



26 June 2020

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

Thank you for the opportunity to make a submission to this inquiry into the Australian Security Intelligence Organisation (ASIO) Amendment Bill 2020 (Cth) (the Bill). We do so as members of the Gilbert + Tobin Centre of Public Law in the Faculty of Law, University of New South Wales. We are solely responsible for the content of, and opinions expressed in, this submission.

This submission focuses upon the proposed amendments to the Special Powers Regime in the *Australian Security Intelligence Organisation Act 1979* (Cth) (*ASIO Act*). For ease of reference, it is divided into three sections. First, an analysis of the proposed amendments to Questioning Warrants generally. Second, an analysis of the proposed amendments to Questioning Warrants insofar as they apply to minors. Finally, an analysis of the proposed repeal of Detention Warrants, and the introduction of a new apprehension regime.

Please do not hesitate to contact Dr Nicola McGarrity on [REDACTED] if you have any queries.

Yours sincerely,

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Questioning Warrants

When the Special Powers Regime was introduced into the Commonwealth Parliament almost two decades ago, it was acknowledged by the then Commonwealth Attorney-General, Daryl Williams MP, as 'extraordinary'.¹ There is no other comparable western democratic country which has given its domestic intelligence agency the power to detain citizens.² The detention component of the Regime – and the proposal in the Bill to repeal this – will be discussed in detail later in this submission. However, equally extraordinary is the bestowal of a power upon ASIO, Australia's domestic intelligence agency, to coercively question non-suspects. The need for the Special Powers Regime was explained by Williams as follows:

The key aim of this important legislation is to enable ASIO to question people in emergency terrorist situations in order to obtain the information we need to stop terrorist attacks before people are hurt or killed.³

We note at the outset that we do not oppose the retention of Questioning Warrants. We agree with the former Independent National Security Legislation Monitor (INSLM), Bret Walker QC, that '[t]here is no objection in principle to ... compulsory powers of questioning given the need to counter terrorism, the frequently conspiratorial character of terrorist activity and the requirement for cogent evidence'.⁴ However, given the extraordinary nature of Questioning Warrants, we emphasise that a Warrant should only be authorised where it is necessary and proportionate to the threat posed to national security. It is imperative that coercive questioning is not normalised such that it is applied to ever-increasing categories of undesirable behaviour. Whilst a wide range of circumstances may be envisioned in which compulsory questioning may be of some assistance (whether for law-enforcement or intelligence-gathering purposes), the inconsistency between such questioning and fundamental human rights, in particular, the right to silence, means that caution must be exercised before extending its operation. We draw this Committee's attention once again to the original justification given by Williams for the adoption of the Special Powers Regime. Of particular relevance is his reference to 'emergency terrorist situations' where obtaining information is necessary in order 'to stop terrorist attacks before people are hurt or killed'.

¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1932 (Daryl Williams MP).

² Nicola McGarrity, 'Coercive Questioning and Detention by Domestic Intelligence Agencies' (2014) 9(1) *Journal of Policing, Intelligence and Counter-Terrorism* 48-65.

³ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10429 (Daryl Williams MP).

⁴ Independent National Security Legislation Monitor, *2012 Annual Report* (2013) 70.

The arguments that we make in this submission are substantially the same as those that we previously made to Walker⁵ and his successor as INSLM, the Hon Roger Gyles AO QC,⁶ as well as to this Committee in our submission in response to the Review of ASIO's Questioning and Detention Powers dated 21 April 2017.⁷ We have consistently argued for reform of three key aspects of Questioning Warrants. In the first place, the threshold for issuing a Warrant should be raised by: (a) narrowing the applicable criteria; and, (b) each criterion being subject to assessment by an independent and impartial issuing authority. In addition, stronger safeguards for the rights of individuals should be incorporated, especially in relation to access to legal representation and enabling lawyers to play a meaningful role in the proceedings. Finally, greater transparency is required to ensure that there is accountability for decision-making at both the issuing and questioning stages of the proceedings. Unfortunately, not only does the Bill fail to adopt any of our recommendations, but, if passed by the Commonwealth Parliament, would result in a considerable relaxing of the minimal checks and balances which currently apply to Questioning Warrants. This is so in relation to both the issuing of Warrants, as well as the process by which a person is questioned. The proposed amendments to the issuing and questioning stages of the proceedings will be discussed in turn below.

Proposed amendments to the issuing process

1. Replacement of the issuing authority with the Commonwealth Attorney-General

As it currently stands, the issuing process for Questioning Warrants occurs in three stages. In the first place, the Director-General of Security (Director-General) must seek the Commonwealth Attorney-General's (Attorney-General) consent to apply for a Warrant. The Attorney-General then considers whether to approve the application. This involves an assessment of two substantive criteria: (a) whether 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 (issuing criterion (a)); and (b) whether 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 (issuing criterion (b)).

⁵ Lisa Burton, Nicola McGarrity and George Williams, Submission to INSLM on ASIO Powers, 3 September 2012, available at http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/centre_submission_asio_powers_2.pdf (accessed 25 June 2020).

⁶ Nicola McGarrity and George Williams, Submission to INSLM on Certain Questioning and Detention Powers in Relation to Terrorism, 24 June 2014.

⁷ Nicola McGarrity and George Williams, Submission to PJCS on ASIO's Questioning and Detention Powers, 21 April 2017, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIO/Submissions (accessed 25 June 2020).

The final stage is the issuing of a Questioning Warrant by a judge appointed by the Commonwealth Attorney-General as an issuing authority. In deciding whether to issue a Warrant, the issuing authority is limited to a consideration of issuing criterion (a). We have previously argued that there is no logical rationale for differentiating between the decision-maker for the purposes of the two substantive criteria. We therefore recommended that both should be assessed by the issuing authority. Walker similarly concluded that:

The justification in policy for this difference between the responsibility of the Attorney-General alone for the last resort prerequisite and the shared responsibility of the Attorney-General and the issuing authority for the more substantive prerequisite is elusive ... It is appropriate for a judicial officer to consider both prerequisites and to be satisfied that they have been met.⁸

The Bill implicitly recognises that there is no logical rationale for differential treatment of issuing criteria (a) and (b). However, it deviates from the recommendation made by both Walker and ourselves by proposing a lowest common denominator approach whereby the criteria would be considered by the Attorney-General alone. In other words, it proposes that there no longer be any role for an independent and impartial issuing authority.

We appreciate that the approach proposed in the Bill is consistent with the authorisation process for other powers in the *ASIO Act*. However, as noted earlier in this submission, compulsory questioning by a domestic intelligence agency is an extraordinary power. It more closely resembles the coercive powers that have typically been given to law enforcement agencies – and which are the subject of rigorous judicial oversight – than the secretive surveillance powers of their intelligence counterparts. By making it a criminal offence for a person to fail to answer questions, to give false or misleading information, or to produce a thing at a particular time and place, such a Warrant also has a more direct and substantial impact upon individual rights and freedoms than do the other powers in the *ASIO Act*. This is particularly so where the Warrant includes an immediate appearance requirement and, as a consequence, may be enforced by apprehension. As will be discussed in more detail later in this submission, the Bill would permit apprehension in a broad range of circumstances, including based upon a law enforcement officer's prediction of the person's likely behaviour.

Under the current Special Powers Regime, the issuing authority plays an integral role in safeguarding the fundamental human rights of the person in relation to whom a Questioning Warrant is sought. Furthermore, and just as importantly, its involvement helps to maintain public confidence that the decision-making process has been approached in a non-discriminatory manner. There is a large body of academic scholarship which

⁸ Independent National Security Legislation Monitor, *2012 Annual Report* (2013) 71.

draws a connection between an increasing risk of radicalisation and a perception within minority communities that they are being disproportionately targeted by anti-terrorism laws, as well as the manner in which they are enforced. Given this, and the fact that the Special Powers Regime represents one of the – if not the – most controversial anti-terrorism regimes ever introduced by the Commonwealth Parliament, it is crucial to ensure that the decision-making process is generally regarded as fair. This is best achieved by vesting the decision-making power in a member of the judiciary, who has experience in making decisions impartially (putting their own prejudices to the sides), objectively (on the basis of the evidence presented), and independently (without reference to political considerations). When the predecessor of this Committee, the Parliamentary Joint Committee on ASIO, ASIS and DSD (PJCAAD) reported on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002, it recommended that the issuing authority be judicial.⁹ It rejected the idea of Questioning Warrants even being issued by members of the Administrative Appeals Tribunal on the basis that this Tribunal was ‘an instrument of executive government’.¹⁰ This is because ‘the majority of members of the AAT hold fixed term appointments and would lack the independence to perform the function of [an issuing authority]’.¹¹ This Committee considered that ‘[t]he status and role of the [issuing authority] is a critical part of the Bill. [It] must be of a certain status which ensures transparency, accountability and provides confidence to the public’.¹²

Bearing these comments in mind, unless concrete examples can be presented which demonstrate that ASIO investigations have been significantly hindered by the current process, the desire for Questioning Warrants to be issued in an efficient and timely manner should not be prioritised over and above the aforementioned considerations. Whilst we appreciate that we are limited in our access to operational material, we urge this Committee to carefully interrogate the vague claims made by the Department of Home Affairs in its submission to this inquiry that ‘[r]emoving the multi-step authorisation process will ensure that ASIO’s compulsory questioning powers are operationally efficient in a fast-paced, high-threat environment’.¹³ In the absence of principled reasoning as to why a weakening of the current issuing framework is necessary to support ASIO’s activities, we are concerned that further inroads into the transparency and accountability of decision-making will occur in the future. The Department’s submission notes that the amendment of the issuing framework would ‘align the process with the authorisation of ASIO’s other special powers’.¹⁴ However, the Bill itself proposes to allow internal authorisation of the use of tracking devices in certain circumstances.

