subject of a QW or QDW are not likely to have all the information available to make a decision as to whether a disclosure will prejudice national security.

### **Time limits for questioning**

The Gilbert & Tobin Centre submission also suggests that the 24 hour time limit for QWs is too long. The maximum period for which a person may be questioned under a QW or QDW is 8 hours. In order for questioning to continue, the Prescribed Authority must be satisfied: that there are reasonable grounds to believe that permitting the continuation will substantially assist the collection of intelligence that is important in relation to a terrorism offence; and that questioning has been conducted properly and without delay. The total period of 24 hours can only be reached if the Prescribed Authority has agreed twice to continue questioning, and has not revoked that permission at any time.

### **Signpost to existing legal bases for judicial review**

The Law Council of Australia recommends that a note to section 34E of the ASIO Act should be adopted as a signpost to legal bases for judicial review. This has been done. This was a

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<sup>13</sup> Section 34ZQ.



recommendation of the PJCAAD in its 2005 report.<sup>14</sup> In response to this recommendation, a signpost was added to the end of section 34J by the *ASIO Legislation Amendment Act 2006*.

### **Use of multiple warrants**

The Law Council of Australia raises concerns that a person could be subject to repeated questioning by different agencies. AGD understands that, in practice, this situation is unlikely to arise, because of the close cooperation between agencies on priority investigations and appropriate information sharing.

It is highly unlikely that the threshold requirements for a further QW or QDW would be met where a person had already been questioned or detained. A request for a QW must include a statement of facts, details of any previous warrant requests, and statements of any previous periods of questioning or detention under a warrant. Both the Attorney-General and the Issuing Authority are in possession of this information when deciding whether there are reasonable grounds to believe that issuing the warrant will substantially assist the collection of intelligence. If previous warrants have not been fruitful, it is unlikely that these reasonable grounds could be made out. In addition, a QDW may only be issued where a person has previously been detained under an earlier warrant if the Issuing Authority is satisfied that additional or materially different information has arisen since the last request. A further QDW cannot be issued while a person is in detention.

The Law Council of Australia also raises the concern that there is no independent oversight of measures before those measures are exercised.<sup>15</sup> However, under section 34ZI of the ASIO Act, the Director-General must give the IGIS a copy of any draft request for a warrant, as well as a copy of any warrant and a copy of a video recording of proceedings, as soon as practicable. In practice, this gives the IGIS an opportunity to intervene before QW and QDW powers are exercised. The IGIS also has the right to be present while a warrant is executed and to raise concerns about impropriety or illegality, and a questioning subject may complain to the IGIS while questioning is ongoing. Please see the IGIS's public submission for more detail.

As stated above, each agency has distinct functions, responsibilities and priorities, and it is important for each agency to have tools available to enable it to carry out its functions. Making each agency's ability to exercise questioning powers dependent on the activities of another agency could limit the ability for agencies to independently perform their functions. This would particularly be the case if the person had been questioned in relation to an unrelated matter, or at some time in the past.

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<sup>14</sup> Parliamentary Joint Committee on ASIO, ASIS & DSD, *ASIO's Questioning and Detention Powers*, November 2005, recommendation 8.

<sup>15</sup> Law Council of Australia submission, [134].

## ***Australian Crime Commission Act 2002***

### **Are the coercive questioning powers of the ACC under the ACC Act ‘fit for purpose’ in this context?**

#### **Role of the ACIC**

The ACIC is Australia’s national criminal intelligence agency. The ACIC is the only agency in Australia that is dedicated to providing the national criminal intelligence picture.

In 2002 the Commonwealth, state and territory governments agreed that Australia needed a national agency to improve strategic understanding of nationally significant criminal activity and to develop responses to multi-jurisdictional crime. As a result, the ACC was established under the *Australian Crime Commission Act 2002*. This replaced and combined the strategic and operational intelligence and specialist investigative capabilities of the National Crime Authority (NCA), the Australian Bureau of Criminal Intelligence, and the Office of Strategic Crime Assessments.