⁹ Parliamentary Joint Committee on ASIO, ASIS and DSD, *An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002* (2002) 19.

¹⁰ Ibid.

¹¹ Ibid 15-16.

¹² Ibid 19.

¹³ Department of Home Affairs, Submission to PJCS on ASIO Amendment Bill 2020 (Cth), 25 May 2020, 14.

¹⁴ Ibid 13.

The Department's submission also notes that other Commonwealth compulsory questioning regimes do not require ministerial authorisation.¹⁵ This raises the very real risk that, at some point in the future, we are likely to see proposals to permit internal authorisation of compulsory questioning by ASIO on the basis that it is more 'operationally efficient'.

Our recommendations are as follows:

- A. The role of the issuing authority under the current Special Powers Regime should be maintained.
- B. Further, the Regime should be amended to require the issuing authority to consider issuing criteria (a) *and* (b) in determining whether to issue a Questioning Warrant.

2. *Empowering the Attorney-General to issue Questioning Warrants orally*

Currently, all stages of the issuing process for a Questioning Warrant must be conducted in writing. In the first place, the Director-General must seek the Attorney-General's consent to apply for a Warrant. The documents provided by the Director-General will (subject to any changes made by the Attorney-General) also form the basis of any subsequent application to the issuing authority. These documents include: (a) a draft of the Warrant; (b) a statement of the facts and other grounds on which the Director-General considers it necessary that the Warrant should be issued; (c) a statement of the particulars and outcomes of all previous requests for the issue of a Warrant relating to this specific person; and (d) if any Warrants covered by (c) were issued, the period for which the person was questioned and/or detained. The next stage is for the Attorney-General to reject or consent to (either unconditionally or subject to specific changes being made) the application being made. If the Attorney-General consents, this must be in writing (although no particular form for this is specified in either the legislation or supporting regulations) and supplied to the issuing authority along with the aforementioned documents prepared by the Director-General. Unlike the Attorney-General, the issuing authority is restricted to either rejecting or approving the Questioning Warrant. It is not its role to insist upon changes being made, but rather, if it is satisfied of issuing criterion (a), simply to sign the Warrant. The legislation does not require the issuing authority to give reasons for its decision. What this overview demonstrates is that the only point at which any lengthy or detailed writing is required is by the Director-General before seeking the Attorney-General's consent.

The Bill would allow the Director-General to make an application for, and the Attorney-General to issue, a Questioning Warrant orally (in person, by telephone or another means of communication) where they are satisfied that there are reasonable grounds on which to believe that the delay caused by submitting a written

¹⁵ Ibid 14.

application or issuing a written warrant may be prejudicial to security. A written record of the application and/or warrant must be made by the Director-General of Security as soon as practicable (and within 48 hours at the latest).

Again, we appreciate that the approach proposed in the Bill is not unprecedented. In particular, it mirrors the authorisation process for special intelligence operations in s 35C of the *ASIO Act*. However, given the extraordinary nature of compulsory questioning, the mere fact that oral authorisation is applicable to other ASIO powers does not automatically mean that it is appropriate for Questioning Warrants. We oppose the proposal for the Director-General of Security to be able to apply for a Warrant orally and/or for a decision to be made orally by the Attorney-General. The requirement for the Director-General to present a written application is a safeguard against hasty and ill-considered decision-making. All of the relevant intelligence must be collated, and then attention directed to whether compulsory questioning is necessary and proportionate in the circumstances. The requirement of a written record of the Attorney-General's decision (which, in reality, will likely involve a mere signature on the aforementioned application rather than any new substantive documentation) ensures, in turn, that the decision-maker thoroughly considers all of the intelligence upon which the application is based and whether the issuing criteria are satisfied. Furthermore, and looking at this issue from the perspective of the subject of the Warrant, the absence of a written record is likely to undermine their ability to understand the grounds upon which the Warrant is based, and, as a result, to provide instructions to their lawyer and receive advice in return. It is also likely to present difficulties in terms of mounting a challenge to either the issuing of the Warrant or the manner in which it was executed, for example, whether apprehension was authorised.

Our position here is the same as that set out in the previous section in relation to the proposal to vest the decision-making power in the Attorney-General alone. That is, unless concrete examples can be presented which demonstrate that ASIO investigations have been significantly hindered by the current process (as opposed to the hypothetical worst-case scenarios set out in the submission made to this Committee by the Department of Home Affairs),¹⁶ the desire for Questioning Warrants to be issued in an efficient and timely manner should not be prioritised over and above the aforementioned considerations. As noted above, the only point at which any lengthy or detailed writing is required is by the Director-General of Security before seeking the Attorney-General's consent. It is therefore difficult to envisage how a requirement to provide a written record is likely to delay the execution of a Questioning Warrant by more than a few minutes. This is especially so given the proposal in the Bill to remove one of the stages of the issuing process, namely, the involvement of an independent and impartial issuing authority. Whilst the Department's submission gives an

¹⁶ Department of Home Affairs, Submission to PJCS on ASIO Amendment Bill 2020 (Cth), 25 May 2020, 15.

example of a situation in which it alleges immediate apprehension for questioning would be required,¹⁷ the reality is that access to a Warrant will never be immediate. The most involved stage will always be the gathering and collating of intelligence to support the application (something which is not affected in any meaningful way by the writing requirement). Furthermore, even in the case of an oral application, the Director-General of Security give a clear and detailed explanation to the Attorney-General of the evidentiary basis for seeking the Warrant, and then allow them time to consider whether the criteria are satisfied.

Our recommendations are as follows:

- C. The requirement that all stages of the issuing process be conducted in writing should be maintained. This is so regardless of whether the proposal in the Bill to amend the issuing process from three-stages (application, consent and issue) to two-stages (application and issue) is adopted.
- D. In the alternative, before the Director-General may make an oral application and/or the Attorney-General issue an oral Questioning Warrant, they should be required to be satisfied that 'security *will* be, or is *likely* to be, *seriously* prejudiced'. This is what is required by s 29 of the *ASIO Act* before the Director-General of Security may personally authorise ASIO to exercise its powers. This high bar ensures that oral applications and/or oral Questioning Warrants remain the exception rather than the norm.

3. *Extension of Questioning Warrants beyond 'terrorism offences'*

Currently, the relevant test, as set out in issuing criterion (a), is that 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'. Insofar as adults are concerned (the position with respect to minors will be discussed later in this submission), the Bill proposes to replace the reference to a 'terrorism offence' with an 'adult questioning matter'. An 'adult questioning matter' would, in term, be defined as a matter that relates to the protection of, and of the people of, the Commonwealth and the several States and Territories from (whether directed from, or committed within, Australia or not): (a) espionage; (b) politically motivated violence; and (c) acts of foreign interference. Terrorism offences would be captured by (b) (although this category would also extend to the investigation of politically motivated violence that is unlikely to satisfy the elements of any criminal offence).