Examination powers were originally vested in the NCA as a result of the findings of the Costigan Royal Commission and the Royal Commission into the Terrence Clark drug syndicate which emphasised that Australia needed a more sophisticated law enforcement structure to fight organised crime. The NCA was designed to create a standing body with similar powers to a Royal Commission, to compel answers and order the production of documents with a view to more thoroughly investigating entrenched organised crime in Australia. The ACIC derives its examinations powers and a number of statutory functions from the former NCA.

In order to fulfil its role as the national criminal intelligence agency the ACIC has mandated functions under section 7A of the ACC Act to:

- collect, correlate, analyse and share criminal information and intelligence
- maintain a national database of criminal information and intelligence
- undertake intelligence operations
- investigate matters relating to federally relevant criminal activity
- provide strategic criminal assessments
- provide advice on national criminal intelligence priorities.

The ACIC Board comprises all Australian Police Commissioners; the Secretary of the Attorney-General’s Department; the Commissioner of Taxation; the Chairperson of the Australian Securities and Investments Commission; the Comptroller-General of Customs (Commissioner of the Australian Border Force); the Director-General of Security as head of the Australian Security Intelligence Organisation; and the ACIC CEO (as a non-voting member).

Under section 7C of the ACC Act, the Board is responsible for providing strategic direction to the ACIC, determining special operations and special investigations and approving the use of the ACIC's special coercive powers.

### **When can an examination be conducted under the ACC Act?**

Under section 24A of the ACC Act, an examiner may only conduct an examination for the purposes of an ACIC special operation or special investigation, the subject matter of which is 'relevant criminal activity'. This term is defined in section 4 of the ACC Act as 'any circumstances implying, or any allegations, that a [federally relevant serious and organised crime] may have been, may be being, or may in future be, committed'. The provisions of subsections 7C(2) and (3) make it clear that the ACIC Board may only determine that an intelligence operation or investigation is 'special' where ordinary police methods of collecting intelligence or investigating offences have not been, or are unlikely to be, effective.

ACIC examinations are used in support of special operations and special investigations, determined by the Board, that cover a range of serious criminal activities, which cause harm to individuals in the Australian community and to Australian society and the economy. The current special investigations and operations authorised by the Board under subsections 7C(2) and 7C(3) cover a diverse range of serious and organised criminal activities, including:

- drug manufacture, importation and supply
- money laundering and other types of financial fraud
- outlaw motorcycle gang related offences
- cyber-enabled crime such as serious and organised investment fraud
- corruption
- firearm crime
- visa and migration fraud, and
- the nexus between serious and organised crime and terrorism.

### **How examinations are used to support the functions of the ACIC under section 7A of the ACC Act**

The ACIC's examination power under Division 2 of Part II of the ACC Act is an important specialist capability and a key function of the ACIC's role as Australia's national criminal intelligence agency.

The examination capability is designed to enable the ACIC to develop an understanding of how serious and organised crime operates in order to assist law enforcement agencies across Australia to respond tactically and strategically.

The examination power supports the ACIC to:

- obtain information from witnesses
- identify and analyse crime trends
- identify targets
- identify and locate victims of serious and organised crime, and
- protect the public from the risks arising from serious and organised criminal activity.

The ACIC collates examination material with other relevant information and, pursuant to its functions under the ACC Act, disseminates the resulting intelligence to Commonwealth, state and territory partner agencies so they can direct their own investigations and develop preventive measures such as changes in government policies or organisational procedures.

### **Safeguards on use of examinations**

The ACC Act provides a range of safeguards in relation to the use of examinations and the disclosure and use of examination material. In 2015, Parliament passed the *Law Enforcement Legislation Amendment (Powers) Act 2015*, which clarified and strengthened the range of safeguards. The safeguards include that

- coercive examination powers can only be exercised in the context of a Board-approved special operation or investigation (see subsections 24A and 28(7))
- coercive examination powers can only be exercised by an ACIC Examiner, each of whom is appointed as an independent statutory office holder (see subsection 24A(1))
- an ACIC Examiner may only issue a summons compelling a witness' appearance at an examination if satisfied that it is reasonable in all the circumstances to do so. Further restrictions apply if the proposed witness has been charged, or a charge is imminent (see paragraphs 28(1)(c) and (d))
- examinations are conducted in private and an examiner may give directions as to who may be present (see subsection 25A(3))
- a person giving evidence at an examination may be legally represented (subsection 25A(2))
- an examiner may make confidentiality directions about evidence given, a document or thing produced or information allowing for a person's identification (see subsection 25A(9))
- an examiner is required to make a confidentiality direction where failure to do so might prejudice a person's safety, or would be reasonably expected to prejudice the examinee's fair trial, if the person has been charged or a charge is imminent (see subsection 25A(9)), and
- a witness has 'use immunity' so that information provided under the protection of the immunity is inadmissible against the witness in a criminal proceeding, a proceeding for the imposition of

a penalty, or a confiscation proceeding that had already commenced or was imminent when the examination was conducted (see subsection 30(5)).

In order to ensure the ACIC discharges its obligations under the ACC Act it is subject to extensive external oversight arrangements including:

- The Inter-Governmental Committee of the Australian Crime Commission (IGC-ACC) chaired by the Commonwealth Minister for Justice and consisting of nominated Ministers from each state and territory.
- Parliamentary Joint Committee on Law Enforcement
- The Commonwealth Ombudsman, which provides avenues for complaints and addressing natural justice concerns. The Ombudsman has an own motion power to inspect any administrative process of the ACIC, including those related to the examination power.
- Australian Commissioner for Law Enforcement Integrity, and
- Australian National Audit Office.

The ACIC's examination powers are also the subject of parliamentary scrutiny; most recently during the passage of the *Law Enforcement Legislation Amendment (Powers) Act 2015*. The ACIC is also accountable to the courts for the lawful and appropriate use of its coercive powers. Decisions by Examiners during ACIC examinations are subject to review by the Federal Court or the Federal Magistrates court pursuant to the *Administrative Decisions (Judicial Review) Act 1977*.

## Part IC of the *Crimes Act 1914*

### **Does AGD consider that the additional measures available under Subdivision B of Division 2 of Part IC of the Crimes Act are reasonably necessary to counter the threat of terrorism (particularly compared to the powers provided under Subdivision A of Division 2 of Part IC of the Crimes Act in relation to non-terrorism-related offences)?**

The following is intended to assist the INSLM in understanding the historical legal policy context and intentions behind the enactment of Subdivision B of Division 2 of Part IC of the Crimes Act.

#### *History of Subdivision B of Division 2 of Part IC of the Crimes Act*

Part IC was amended in 2004 by the *Anti-Terrorism Act 2004* to create specific provisions that applied when someone had been arrested for a terrorism offence. The purpose of the amendments was to provide for a longer investigation period for investigations of terrorism offences, and provide for additional types of time which were excluded from the investigation period. In particular, the existing investigation period was regarded as an inadequate length of time in which to question

suspects in the context of complex terrorism investigations that may have international aspects. Rather than creating a separate regime for the investigation of terrorism offences, the terrorism provisions were built into the existing Part IC structure with many of the provisions being based on the existing provisions in Part IC.

The provisions in Part IC were considered by the Hon John Clarke QC, who was appointed to conduct an independent inquiry into the case of Dr Mohamed Haneef (who was arrested for the offence of providing support to a terrorist organisation). Mr Clarke produced a Report on his inquiry, which was tabled in Parliament on 23 December 2008. One aspect of the Report looked at deficiencies in the relevant laws of the Commonwealth that were connected to Dr Haneef's case, including Part IC of the Crimes Act.

The *National Security Legislation Amendment Act 2010* amended Part IC in response to the findings in the Clarke Report. The amendments aimed to clarify the original policy intent of the terrorism investigation powers and improve the practical operation of Part IC. The amendments were designed to achieve the following general objectives:

- clarify the interaction between the power of arrest without warrant under section 3W with the powers of investigation under Part IC
- set a maximum 7 day limit on the amount of time that can be specified by a magistrate and disregarded from the investigation period when a person has been arrested for a terrorism offence ('specified disregarded time')
- clarify how the investigation period and time that is disregarded from the investigation period are calculated, and
- clarify the procedures that apply when making an application to extend the period of investigation or apply for a period of specified disregarded time, including the enhancement of safeguards.

The amendments also separated Part IC into two divisions. Division A sets out the framework for investigating a person who has been arrested for a non-terrorism Commonwealth offence. Division B sets out the framework for investigating a person who has been arrested for a terrorism offence. The purpose of having two separate divisions was to facilitate a clearer understanding of the provisions.