The authors of this submission appreciate the impetus for the amendment proposed by the Bill. It is anomalous that the Special Powers Regime has always been tied to the investigation of a criminal offence. The role of a

¹⁷ Ibid.

domestic intelligence agency is to gather intelligence about potential risks to security rather than conducting law enforcement activities. However, any expansion of the umbrella subject-matter to which the Special Powers Regime applies should be dependent upon a clear justification being provided as to its necessity and proportionality. This must include an explanation as to why espionage, politically motivated violence and acts of foreign interference are equivalent to terrorism offences in the threat that they pose to national security. It is important that we continue bear in mind that compulsory questioning is an extraordinary power, and should only be permitted where the threat is so great that no other measure would be an adequate response. Such an explanation is particularly lacking in relation to espionage and acts of foreign interference. The submission by the Department of Home Affairs to this Committee refers to these as ‘serious threats’ which are ‘occurring on an unprecedented scale and pose and increasing threat to our nation and its security’¹⁸. However, no evidence in support of this claim is provided. Furthermore, in relation to the expansion of Questioning Warrants to politically motivated violence, the Department’s submission describes the current requirement that questioning be related to an investigation into a terrorism offence as having:

[T]he unintended consequence of limiting ASIO’s ability to question someone when conducting very preliminary investigations in relation to individuals who may be engaging [in] preparatory acts of politically motivated violence ... or where existing intelligence indicates the individual may not yet be at the threshold of a criminal offence. ... This amendment will enable the use of the powers to collect intelligence at an earlier stage of investigation by removing the need to establish the presence of criminality.¹⁹

The difficulty that we have with this argument is that we typically rely upon the boundaries of the criminal law to differentiate between conduct that is illegal and that which is merely immoral or improper. The impact of compulsory questioning on fundamental human rights means that it is imperative that its limits are clearly spelt out and, furthermore, restricted to the most serious cases of illegal activity. The requirement of a connection with the commission of a criminal offence is particularly appropriate given that compulsory questioning, in its coerciveness, is akin to the powers given to law enforcement agencies.

Additionally, any claim that the reference to terrorism offences has limited ASIO’s power to compulsorily question people with knowledge of politically motivated violence is dubious given the unprecedented breadth and scope of those offences (extending for example to a person who has conspired to do any act in preparation for a terrorist act), as well as the relatively lenient requirement that there be reasonable grounds for believing

¹⁸ Department of Home Affairs, Submission to PJCS on ASIO Amendment Bill 2020 (Cth), 25 May 2020, 11.

¹⁹ Ibid.

that a Questioning Warrant will ‘substantially assist the collection of intelligence that is important in relation to a terrorism offence’. We note that the definition of a terrorism offence is currently limited to offences under Subdivision A of Division 72 (Cth) (international terrorist activities using explosive or lethal devices) and Part 5.3 (individual terrorism offences, terrorist organisation offences and financing offences) of the *Criminal Code Act 1995* (Cth) (*Criminal Code*). It does not currently include other related offences in Part 5.5 of that Act. To address this, we agree with the recommendation of the former INSLM, Gyles, that the definition of a ‘terrorism offence’ should be amended to include foreign incursions and recruitment offences.²⁰ We would also support an amendment to extend the Special Powers Regime to suspected and threatened terrorism offences. This would seem to address the concerns raised in the Department’s submission about the limitations on ASIO’s powers to investigate potential terrorist acts or related offences.

Any justification of the necessity and proportionality of the amendment must also explain why the expansion is limited to the ‘serious’ and ‘increasing’ threats posed by espionage, politically motivated violence and acts of foreign interference, rather than all heads of the definition of ‘security’ in the *ASIO Act*. The latter also includes the promotion of communal violence, attacks on Australia’s defence system, the protection of Australia’s territorial and border integrity from serious threats, and the carrying out of Australia’s responsibilities to any foreign country in respect of any of these aspects. It is notable that, in its submission to this Committee’s Review of ASIO’s Questioning and Detention Powers in April 2017, the Attorney-General’s Department, after consultation with ASIO, ‘consider[ed] that ASIO’s compulsory questioning powers should be amended to ... be made available in relation to *each* of the heads of security’ (emphasis added).²¹ Clearly stating why the decision was made to adopt a narrower definition of an ‘adult questioning matter’ in the Bill would help to ensure that there is not ever-increasing expansion of the umbrella subject-matter in the future.

In our oral evidence to this Committee in June 2017, we expressed concern about a similar proposal to expand the Special Powers Regime. At that time, the discussion revolved around both expanding the umbrella subject-matter of the Regime, as well as the criteria upon which Questioning Warrants were issued. In particular, there was discussion of adopting the ‘reasonable in the circumstances’ test used by the Australian Criminal Intelligence Commission. Such a test would impose a significantly lower threshold than issuing criteria (a) and (b). What this demonstrates is that the umbrella subject-matter in relation to which a Questioning Warrant may be sought is simply the first issue for discussion. Equally, if not more significant, is the more detailed criteria which is applied to that subject-matter, as well as the process for applying it.

²⁰ Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016) 52.

²¹ Attorney-General’s Department, Submission to PJCS Review of ASIO Questioning and Detention Powers, April 2017, 16.

Assuming that a justification can be provided which satisfactorily addresses the issues outlined above, we nevertheless remaining concerned about the cumulative impact of expanding the umbrella subject-matter when considered alongside the other amendments proposed by the Bill, in particular, the removal of the role of the independent and impartial issuing authority, and permitting applications to be made, and Questioning Warrants issued, orally. The impact of these amendments would be to significantly expand the discretion of the executive branch of government with a corresponding reduction in the transparency and accountability of the decision-making process. Our concerns are usefully explained through a comparison of the definition of ‘terrorism offences’ with the definition of ‘politically motivated violence’ in the *ASIO Act*.

The definition of a ‘terrorist act’, upon which the offences in Part 5.3 of the *Criminal Code* hinge, contains an exception for advocacy, dissent and protest that is not likely to endanger the safety of the public or cause personal harm. This exception acts as a safeguard against the enforcement of the terrorism offences for political or other purposes unrelated to the protection of the community from harm. It ensures, for example, that people involved in the recent Black Lives Matters protest who engaged in property damage, such as the defacing of statues, cannot be prosecuted as terrorists (although they may be prosecuted under other criminal laws) and are not subject to the expanded powers given to law enforcement and intelligence agencies to investigate terrorism offences. The definition of ‘politically motivated violence’ goes well beyond ‘terrorism offences’ and captures a wide range of additional offences in the *Criminal Code* and other legislation, as well as any ‘acts or threats of violence or unlawful harm that are intended or likely to achieve a political objective, whether in Australia or elsewhere, including acts or threats carried on for the purpose of influencing the policy or acts of a government, whether in Australia or elsewhere’. The risk of misuses of power for political purposes is particularly great when it is considered that it is the Attorney-General – a member of the executive branch of government – who is ultimately responsible for determining whether to authorise compulsory questioning.

Our recommendations are as follows:

- E. The reference to ‘terrorism offences’ should not be replaced with an ‘adult questioning matter’ unless principled reasoning (supported by concrete examples) is provided to this Committee to address the matters raised in this section, including the equivalence of the additional matters to terrorism offences and why all aspects of the definition of ‘security’ in the *ASIO Act* have not been included.
- F. In the alternative, if the definition is changed, the current issuing process should be retained.

4. *Permitting a Questioning Warrant to be issued post-charge*

Central to the Special Powers Regime is the abrogation of the privilege against self-incrimination. The Regime compels a person to appear for questioning, answer questions, and produce records or things, even where to do so may incriminate them or result in the discovery of incriminatory evidence. This compulsion arises by virtue of the imposition of criminal penalties if the person fails to comply. In his 2012 Annual Report, the former INSLM, Walker, found that '[t]he dangers of terrorism, the typically deliberate secrecy of terrorist plots and the established resort to compelled answer to official questioning to combat [serious criminal activity]' meant that compulsory questioning was 'appropriate notwithstanding the abolition of privilege against self-incrimination'.²² However, he outlined two qualifications to his general support of compulsory questioning.

First, '[t]he 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'.²³ Not only did Walker query the constitutionality of post-charge questioning, but, as a matter of principle, he noted that:

To exert executive force against an accused person to compel answers incriminating him or her of the very matters for which he or she is facing trial before the judicial power, constitutes a fundamental challenge to the capacity for the judicial power to ensure a fair trial. It would be a mockery of the standard trial judge's direction to a jury that the accused is under no requirement to give evidence, if simultaneously a statute purported to require the accused to give answers that may be either tendered against the accused at the trial or may lead to other damaging material being tendered at the trial.²⁴

The Bill adopts a starkly different approach. Instead of clarifying that compulsory questioning may not occur after charges have been laid (or where they are imminent), the Bill 'ensures that questioning can occur despite the laying of any charges or commencement of [confiscation] proceedings'.²⁵ This applies to Questioning Warrants for minors as well as adults. We agree with the arguments made by the Law Council of Australia in its submission to this Committee's Review of ASIO's Questioning and Detention Powers in 2017 that the examination of a person charged with an offence should be deferred until those charges have been disposed of. To do otherwise 'is very likely to prejudice [that person's] defence. An accused person should not be forced

²² Independent National Security Legislation Monitor, *2012 Annual Report* (2013) 93.

²³ Ibid 95-96.

²⁴ Ibid 93.

²⁵ Explanatory Memorandum to the ASIO Amendment Bill 2020 (Cth) 46.

to divulge his or her position prior to trial or to assist law enforcement officers in gathering supplementary information to aid in his or her prosecution'.²⁶

In the alternative, if compulsory questioning is to occur post-charge, the decision as to whether this is appropriate should be left to a judicial authority (such as an independent and impartial issuing authority) to determine whether such questioning is consistent with the subject's right to a fair trial. It is completely inadequate for this decision to be made, as the Bill proposes, by the Attorney-General on the vague criteria already mentioned. Furthermore, and to again adopt the language used by the Law Council, the issuing authority should, if post-charge questioning is authorised, be able to 'strict[ly] regulat[e] ... who is present at the examination, what use can be made of the information obtained, and the subject matter able to be covered'.²⁷

It is not simply that post-charge questioning is permitted by the Bill which is problematic. Equally as important are the lenient provisions in the Bill regarding the use and derivative use of both pre- and post-charge questioning material. The essence of these provisions is outlined in the Explanatory Memorandum:

The *ASIO Act* has always intended to authorise the derivative use of questioning materials for a number of purposes, including to provide to law enforcement for use in the investigation and prosecution of the subject and other people. This is an important part of enabling ASIO to fulfil its statutory functions, which include communicating intelligence for purposes relevant to security and co-operating with and assisting law enforcement agencies in the performance of their functions. ... In light of the subject matter of questionings and the gravity of the activities involved, it is important that material derived from them can be used to disrupt and prevent serious harm to the community, including by prosecuting persons who have been subjects of questioning'.²⁸

We do not propose to analyse these aspects of the Bill in any detail. Instead, we simply draw this Committee's attention to the second qualification expressed by the former INSLM, namely, the need for a blanket prohibition upon the direct use of material obtained during questioning in criminal proceedings.²⁹ Walker drew a distinction between 'the tender of a person's compelled (as opposed to volunteered) own words against himself or herself' (use) and 'where a person's compelled answers are not themselves as evidence, but rather

²⁶ Law Council of Australia, Submission to PJCIS Review of ASIO Questioning and Detention Powers, 19 April 2017, 11.

²⁷ Ibid 12.

²⁸ Explanatory Memorandum to the ASIO Amendment Bill 2020 (Cth) 77.

²⁹ An exception was made for offences under the Special Powers Regime, such as those for failing to appear before a prescribed authority and providing false or misleading information in response to questions.

help to direct, shape or expedite investigation and the eventual marshalling of prosecution evidence' (derivative use).³⁰ However, he concluded that if post-charge questioning was permitted, both use and derivative use must be prohibited:

The grant of use immunity goes some way to mitigating that completely unacceptable prospect [of material being tendered against the accused at trial]. But the lack of derivative use immunity leaves open the possibility of answers being compelled to questions in such a way as to arm a prosecution with information, insights and warnings about what might be called loosely the defence 'case'. That would be of potential great advantage to a prosecution even without the tender of any such answers directly against the accused.³¹

Our recommendations are as follows:

- G. The proposal to allow post-charge questioning should be rejected. Instead, the *ASIO Act* should be clarified to indicate that post-charge questioning is prohibited.
- H. In the alternative, the following safeguards should be included in any post-charge questioning regime:
 - (i) a Warrant for post-charge questioning should be issued by an issuing authority; and (ii) the regime should include both use and derivative use immunities.

Proposed amendments to the questioning process

1. Broadening the categories of people who may be appointed as prescribed authorities

Currently, the Special Powers Regime adopts a tiered approach to the appointment of prescribed authorities. The preferred category of appointee is a person who has previously held a position as a judge of a superior court for at least five years. In other words, a retired superior court judge. If insufficient numbers of such people are willing and able to be appointed as a prescribed authority, a person may be appointed if they are currently, and have been for at least five years, a judge of a superior court. If there are *still* insufficient numbers of people, a person who is a President or Deputy President of the Administrative Appeals Tribunal, and has been enrolled as a legal practitioner for at least five years, may be appointed.

The Bill proposes to remove this tiered approach. Instead, three categories of people who may be appointed are set out in the Bill. The first and third categories in the current Regime are retained. The second category is

³⁰ Independent National Security Legislation Monitor, *2012 Annual Report* (2013) 85-86.

³¹ *Ibid* 93.

replaced with a broader category of people who are enrolled as legal practitioners of a federal or Supreme court, have engaged in legal practice for at least 10 years, and hold a State or Territory practising certificate. As they do not hold practising certificates, current judges would no longer be able to be appointed as prescribed authorities.

The appointment of a person as a prescribed authority is currently subject to that person's consent. The Bill does not propose to change this, however, it would introduce an additional two criteria that must be considered prior to appointment. The Attorney-General must have regard to whether the person engages in any paid or unpaid work, or has an interest (pecuniary or otherwise) which conflicts, or could conflict, with the proper performance of the person's duties as a prescribed authority. Furthermore, the Attorney-General must not appoint a person unless satisfied that the person has the knowledge or experience necessary to properly perform the duties of a prescribed authority. Whilst not explicitly addressed in the Explanatory Memorandum, this additional criterion is presumably necessary because the categories of people who may be appointed as a prescribed authority are no longer limited to those who have decision-making experience.

A significant part of the role of the prescribed authority is to supervise the questioning of the person, including to explain the matters set out in s 34DC and, for a minor, the additional matters set out in s 34DD. However, this is not all that the authority does. Although the Bill proposes that the authority no longer have a role in detention, they nevertheless have the power to make directions about matters which have a significant impact upon the rights of the subject of a Questioning Warrant. These matters relate to:

- timing of questioning, including whether it should be extended;³²
- authorisation of strip searches;
- access to an interpreter;³³
- contact between the subject and other people;³⁴
- disclosure of information;³⁵
- access to legal representation;³⁶

³² This involves determining, at prescribed intervals, whether further questioning will substantially assist the collection of intelligence in relation to an adult or minor questioning matter, as well as the timing of any breaks in questioning. It is also at the discretion of the prescribed authority to defer questioning of the subject (for example, where they wish to make a complaint).

³³ The prescribed authority is responsible for determining whether, if requested by the subject of a Questioning Warrant, an interpreter is required.

³⁴ The prescribed authority may make directions permitting the subject to contact a specified person or people generally.

³⁵ One of the responsibilities of the prescribed authority is to determine whether to (or not to) permit the subject to disclose specified information to a specified person.

³⁶ This will be discussed in the section below on access to legal representation.

- use and disclosure of questioning material in post-charge and post-confiscation proceedings;³⁷
- determining whether the subject is under 14 years age; and, finally,
- making directions in relation to minors' access to non-lawyer representatives.³⁸

In its submission to this Committee in 2017, the Attorney-General's Department stated that the current prescribed authority model had presented difficulties as 'a significant number of appointees are unwilling or unable to serve in this capacity for an extended period of time, representing a significant barrier to the development of institutional expertise in controlling compulsory questioning'.³⁹ No other reason – either principled or practical – has been given for the need to significantly rework the appointment of prescribed authorities. In any event, the claim made by the Department is difficult to accept given the extremely limited number of applications that have been made for Questioning Warrants since the introduction of the Special Powers Regime almost two decades ago. Detailed information about the appointment of prescribed authorities is contained in the PJCAAD's 2005 report into ASIO's Questioning and Detention Powers.⁴⁰ At that stage, 14 Questioning Warrants had been issued. As only two Warrants have subsequently been issued, this report provides a useful starting point in assessing whether amendments to the appointment process for prescribed authorities are required. It noted that four prescribed authorities in various States had been utilised for the 14 people questioned. All of these authorities were former judges. One authority supervised the questioning for eight Warrants, two authorities for five Warrants, and one for one Warrant. Not only does this data suggest that it is not necessary to further extend the categories of people who may be appointed as prescribed authorities, but the Attorney-General's Department itself advised in its oral testimony to that Committee that '[t]hey have not had any difficulty with recruitment'.⁴¹

The proposed amendment in the Bill is ostensibly based upon the 'examiner' model contained within the *Australian Crime Commission Act 2002* (Cth) (ACC Act). Under this model, people who have at least five years' experience as a legal practitioner are eligible for appointment as an examiner. Whilst this does provide a precedent for the proposal in the Bill, the context is significantly different. In contrast to the 16 Questioning Warrants issued over the last 17 years, in the 2018-2019 financial year alone, 193 examinations were carried out by the three (one full-time and two part-time) examiners employed by the Australian Criminal Intelligence Commission.⁴²

³⁷ This has already been discussed earlier in this submission.

³⁸ This will be discussed in the section below on the application of the Special Powers Regime to minors.

³⁹ Attorney-General's Department, Submission to PJCAAD Review of ASIO Questioning and Detention Powers, April 2017, 26.