#### *Key differences between Subdivision A and B*

There are three key differences between the operation of Part IC when someone has been arrested for a terrorism offence and when someone has been arrested for any other Commonwealth offence.

#### Arrest threshold

Part IC only applies if a person has been arrested for a Commonwealth offence under sections 3W (non-terrorism offence) or 3WA (terrorism offence) of the Crimes Act. A different threshold applies for a person arrested for a terrorism offence, as compared with a person arrested for a non-terrorism offence. The threshold for a non-terrorism offence is 'reasonable belief' that a person has committed

or is committing an offence, whereas the test for a terrorism offence is 'reasonable suspicion'. The different threshold for terrorism offences was created in 2014 due to the time critical and extraordinary risk posed to the Australian public by terrorism. The lower arrest threshold was designed to allow police to intervene and disrupt terrorist activities at an earlier point than would be possible where the threshold is 'reasonable grounds to believe'.

### Investigation Period

The investigation period during which an arrested person may be detained and questioned is limited to that which is reasonable in the circumstances. The maximum period in cases other than terrorism is 4 hours, extendable by a magistrate once by a maximum of 8 hours. For terrorism offences, the maximum investigation period is 4 hours, extendable by a magistrate any number of times, provided the extensions do not exceed 20 hours.

At the time of enactment, it was deemed that a reasonable investigation period comprising up to 24 hours questioning time with adequate 'dead time' categories should be a minimum for the investigation of a terrorism offence in order that Australian law enforcement officers may:

- conduct thorough interviews with terrorist suspects in which all information is appropriately analysed and presented to a suspect,
- secure evidence before it can be destroyed,
- prevent further possible attacks, and
- compile evidence which is sufficiently comprehensive to present all relevant and available facts as they relate to bail, or importantly, to eliminate persons from further inquiries.

### *Disregarded Time*

Subsections 23C(7) (non-terrorism offences) and 23DB(9) (terrorism offences) also provide for periods of time (often referred to as 'dead time') that are disregarded in the calculation of the investigation period. Generally, the purpose of disregarded time is to ensure that a proper pre-charge interview can take place. It recognises that there needs to be some flexibility in the maximum time limit for the investigation period to balance two competing considerations – the reasonable requirements of law enforcement and the protection of civil liberties of people who have been arrested for, but not yet charged with, a criminal offence. Examples of disregarded time include time to allow the person to receive medical attention; time to allow for an identification parade to take place; and time to allow the person to rest or recuperate.

Unlike for non-terrorism offences, subsection 23DB(9)(m) provides for additional 'specified time'. Specified time, which may be granted by a magistrate acting in his or her personal capacity, includes the time needed to collate information from an overseas country before presenting it to a suspect during questioning, or waiting for overseas jurisdictions to respond to requests for critical information from the Australian Federal Police (AFP).

At the time of enactment, it was deemed essential that the Commonwealth provisions allow for appropriate 'dead time' provisions in order for law enforcement to adequately:

- collate relevant information, including post bomb blast analysis, crime scene forensic information, overseas information regarding suspects, associates, information regarding other bombings (e.g. to query instances where similar modus operandi was deployed)
- translate potentially voluminous information (and replies where required) from domestic and overseas inquiries
- relay information to overseas jurisdictions
- permit decryption of encoded messages
- receive and analyse responses, and
- prepare the presentation of questions to suspects, or for follow-up inquiries.

The amendments in 2010 placed a cap of 7 days on the total amount of disregarded time that could be specified by a magistrate. Previously there was no such limit and unlike other categories of disregarded time which may be naturally capped because of the nature of the event, the length of time that could be disregarded under proposed paragraph 23DB(9)(m) was not as naturally confined. The proposed cap of 7 days was intended to provide certainty as to the amount of time that can be disregarded under proposed paragraph 23DB(9)(m) and accordingly, greater certainty about the length of time a person may be detained under Part IC when a person is arrested for a terrorism offence.

## **Does AGD consider that the balance struck in Subdivision B of Division 2 of Part IC of the Crimes Act between individual rights and protection of the community is appropriate?**

Part IC contains a range of safeguards which seek to balance individual rights and the protection of the community.