⁴⁰ Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO's Questioning and Detention Powers* (2005) 7-8.

⁴¹ Joint Committee on ASIO, ASIS and DSD, Australian Parliament, *Committee Hansard*, 19 May 2005, 25.

⁴² Australian Criminal Intelligence Commission, *Annual Report 2018-2019* (2019) iv. In the previous two financial years, there were 227 (2016-2017) and 212 (2017-2018) examinations.

It is possible that expanding the umbrella subject-matter for Questioning Warrants may result in a significant increase in the number of applications such that the current system for appointment is no longer adequate. However, given that there is general consensus that judges – with their experience in making decisions on difficult and complex issues that have a significant impact upon individual rights – are the ideal candidates for appointment, the current approach prioritising retired judges, followed by current judges, should be maintained until there is clear evidence that it is no longer adequate. Urgent changes are unlikely to be required, given that, even if there are insufficient numbers of people falling into these two categories, it is still possible to draw appointees from the third category of AAT members.

In light of this, our recommendations are as follows:

- I. No amendments should be made to the current rules for the appointment of prescribed authorities.
- J. In the alternative, if the categories of potential appointees are amended, the tiered approach should be retained. People from the second and third categories should only be able to be appointed if there are insufficient numbers of people falling into the first category (retired judges) who are willing and able to be appointed.

2. *Amending the rules relating to access to legal representation*

The subject of a Questioning Warrant may elect to *not* have legal representation. The discussion in this section therefore relates only to the situation where that person wishes to be represented by a lawyer. The Explanatory Memorandum to the Bill states that the purpose of amendments in relation to legal representation is ‘strengthening the right to legal representation during questioning while retaining the ability to prevent contact with specific lawyers due to security concerns, and to remove a lawyer who is unduly disruptive during questioning’.⁴³ We welcome any steps taken by the government to improve access to legal representation whilst a person is being questioned pursuant to the Special Powers Regime. Whilst such questioning does not form part of a formal criminal investigation, the Regime may nevertheless have serious (and even criminal) implications. For example, the subject of a Questioning Warrant may be prosecuted for failing to comply with the complex obligations which the Regime imposes. These include not only the obligation to answer questions, and providing records or things, but also prohibitions on the disclosure of information and contact with people beyond those who have been authorised. Furthermore, the provisions for challenging the legality of a Warrant, its execution or the treatment of the subject of the Warrant will likely only be effective if that person receives legal advice. The importance of the subject of a Questioning Warrant

⁴³ Explanatory Memorandum to the ASIO Amendment Bill 2020 (Cth) 3.

being able to obtain meaningful legal representation is obviously heightened if the proposal in the Bill to allow questioning post-charge and post-confiscation proceedings is adopted.

Under the current Special Powers Regime, a Questioning Warrant must specify that a person is permitted to contact a single lawyer of their choice at any time that they are appearing before a prescribed authority for questioning. We have, however, previously outlined four reasons why this right to contact a lawyer may not ultimately equate to meaningful legal representation. It is unfortunate that insufficient attention appears to have been given to rectifying these deficiencies in the drafting of the Bill. In addition, several of the amendments proposed by the Bill – far from strengthening access to legal representation – appear to prioritise the speed and efficiency of the questioning process over and above the right of the subject of a Questioning Warrant to a lawyer of their choice. Each of these four concerns will be addressed in turn below.

Our first concern regarding the current Special Powers Regime is that there is no prohibition on questioning prior to the appearance of that lawyer. Whilst the prescribed authority may defer questioning, s 34ZP specifically states that a person may be questioned ‘in the absence of a lawyer of the person’s choice’.

One of the goals of the Bill is ostensibly to minimise the circumstances in which questioning in the absence of a lawyer will occur. The most significant amendment which it proposes in respect of a person’s access to legal representation relates to Questioning Warrants which contain an immediate appearance requirement. Under the current Special Powers Regime, a person who is required to immediately appear before a prescribed authority for questioning could be questioned prior to receiving legal advice or their lawyer arriving at the questioning facility. The mechanism proposed by the Bill for avoiding this situation is for a lawyer to be appointed for the subject of the Warrant pending the arrival of a lawyer of their choice. The problem with this proposal is that it is imperative that not only are lawyers *actually* independent and impartial, but also that they are *perceived* to be so. Where a person has been compelled to appear before a prescribed authority for questioning by intelligence officers, it is highly likely (and indeed understandable) that they will be suspicious of any lawyer appointed by that authority to represent them. Unless a lawyer has the confidence of their client, there is a risk that the subject of a Questioning Warrant will not disclose all of the relevant facts and, as a result, may receive inaccurate or incomplete advice. Our strong preference would therefore be, even in relation to Questioning Warrants that contain an immediate appearance requirement, that questioning be deferred for a reasonable period of time to allow the subject’s lawyer to arrive and provide initial advice. The Explanatory Memorandum rejects this possibility on the basis that ‘there would likely be a risk to security where questioning were deferred to enable them to arrange for a lawyer to be present’.⁴⁴ However, what this

⁴⁴ Explanatory Memorandum to the ASIO Amendment Bill 2020 (Cth) 85.

conclusion is based on is unclear. Deferring questioning does not seem to be problematic given that – when the subject’s lawyer of choice ultimately arrives – the prescribed authority is required to defer questioning for such time as it regards as reasonable to enable the appointed lawyer to brief the lawyer of choice, and for the latter to then provide advice to the subject of the Warrant.

Our second concern regarding the current Special Powers Regime is that the prescribed authority may prohibit a person from contacting a lawyer of their choice on national security grounds. Where this occurs, the subject of the Warrant may contact another lawyer, however, this person may again be prohibited (and so on). The proscribed authority may prohibit a person from contacting a specific lawyer of their choice if they are satisfied that: (a) a person involved in a terrorism offence may be alerted that the offence is being investigated; or (b) a record or thing that the person may be requested in accordance with the warrant to produce may be destroyed, damaged or altered. The right to a lawyer of one’s choosing is so fundamental that it should only be restricted or abrogated where there is extremely good reason to do so. The breadth of the criteria in (a) and (b), combined with the low bar that one of the circumstances ‘may’ eventuate, is insufficient to meet this threshold.

Unfortunately, the Bill does not propose any narrowing of the relevant criteria. In fact, it proposes a significant expansion of the criterion in (a) to cover circumstances where ‘a person involved in an *activity prejudicial to security* may be alerted that the *activity* is being investigated’ (emphasis added). In its submission to this Committee, ASIO gives the following example of when it may be appropriate to prevent a person subject to a Questioning Warrant from contacting a lawyer of their choice:

A particular lawyer is known to represent multiple persons involved in an ASIO security investigation, including the subject of the questioning warrant. ASIO has information to indicate the lawyer has previously shared information between his clients who are the subject of ASIO investigations.⁴⁵

We agree that it may be appropriate in these circumstances for the subject of the Warrant to be prohibited from contacting the relevant lawyer. However, far more tightly worded criteria, such as those set out by the Law Council of Australia in its submission to this Committee’s Review of ASIO’s Questioning and Detention Powers in 2017, would also achieve this purpose. Those criteria were as follows:

⁴⁵ Australian Security Intelligence Organisation, Submission to PJCS on ASIO Amendment Bill 2020 (Cth), 29 May 2020, 11.

- The lawyer is subject to the security intelligence investigation in question or an associated security intelligence investigation;
- [The prescribed authority] has reasonable grounds to suspect that:
 - The lawyer is working on behalf of a foreign power or an entity with intent prejudicial to Australia's security; or
 - There is a likely risk that the lawyer will advise other individuals of interest; or
 - There is a likely risk that a record or thing that the person may be requested in accordance with the summon to produce may be destroyed, damaged or altered.⁴⁶

It is notable that, in addition to preventing a person from contacting a lawyer of their choice on national security grounds, the Bill also proposes to restrict a person's ability to obtain alternative legal representation where they already have a lawyer and the prescribed authority considers they have had a reasonable opportunity to contact another lawyer. Given the complexity of the relevant law, the specific (and extremely narrow) field of expertise which a lawyer needs to have in order to provide meaningful advice, and the subject of the Warrant's likely lack of prior involvement with national security laws and agencies, it is easy to envisage an instance in which either the lawyer informs the subject that they are unable to assist or the latter realises that they require a different lawyer. However, the Bill again appears to prioritise the speed and efficiency of questioning over the subject of the Warrant's right to seek alternative legal representation. We believe that instead of preventing the subject from contacting another lawyer simply on the ground that they have already had 'reasonable opportunity to do so', the discretion of the prescribed authority should be limited to circumstances where it is likely that the person is trying to delay or manipulate the proceedings. This would still achieve the purpose explained in the Explanatory Memorandum that the subject of a Warrant 'is not able to disrupt questioning by making repeated requests to have a lawyer'.⁴⁷

Our third concern regarding the current Special Powers Regime is that the lawyer is limited to a largely passive role in the questioning process. They are not permitted to ask questions, cross-examine witnesses or intervene in questioning (other than to request clarification of an ambiguous question). If the lawyer's conduct 'unduly disrupts' the proceedings, the prescribed authority may even order their removal from the questioning room.⁴⁸ These provisions substantially reduce the lawyer's ability to play a meaningful role in the questioning

⁴⁶ Law Council of Australia, Submission to PJCS Review of ASIO Questioning and Detention Powers, 19 April 2017, 8-9.