Fixed time limits for post-arrest investigations are a crucial investigatory safeguard in Part IC. Importantly, irrespective of the fixed investigation period, the detention of the person must always be reasonable. Other key safeguards include:

- an obligation on the investigating official to caution the arrested person, before starting to question the person, that he or she does not have to say or do anything, but that anything the person does say or do may be used in evidence (section 23F)
- a right to communicate with a legal practitioner, friend or relative (section 23G), an interpreter (section 23N) and a consular office (section 23P)



- a right to remain silent (section 23S)
- a requirement that the arrested person be treated with humanity and respect for human dignity and not be subject to cruel, inhuman or degrading treatment (section 23Q)
- a tape recording of any admissions or confessions made by a suspect during questioning is a pre-requisite to establishing the admissibility of any such admission or confession (section 23V) and
- a right to a copy of recorded interviews (section 23U).

In accordance with general principles there is judicial discretion to exclude unfairly, illegally or improperly obtained evidence.

## **What does AGD say about the consistency of Subdivision B of Division 2 of Part IC of the Crimes Act with the International Covenant on Civil and Political Rights (eg, articles 9(3) and 14 thereof)?**

Subdivision B of Division 2 of Part IC of the Crimes Act is consistent with the International Covenant on Civil and Political Rights (ICCPR) including specifically articles 9(3) and 14 thereof.

### *Article 9(3) ICCPR*

Article 9 of the ICCPR is designed to protect the right to liberty and security of the person and to prevent arbitrary detention. Article 9(3) provides:

“Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.”

The United Nations Human Rights Committee in General Comment No 35, *Article 9 (Liberty and security of the person)*<sup>16</sup> has stated that the first sentence of Article 9(3) applies to persons ‘arrested or detained on a criminal charge’ while the second sentence concerns persons ‘awaiting trial’ on a criminal charge. In our view, it is only the first sentence (as highlighted above) that is relevant to the INSLM’s question.

The Committee also stated that Article 9(3) is ‘intended to bring the detention of a person in a criminal investigation or prosecution under judicial control’ to ensure that an ‘independent objective and impartial’ person is able to assess ‘the legality or necessity of detention’. If additional

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<sup>16</sup> Human Rights Committee, General Comment No 35, *Article (Liberty and security of the person)* (2014) UN Doc CCPR/C/GC/35.

investigation or trial is considered to be justified after this initial review the judge should have the power to decide whether the individual should be released (and if so, whether subject to particular conditions) pending further proceedings.

Subdivision B of Division 2 of Part IC of the Crimes Act does not adversely impact on Article 9(3) of the ICCPR. It pursues a legitimate national security objective of detaining a terrorist suspect for a circumscribed investigation period with a view to bringing a charge. It is reasonable, necessary and proportionate to achieving that objective.

Section 23DB provides that a person arrested for a terrorism offence can be detained for the purposes of investigating whether he or she committed the offence or another Commonwealth offence. The relevant investigation period is two hours for a minor and/or an Aboriginal or Torres Strait Islander person and, in all other cases, for four hours. After the expiry of this period the detention can only be extended by a magistrate acting in his or her personal capacity. Section 23DF provides that a magistrate can extend the investigation period multiple times where an application has been made for an extension of the investigation period. However, the total investigation period cannot exceed 24 hours. In order for a magistrate to exercise this power he or she must be satisfied of a number of matters, including that the offence for which the person is being investigated is a terrorism offence; the further detention of a person is necessary to preserve or obtain relevant evidence or to complete the investigation of the offence or the investigation of another offence; the investigation is being conducted properly and without delay; the application is duly authorised; and the person or his or her legal representative has had the opportunity to make representations about the application.

Section 23DB also sets out how the time during which a person is detained may not count for the purpose of these time periods, including the transportation of the person; allowing communication by the person with legal practitioners, interpreters, friends or parents; the receiving of medical attention and facilitating an identity parade occurring; and any specified time under section 23DD. Importantly, any time that is disregarded must be reasonable. The prosecution has the burden to demonstrate that a person was brought before a judicial officer as soon as practicable and that any relevant period was in fact 'disregarded time'. A person cannot be questioned by police during disregarded time.