⁴⁷ Explanatory Memorandum to the ASIO Amendment Bill 2020 (Cth) 83.

⁴⁸ This may be contrasted with the *ACC Act*, where it is an offence for a lawyer to hinder or disrupt the examination. However, the examination regime expressly provides for a person to be represented by a legal practitioner and prohibits the exclusion of the representative by direction of the examiner. The rationale for the approach in the Bill is explained in the Explanatory Memorandum: '[t]he ability to remove a lawyer for being unduly disruptive, and then replace that lawyer, ensures that the questioning is not frustrated and can continue in circumstances where it is being used to obtain critical and time sensitive national security information ... [T]he primary intention of this provisions [sic] is to prevent the

process. Many of the provisions in the current Special Powers Regime are replicated in the Bill, for example, the circumstances in which a lawyer may be removed. The Bill goes on to provide that, where this occurs, the subject of the Warrant may contact an alternative lawyer. However, if, after a reasonable period of time has elapsed, that person still fails to appear, the subject may then be questioned in the absence of a lawyer. This is problematic because it punishes the subject for the poor behaviour of their lawyer (whether to disrupt the proceedings, refusal to comply with the requests of officers prior to entry to the questioning facility,⁴⁹ or to appear at all) over which they have no control. The Bill also proposes a new provision allowing lawyers to intervene to request a break in the questioning in order to provide advice to the subject. Whilst this may be approved or refused at the discretion of the prescribed authority, it nevertheless represents a significant improvement in allowing the lawyer to play a meaningful role in the proceedings. It unfortunately remains the case that there is no opportunity for a lawyer to address the prescribed authority in relation to a request for questioning to be extended. Indeed, the Bill specifically provides that this request may be made in the absence of the subject of a Questioning Warrant and their lawyer.

The Bill also proposes to introduce a new section 34FE provides that a lawyer may request a copy of a Questioning Warrant and any variations which have been made. This is, however, subject to any deletions which the Director-General considers to be necessary to avoid prejudice to security, defence of the Commonwealth, the conduct of the Commonwealth's international affairs or the privacy of individuals. This applies not only to a lawyer chosen by the subject of the Warrant, but also includes an appointed lawyer. The Explanatory Memorandum states that '[i]t is appropriate to limit the lawyer's ability to see the entirety of these documents given the high likelihood that such documents will contain highly sensitive national security information'.⁵⁰ We appreciate that there may be circumstances in which it is necessary for the subject of a Questioning Warrant to be prevented from viewing the Warrant in its entirety. However, we are concerned about the potential for the Director-General to withhold materials from not only the subject of the Warrant

frustration of questioning in high risk situations' (90). The argument is problematised by the finding of the PJCAAD in November 2005 that 'it is not aware that the ACC has been frustrated in performing its function as a result of the recognition of the basic right to legal advice and representation': *ASIO's Questioning and Detention Powers* (2005) 48.

⁴⁹ The Bill proposes a new Subdivision D, which would contain a power for law enforcement officers to request to search any person (not simply the subject of the Warrant, and even lawyers) wishing to enter a questioning facility. This may include requesting that the person produce anything in their possession for inspection, for example, by taking off items of outer clothing, removing items from their pockets or producing items from baggage. Officers may request that a person answer reasonable questions about anything that is found in their possession or control during the screen procedure. If any dangerous item or communication device is found during the search, law enforcement officers may request to retain them for safekeeping whilst the questioning is being conducted. The purpose of these measures is to enforce the prohibition on possession by any person of communication devices and dangerous items whilst the subject is appearing for questioning. In contrast to the seizure of communication devices in other circumstances, such as where a search is conducted whilst a person is apprehended prior to questioning, it does not appear that there is any right for an officer to look at the contents of a device.

⁵⁰ Explanatory Memorandum to the ASIO Amendment Bill 2020 (Cth) 89.

but also their lawyer. If the Committee regards provisions of this type as necessary, we would urge it consider recommending a mechanism for review of the Director-General's decision to redact information (ideally by a judicial or other independent tribunal) and also permitting lawyers who hold a security clearance at the appropriate level to view the complete Warrant.

Our fourth, and final, concern is that the current Special Powers Regime does not give Questioning Warrant the right to communicate with their lawyer in private. Section 34ZV of the *ASIO Act* states that the law relating to legal professional privilege is unaffected. However, at the same time, all contact between the subject of a Questioning Warrant and their lawyer 'must be made in a way that can be monitored by a person exercising authority under the Warrant'. We are pleased to see that there is no equivalent provision in the Bill.

Our recommendations are as follows:

- K. Even where a Questioning Warrant contains an immediate appearance requirement, questioning should be deferred for a reasonable period of time to allow the subject's lawyer to arrive and provide initial advice. Only if that person fails to appear should a specified lawyer be appointed to represent the subject of the Warrant.
- L. Contact with a lawyer should only be prohibited where: (i) the lawyer is subject to the security intelligence investigation in question or an associated security intelligence investigation; (ii) the prescribed authority has reasonable grounds to suspect that the lawyer is working on behalf of a foreign power or an entity with intent prejudicial to Australia's security, there is a likely risk that the lawyer will advise other individuals of interest, or there is a likely risk that a record or thing that the person may be requested in accordance with the summon to produce may be destroyed, damaged or altered.
- M. The discretion of the prescribed authority to deny a request to contact an alternative lawyer should be limited to circumstances where it is likely that the person is trying to delay or manipulate the proceedings.
- N. The lawyer for the subject of a Questioning Warrant should be given an opportunity to address the prescribed authority in relation to a request for questioning to be extended (albeit that there may be circumstances in which they must be excluded from the submissions made by ASIO on national security grounds).

Application of the Special Powers Regime to minors

The concerns that we have already outlined in relation to the proposed amendments to Questioning Warrants for adults are magnified where vulnerable minors are involved. This is especially so in relation to the absence of an independent and impartial issuing authority, as well as the extension of Warrants beyond the

investigation of terrorism offences. The proposed extension of the umbrella subject-matter for minors is limited to politically motivated violence. Unlike adults, minors may not be questioned in relation to espionage or acts of foreign interference. Whilst this undoubtedly preferable, the expansion nevertheless represents a significant movement away from the original justification for allowing compulsory questioning of minors:

[T]he threshold at which they would be asked to come in would be raised. So only if they were suspected of an offence or engaged in an offence would they be called in. ... [I]t would not be for the purpose of adducing evidence for a prosecution of them for offences; it would still be with the intention of getting the evidence.⁵¹

In contrast, the Bill proposes that a minor may be questioned if the Attorney-General is satisfied that: (a) they are at least 14 years old; (b) there are reasonable grounds for believing that the person has likely engaged in, is likely engaged in, or is likely to engage in activities prejudicial to the protection of, and of the people of, the Commonwealth and the several States and Territories from politically motivated violence, whether directed from, or committed with, Australia or not; and (c) there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a minor questioning matter.

The most problematic aspect of the Bill insofar as minors are concerned is that it would lower the minimum age for a person subject to a Warrant from 16 to 14 years. Given the extraordinary nature of compulsory questioning in terms of its impact upon fundamental human rights, and the particular vulnerability of minors, this Committee should not support lowering the minimum age unless satisfied that it is both necessary and proportionate to the threat to national security. We appreciate that the amendment is in line with a trend of lowering the minimum age for civil orders in the national security context. For example, less than five years ago, the *Counter-Terrorism Legislation Amendment Act (No 1) 2016* (Cth) lowered the minimum age for control orders to 14 years. However, a line must be drawn somewhere. Otherwise, there is a very real risk that the minimum age will be lowered in respect of an ever-increasing range of orders, as well as younger and younger individuals. The latter is not merely a hypothetical possibility. One of the most controversial aspects of the ASIO Amendment Bill 2002 (Cth), when first introduced into the Commonwealth Parliament, was that it proposed that children of any age could be subjected to compulsory questioning.⁵²

⁵¹ Senate Legal and Constitutional Affairs Committee, Australian Parliament, *Committee Hansard*, 13 November 2002, 39.