Section 23DD sets out the way in which a magistrate may specify that a suspension or delay of questioning may be disregarded for the purpose of the investigation period. However, the magistrate must be satisfied that the detention of the person is necessary to preserve or obtain evidence or to complete the investigation into a terrorism offence, that the investigation is being undertaken properly and without delay and that the person or their legal representative has had an opportunity to make representations about the application for specified disregarded time.

#### *Article 14 ICCPR*

Article 14 of the ICCPR sets out a range of protections for persons subject to legal processes. This includes a right to a fair and public hearing in the determination of a criminal charge and in relation to a person's rights and obligations in a suit at law under Article 14(1). For persons charged with a criminal offence Article 14(2) provides that the presumption of innocence should apply. Most notably

in relation to the present inquiry Article 14(3) provides a number of rights, known as minimum guarantees in criminal proceedings, which are relevant where a person is charged with a criminal offence. Specifically, Article 14(3) provides:

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) To be tried without undue delay;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- (e) To examine, or have examined, the witness against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- (g) Not to be compelled to testify against himself or to confess guilt.”

Part IC provides for the pre-charge detention of a person arrested for Commonwealth offences. However, we do also note that the arrest and detention procedures under Part IC of the Crimes Act contain a range of safeguards in furtherance of Article 14 of the ICCPR. In particular, the person:

- must be informed of the offence for which the person is being arrested (section 3ZD)
- has a right to communicate with a legal practitioner, friend or relative (and must be informed as such) (section 23G)
- must be treated with humanity and respect for human dignity and must not be subject to cruel, inhuman or degrading treatment (section 23Q)
- has a right to an interpreter (section 23N) and a consular office (section 23P), and
- has a right to remain silent (section 23S).

These safeguards reinforce the protections contained in Article 14. In light of these safeguards, in AGD’s view Subdivision B of Division 2 of Part IC operates consistently with Article 14 of the ICCPR.

## **Are the questioning powers in Part IC of the Crimes Act ‘fit for purpose’ in this context?**

### *Part IC of the Crimes Act*

Part IC was inserted into the Crimes Act in 1991 to make it clear that an arrested person may be detained, prior to being brought before a magistrate or other judicial officer, for the purpose of:

- investigating whether that person committed the offence for which they were arrested, and/or
- investigating whether the person committed another Commonwealth offence that an investigating official suspects them of committing.

Prior to the enactment of Part IC, the common law rule of arrest applied, so that a person who was arrested could only be detained for the purpose of bringing the person before a judicial officer to be dealt with according to law. This common law principle was restated in *Williams v R* (1986) 161 CLR 278. In *Williams* the High Court looked at the issue of whether a suspect, after his or her arrest, was detained longer than was reasonably necessary to enable him or her to be brought before a magistrate. The relevant state law had provided that the suspect should be taken before a justice as soon as practicable. The High Court held that ‘as soon as practicable’ gave no power to question an arrested person about the offence for which he or she had been arrested or other offences and did not make justifiable a delay which resulted only from the fact that the arresting officers wished to question him or her. If legislation were to abrogate the common law principle it needed to be very clear.

Part IC provides a framework for how a person can be detained and questioned once they have been arrested for a Commonwealth offence. It also contains important investigatory safeguards to balance the practical consideration that police should be able to question a suspect about an offence before they are brought before a judicial officer.

This framework was based on model provisions developed by a Review Committee chaired by the Hon Sir Harry Gibbs in 1991. The Review Committee was of the clear opinion that the law should provide officials, whose duty it is to investigate criminal offences, with a reasonable opportunity to interrogate an arrested person, and to conduct other investigations before taking the arrested person before a magistrate. The Review Committee considered that the interrogation of suspects plays a very important and necessary part in the process of law enforcement. The Review Committee also concluded that a fixed investigation period, coupled with the time that can be excluded from that period (i.e. disregarded time), provided a statutory framework for what is reasonable conduct in the course of investigating a person for a Commonwealth offence.

## Interaction between regimes

### **As far as your department is aware, what questioning and detention powers are being used directly or indirectly in practice now in relation to terrorism matters?**

As a policy department AGD has no direct involvement in the operations of our portfolio agencies.