⁵² Both the Senate Legal and Constitutional Affairs Committee and the Parliamentary Joint Committee on ASIO, ASIS and ASD recommended that the Special Powers Regime should not apply to minors. In response to these recommendations, the then Howard Government proposed to introduce a minimum age of 14 years. This proved to be a major sticking point in the passage of the Regime through the Commonwealth Parliament. Ultimately, on 11 June 2003, the Government agreed that the minimum age would be lifted to 16 years. This seems to have been a decision made on political rather than principled grounds.

If this Committee ultimately decides to support the proposal in the Bill, principled reasoning should be provided as to why 14 years (and nothing higher or lower) is the appropriate minimum age for compulsory questioning. Such reasoning – which has been missing to date – would provide an important point of reference if this issue arises again in the future. We note that it would be insufficient in such reasoning to rely simply upon consistency with the age of criminal responsibility in Australia, which is generally 14 years. Not only are there currently circumstances – that is, where the *doli incapax* rule has been rebutted – in which a person as young as ten may be held criminally responsible, but there is also a strong push both domestically and internationally towards increasing the age of criminal responsibility. In September 2019, the United Nations Committee on the Rights of the Child indicated that 15 or 16 years of age would be the ideal age for criminal responsibility.⁵³

In assessing whether an evidence-based case has been made for the need to lower the minimum age, the submission made to this Committee by the Department of Home Affairs refers to a number of cases in which minors were ‘involved in the planning and preparation of politically motivated violence in Australia’.⁵⁴ However, with only one exception, the minors involved in each of these cases were aged 16 years or above, and therefore would already have been caught by the Special Powers Regime. As a result, reference to these cases offers little support for the proposal to lower the minimum age even further. The only concrete example given by the Department is the shooting of Curtis Cheng by 15-year-old, Farhad Jabar, almost five years ago. Even assuming that the Department was able to point to a substantial number of cases involving minors aged 14 and 15 years (as opposed to instances in which they were merely at risk of radicalisation), this would still be insufficient in and of itself to justify lowering the minimum age. In order to determine whether there are compelling reasons for doing so, three questions would need to be considered. First, whether a Questioning Warrant, if available, would have been effective in significantly reducing the risk of a specific terrorist act by a minor under 16 years of age. Second, whether other measures were, or would have been, available to mitigate any risk of a terrorist attack occurring, whether those measures were taken and how far they were successful. It is relevant to both of these first two questions that in none of the cases referred to by the Department, and which involved a minor aged 16 or 17 years, was a Questioning Warrant sought by the Director-General of Security.

The third, and final, question is how great an impact a Questioning Warrant would have had on the rights of any minor concerned, and whether that would have been proportionate to the reduction of risk that might

⁵³ United Nations Committee on the Rights of the Child, ‘General Comment No 24 (2019) on Children’s Rights in the Child Justice System’, CRC/C/GC/24, 18 September 2019 [22].

⁵⁴ Department of Home Affairs, Submission to PJCIS on ASIO Amendment Bill 2020 (Cth), 25 May 2020, 21.

have been achieved. We are pleased to see the inclusion in the Bill of a requirement for the Attorney-General to consider the 'best interests' of a minor in making a decision whether to issue a Questioning Warrant (albeit that our strong preference, as indicated at various points throughout this submission, would be for this decision to be made by an independent and impartial issuing authority). It is also significant that the Director-General must provide all information which is known to them, and which is relevant to this consideration, to the Attorney-General when applying for a Warrant. There are, nevertheless, obvious limitations upon the ability of the Director-General to know all of the personal circumstances of a minor potentially subject to a Questioning Warrant and the impact that a Warrant is likely to have on them, especially where the warrant is being sought as a matter of urgency. It would therefore be preferable for an independent children's lawyer who holds a security clearance at the appropriate level to be appointed to gather evidence or, if the urgency of the investigation makes this impractical, for that lawyer to rely upon the evidence presented by the Director-General and make submissions to the Attorney-General as to what is in the best interests of the minor.

Whilst many of the other safeguards for minors contained in the current Special Powers Regime are replicated in the Bill, for example, the two hour limit upon questioning, we are concerned that it makes inroads into at least one of those safeguards. In its submission to this Committee's Review of ASIO's Questioning and Detention Powers in April 2017 justifying why the minimum age should be lowered, the Attorney-General's Department noted the special safeguards which applied to compulsory questioning of a minor. It noted that 'ASIO may only question a minor in the presence of a parent or guardian of that minor, and if this is not acceptable to the person, another person who is acceptable to the minor'.⁵⁵ Our reading of the Bill is that it makes it possible for a minor to be questioned in the presence of a lawyer alone. That is, without a parent, guardian or another non-legal representative.

The Bill clearly states that a minor must not be questioned in the absence of a lawyer and, unlike an adult, cannot elect to waive their right to legal representation. This means that where the Warrant contains an immediate appearance requirement or the minor's lawyer (assuming that they are practically able to contact one) fails to appear within a reasonable period of time, a specific lawyer will be appointed to represent them during the questioning. A minor may also request to have a parent, guardian or other non-legal representative attend the questioning with them. However, there are several circumstances spelt out in the Bill in which questioning may take place in the absence of that person. First, where they are excluded on similar grounds to those discussed in relation to lawyers representing adult subjects (for example, where contact is prohibited

⁵⁵ Attorney-General's Department, Submission to PJCS Review of ASIO Questioning and Detention Powers, April 2017, 22.

or they unduly disrupt the questioning). Second, where the Warrant contains an immediate appearance requirement and questioning commences prior to their arrival. Finally, where the parent, guardian or other non-legal representative does not appear within a reasonable time. In such circumstances, the minor's lawyer or appointed lawyer will also act as their non-legal representative. The practical consequence of this framework is that a minor may be questioned by ASIO officers in an intimidating setting before a prescribed authority without having any familiar support with them.

Our recommendations are as follows:

- O. The Special Powers Regime should be amended such that it applies only to adults.
- P. In the alternative, the minimum age should not be lowered to 14 years. It should remain as 16 years of age.
- Q. Further, and in the alternative, the decision whether to issue a Questioning Warrant generally, or at least in relation to minors, should be made by an independent and impartial issuing authority.
- R. Finally, regardless of whether the decision is vested in an issuing authority or the Attorney-General, an independent children's lawyer should be appointed to gather evidence or, if the urgency of the case makes this impractical, to rely upon the evidence presented by the Director-General and make submissions as to the best interests of the minor.
- S. A minor should never be questioned in the absence of a parent, guardian or other non-legal representative.

Apprehension

Replacing Detention Warrants with a more limited apprehension regime

We commend the Government for its decision to repeal Detention Warrants. Under the current Special Powers Regime, an issuing authority may issue a Warrant for the detention of a person for up to seven days for the purpose of questioning. This period starts when the person is brought before the prescribed authority, which the Regime requires to be 'immediate'. Whilst the proposed change in terminology from 'detention' to 'apprehension' is, in our view, simply a matter of semantics, the Bill does make two amendments which arguably render apprehension under the new regime more proportionate to the threat posed to national security.

First, only where a Questioning Warrant contains an immediate appearance requirement may the subject of the Warrant be apprehended. Before turning to the operation of this amendment, we note that we are

uncertain as to the rationale for limiting the scope of apprehension in this way. For example, if a person who was due to be questioned the following day posted a video online to the effect that they were about to abscond, it would be nonsensical to require law enforcement officers to simply stand by. If the recommendations we make below – that is, those in relation to the identity of the decision-maker and the criteria upon which the decision to apprehend – were included in the Bill, we would be supportive of the possibility of apprehension applying to all Questioning Warrants (and not just simply those with an immediate appearance requirement). This is consistent with the findings of the former INSLM, Walker, that an independent authority should be able ‘to authorize detention [either at the time of or] after service but before the stipulated time for attendance in cases where that necessity appears from the circumstances including the person’s own words and conduct’.⁵⁶

In theory, limiting apprehension to Questioning Warrants containing an immediate appearance requirement is a significant limitation on the circumstances in which a person may be detained. However, whether that is the case in practice depends upon how often and in what circumstances an immediate appearance requirement is attached to Questioning Warrants. This depends, in turn, upon the – largely unfettered – discretion of the Attorney-General. The Bill merely states that a Questioning Warrant may include an immediate appearance requirement ‘if the Attorney-General is satisfied that it is reasonable and necessary in the circumstances’. The breadth and vagueness of these criteria means that judicial review – to the very limited extent that it is available for decisions made under the *ASIO Act* – is extremely unlikely to be successful. It is informative to compare these criteria with those which apply before the New South Wales Crime Commission. A summons requiring the immediate appearance of a person may only be issued if the Commissioner or an Assistant Commissioner believes on reasonable grounds that delay in attendance might result in the commission of an offence, the escape of the offender, the loss or destruction of evidence or serious prejudice to the conduct of an investigation.

Second, in contrast to the lengthy period of detention under the current Special Powers Regime, the power to detain a person ‘ends when the subject appears before a prescribed authority for questioning under the warrant’. Whilst this amendment is welcomed, it should not be assumed that no person will ever have their liberty constrained for a lengthy period of time. We draw this Committee’s attention to the potential for a person to be apprehended on multiple occasions, either where a series of Questioning Warrants is issued or where a Warrant is varied.

⁵⁶ Independent National Security Legislation Monitor, *2012 Annual Report* (2013) 106.

Apprehension regime goes beyond what is necessary and proportionate

In Australia, detention by, or at the request of, the executive is the exception – not the rule. It should only be permitted where it is supported by principled reasoning and concrete evidence. There will undoubtedly be some circumstances, for example, where a person fails to appear before a prescribed authority for questioning at the required time, in which apprehension is required in order that a Questioning Warrant can be executed. However, the critical issue is whether the Bill confines detention to those circumstances where it is necessary and proportionate to the threat to national security. There are two aspects of the apprehension regime about which we are concerned.

1. Criteria for apprehension are overly broad

We have consistently expressed opposition to the breadth, and pre-emptive nature, of the criteria for issuing a Detention Warrant under the current Special Powers Regime. The Attorney-General (but, as will be discussed below, not the issuing authority) must only consent to an application for a Detention Warrant if satisfied that there are reasonable grounds for believing that the person may: (a) alert a person involved in a terrorism offence that the offence is being investigated; (b) not appear before the prescribed authority; or (c) destroy, damage or alter a record or thing that they have been ordered to produce. The Bill proposes to substantially retain these criteria as the basis for authorising detention under a Questioning Warrant, with the sole (albeit significant) change being that the reference to a ‘terrorism offence’ would be replaced with the broader concept of an ‘adult questioning matter’.

The basic issue is whether these criteria are sufficiently narrow to confine detention to those circumstances where it is necessary and proportionate to the threat to national security. We agree with the conclusion reached by the former INSLM, Walker, in his 2012 Annual Report that the criteria are overly broad. Walker stated that:

[I]n the nature of things and in the circumstances of counter-terrorism powers, these are not overly demanding prerequisites ... they are inappropriately slight as prerequisites for the exercise of such a drastic power.⁵⁷

Walker pointed out that there are considerable similarities between the criteria which apply to Detention Warrants and those which permit rejection of a person’s choice of lawyer (which have already been discussed

⁵⁷ Independent National Security Legislation Monitor, *2012 Annual Report* (2013) 101.

earlier in this submission), and yet '[t]here is a gulf between another lawyer needing to be chosen and an individual being detained. What does appear reasonable in the case of a choice of lawyers has quite a different appearance in the case of a person to be questioned'.⁵⁸ He noted that 'only one of the three possibilities [needs] to appear by way of reasonable grounds',⁵⁹ and criterion (b), in particular, represented a very low threshold. The risk of non-appearance 'may well literally be true of everyone, in the sense that the failure to answer subpoenas or summonses in ordinary court proceedings is an everyday occurrence'.⁶⁰ Even the first and third criteria 'may not provide a very high bar to be cleared' because

In the nature of things, a person in relation to whom there are reasonable grounds for believing that questioning will substantially assist the collection of intelligence that is important in relation to a terrorism offence is usually going to be a person who can provide evidence or assist in its collection, and in turn that means he or she will often know another person or other people of interest to ASIO. It does not take much imagination to see a straightforward link – providing the requisite reasonable grounds – for regarding any such person as a candidate for detention and not just questioning.⁶¹

We acknowledge that the Bill does propose one substantive change to the criteria. This is to change the connection between the person and any of the activities in (a) to (c) from 'may' (under the current Special Powers Regime) to 'likely'. Whilst this goes some way towards addressing our concerns about the breadth of the criteria, it does not ameliorate them altogether (especially in light of the concurrent proposal to give the decision-making power to the Attorney-General alone).

2. *The decision to apprehend should be made by an independent and impartial authority*

Earlier in this submission, we discussed the distinction which the current Special Powers Regime draws between the decision-maker for the purposes of the two issuing criteria for Questioning Warrants. Issuing criteria (a) and (b) are considered by the Attorney-General in determining whether to consent to an application for a questioning warrant being made. However, only criterion (a) is considered by the issuing authority. A similar distinction may be found in the current Special Powers Regime insofar as Detention Warrants are concerned. The issuing authority only considers the equivalent of criterion (a). It is for the Attorney-General alone to determine whether an application for a Detention Warrant is justified because there are reasonable grounds for believing that any of the activities in (a) to (c) may be engaged in. Again, earlier in this submission,

⁵⁸ Independent National Security Legislation Monitor, *2011 Annual Report* (2012) 34.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

we set out several reasons why it is imperative that an independent and impartial issuing authority be involved in the decision-making process and, furthermore, be required to consider all of the criteria. This is especially important where it is not only the right to silence which is burdened, but also the freedom of movement and the right to liberty (even if only for a relatively short period).

Unfortunately, the Bill goes in the opposite direction by vesting the power to authorise detention for the purposes of compulsory questioning in the hands of the Attorney-General alone. This is not only contrary to our recommendations, but also to those made by Walker. He noted that they are matters ‘traditionally and best determined by an impartial judicial officer rather than by an officer of the executive government that is seeking the person’s detention’.⁶²

Another respect in which the apprehension regime is significantly broader than the current Special Powers Regime is that it leaves it open to a law enforcement officer – without any prior authorisation – to apprehend a person. At the time that the subject of the Questioning Warrant is made aware of the immediate appearance requirement, they may be apprehended if they make a representation that they will: (a) alert a person involved in an activity prejudicial to security that it is being investigated; (b) not appear; or (c) destroy, damage or alter a thing they have been ordered to produce. This representation may be express or implied, or even inferred from their conduct. We regard it as highly problematic to give a power of apprehension to a law enforcement officer in circumstances where they are merely predicting on the basis of extremely limited evidence what a person might do. The Department of Home Affairs’ submission to this Committee gives an example of when an officer might need to apprehend a person: ‘While still in the presence of the police officer, the subject may begin taking steps to destroy those documents’.⁶³ This example does not involve any significant level of prediction, however, at the same time, it is also unclear why, in such circumstances, the officer could not simply arrest a person for breaching their obligations under the Questioning Warrant to which they are subject. In other words, no amendment to the Special Powers Regime is required to authorise apprehension.

The proposal to allow apprehension by a law enforcement officer seems to be modelled on the legislation pertaining to the New South Wales Crime Commission. There are, however, two critical points of difference. The first is that it is the Commissioner (and not an individual law enforcement officer) who decides whether a warrant for a person’s arrest should be issued. This is undoubtedly a preferable approach. Indeed, this approach was supported by the Attorney-General’s Department in its submission to this Committee’s Review of ASIO’s Questioning and Detention Powers in April 2017. The Department stated that ‘it is preferable that

⁶² Ibid.

⁶³ Department of Home Affairs, Submission to PJCIS on ASIO Amendment Bill 2020 (Cth), 25 May 2020, 19.

powers of arrest be exercised under warrant wherever possible. The power of arrest involves a range of significant interferences with fundamental rights, including the rights to liberty, privacy, and freedom of movement.⁶⁴ The second point of difference is that it is not sufficient that a person makes a representation (evidence of which is provided on oath or affirmation), but also that 'it is in the public interest that the person be compelled to [appear] to avoid serious prejudice to the conduct of an investigation'.

Our recommendations are as follows:

- T. The decision whether to issue a Questioning Warrant, including whether it should contain an immediate appearance requirement, should be made by an independent and impartial issuing authority.
- U. Clear and reviewable criteria should be provided as to the circumstances in which an immediate appearance requirement is appropriate.
- V. The decision whether to authorise detention of a person subject to a Questioning Warrant which contains an immediate appearance requirement should be made by an independent and impartial issuing authority.
- W. Detention should only be authorised in extraordinary circumstances. Section 31 of the *ACC Act* provides some useful guidance in this regard. A warrant for the arrest of a witness may only be issued where there are reasonable grounds to believe that a person: (a) is likely to leave Australia for the purpose of avoiding giving evidence; (b) has absconded or is likely to abscond; (c) is otherwise attempting, or is otherwise likely to attempt, to evade service of the summons; or (d) has committed an offence (or is likely to do so) by failing to attend as required by the summons.

⁶⁴ Attorney-General's Department, Submission to PJCIS Review of ASIO Questioning and Detention Powers, April 2017, 15.