AGD understands from discussions with ASIO and through public reporting that no questioning warrants or questioning and detention warrants have been issued since the INSLM's last inquiry.

AGD understands that Part IC has been used on a number of occasions in practice in relation to terrorism matters.

The ACIC regularly conducts examinations but it would be a matter for the ACIC to advise on the number and frequency of examinations.

### **What is the relationship between Division 3 of Part III of the ASIO Act, Part IC of the Crimes Act and the coercive questioning powers of the ACC under the ACC Act?**

As a policy department, AGD has no direct involvement in the operations of our portfolio agencies, and the department plays no role in operational decisions or judgments. Questions regarding the operation of these provisions and the way in which the powers are used in practice are best directed to the operational agencies. Agencies are responsible for conducting their operations in accordance with their functions and powers and are subject to significant oversight, including by the IGIS and the Commonwealth Ombudsman. We understand that agencies work together where appropriate and necessary to ensure the effective performance of their functions.

Similarly, AGD plays no direct role in the sharing of information between agencies. We understand from our discussions with agencies in the context of this review that information sharing occurs through official channels including via section 59AA of the ACC Act and through the Joint Counter Terrorism Teams in each state and territory.

Each of these questioning regimes applies in different circumstances, and there are different criteria which apply to the use of each regime. It is important for each agency to have the power to question a person relevant to an investigation being conducted by that agency, in appropriate circumstances. Removing an agency's independent power to carry out investigations could have a significant impact on an agency's ability to carry out its functions, particularly in circumstances where agencies are under no obligation to cooperate and depend on effective inter-agency relationships. At the same time, where the subject of an investigation is of interest to more than one agency, it is important for agencies to work together to ensure that the operations of one agency do not undermine the work of another.

## Differences between the regimes

In addition to technical variations between the three regimes, each regime has a different purpose, applies to a different agency and in different circumstances, and authorises a variety of acts.

### **ASIO Act**

- QWs and QDWs are available where there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence. This provides broad coverage of terrorism offences, including those involving lone offenders, for example, which may not meet the threshold criteria that apply to the use of compulsory questioning under the ACC Act.
- Detention is permissible where there are reasonable grounds for believing that the person may alert a person involved in a terrorism offence that the offence is being investigated, may not appear before the Prescribed Authority, or may destroy, damage or alter a record or thing. The Minister may issue a QDW, or a Prescribed Authority may order the detention of a person subject to a QW, where these conditions are met. However, the issuing of a QDW is a method of last resort. The grounds for detaining a person under the ASIO Act reflect the purpose of Part III Division 3 to disrupt and prevent a terrorist attack, including through preventing prejudice to the intelligence investigation.

### **ACIC powers**

- In order for the ACIC powers to authorise compulsory questioning the ACC Board must determine that an operation or investigation is a special ACC operation or investigation. In making such a determination the ACC Board must consider whether other methods of collecting the criminal information and intelligence *have been* effective (for a special operation) or whether ordinary police methods of investigation *are likely to be* effective (for a special investigation).
- The ACC Act specifically allows for questioning post-charge and includes safeguards to ensure that a person's right to a fair trial is not prejudiced by compulsory questioning. This includes restrictions on the disclosure of derivative material to prosecutors which can only be disclosed after an application to a Court under section 25E of the ACC Act.
- The ACIC is limited in using its coercive powers to instances where conduct meets the definition of serious and organised crime as set out in section 4 of the ACC Act, which includes the element that it involve two or more offenders and substantial planning and organisation. Detention is permitted in certain circumstances (where a person has been ordered to deliver their passport, has absconded or likely to abscond, or has failed or is likely to fail to attend as required) and a Judge has issued a warrant for the apprehension of the person.

### **Part IC Crimes Act**

- The power to detain and question under Part IC applies only where a suspect has been arrested. This distinguishes this regime from those available to the ACC and ASIO, under which a person may be questioned even if they are not personally suspected of involvement in an offence.
- Similarly, the detention power may be exercised for the purpose of investigating whether the person committed a Commonwealth offence. It is aimed at gathering evidence for a criminal prosecution rather than at preventing or disrupting an attack, or investigating whether an attack might be committed by a second person or group.
- Additionally, questioning under Part IC is not coercive and a person may choose not to answer questions.