



Australian Government
Department of Home Affairs

Submission to the Parliamentary Joint Committee of Intelligence and Security's Review of the Australian Security Intelligence Organisation Amendment Bill 2020

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1. Introduction

The Department of Home Affairs (the **Department**) welcomes the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security's (the **Committee**) review of the Australian Security Intelligence Organisation Amendment Bill 2020 (the **Bill**).¹ The Australian Security Intelligence Organisation (**ASIO**) has contributed to this submission and will make a separate submission to the review

ASIO is facing a wider range of security challenges than at any time in its 70 year history. To improve ASIO's capacity to respond to the current threat environment, the Bill would modernise ASIO's powers by:

- repealing ASIO's current questioning and detention regime set out in Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (**ASIO Act**)
- introducing a reformed compulsory questioning framework for ASIO, and
- amending ASIO's tracking device framework to support operational agility, mitigate risk to ASIO's surveillance operatives, and resolve the current disadvantage faced by ASIO when engaging in joint operations with law enforcement.

The Department is responsible for administering the ASIO Act, and worked closely with ASIO throughout the development of the Bill to ensure the reforms are responsive to ASIO's operational needs and the rapidly evolving security environment. The Department consulted with the Attorney-General's Department (**AGD**), the Australian Federal Police (**AFP**), the Department of the Prime Minister and Cabinet (**PM&C**) the Department of Finance, the Australian Criminal Intelligence Commission, the Department of Defence, the Treasury, and the Department of Foreign Affairs and Trade throughout the development of these reforms. Noting the Inspector-General of Intelligence and Security's (**IGIS**) special role, the Department consulted extensively with IGIS to ensure these reforms have the level of robust oversight that the Australian community should expect of ASIO's most intrusive powers.

This submission provides an overview of the reformed compulsory questioning framework and tracking device amendments proposed in the Bill. This submission also explains the extent to which the proposed questioning reforms align with the recommendations and commentary of the Committee's 2018 report.²

2. Compulsory questioning framework

2.1. Background and context

ASIO exists to protect Australia and Australians from violent, clandestine and deceptive efforts to harm its people and undermine its sovereignty. ASIO's primary role is to collect and assess

¹ Unless otherwise indicated, in this submission clause references to the Bill refer to proposed amendments to the *Australian Security Intelligence Organisation Act 1979*, rather than to other acts being amended by the Bill.

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

intelligence to advise the Government about threats to Australia's security. ASIO's current questioning warrant powers were introduced 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 in Bali on 12 October 2002.

The powers have been the subject of several independent reviews since their enactment, including:

- the Parliamentary Joint Committee on ASIO, ASIS and DSD (**PJCAAD**)³
- two separate reviews, by former Independent National Security Legislation Monitors Mr Bret Walker SC⁴ and the Hon Roger Gyles AO QC,⁵ and
- the Parliamentary Joint Committee on Human Rights in the context of its review of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.⁶

Two Independent National Security Legislation Monitors (**INSLM**), Bret Walker SC and the Hon Roger Gyles AO QC, supported the retention of a compulsory questioning power for ASIO.⁷ While each recommended amendments to the legislative framework, including the repeal of ASIO's existing detention power, both acknowledged that compulsory questioning is an effective and appropriate intelligence collection tool in relation to terrorism.

In 2017, the Committee commenced a review of the operation, effectiveness and implications of ASIO's questioning and detention powers set out in Division 3 of Part III of the ASIO Act. The Committee's 2018 report recommended that:

- ASIO retain a compulsory questioning power
- ASIO's current detention powers be repealed
- legislation for a reformed compulsory questioning framework be introduced by the end of 2018 and include an appropriate sunset clause, and
- the sunset date of 7 September 2018 be extended by 12 months to allow sufficient time for legislation to be developed and reviewed.⁸

The Government tabled its response to the Committee's report on 3 April 2019.⁹ The Government accepted the Committee's first recommendation, and accepted in-principle the Committee's second and third recommendations. The Committee's fourth recommendation was implemented by the *Counter-Terrorism Legislation Amendment Act (No. 1) 2018*, which extended the operation of the Australian Security Intelligence Organisation's questioning and detention powers by 12 months to 7 September 2019.

The *Australian Security Intelligence Organisation Amendment (Sunsetting of Special Powers Relating to Terrorism Offences) Act 2019* further extended ASIO's current questioning and

³ Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002* (2002), Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *ASIO's Questioning and Detention Powers*, (2005).

⁴ Bret Walker SC, *Declassified Annual Report 20th December 2012* (Commonwealth of Australia, 2012).

⁵ The Hon Roger Gyles AO QC, *Certain Questioning and Detention Powers in Relation to Terrorism* (Commonwealth of Australia, 2016).

⁶ Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament*, (2014).

⁷ See, Walker, (n 5), 61–87 and Gyles, (n 6), 43.

⁸ Committee's 2018 Report, (n 3), xi.

⁹ Parliament of Australia, Australian Government response to the Parliamentary Joint Committee on Intelligence and Security report ASIO's questioning and detention powers, *Government Response*, (Web Page)

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIO/Government_Response.

detention powers to 7 September 2020, to provide adequate time to develop and progress the Bill, and facilitate review by the Committee.

2.1.1. Summary of the proposals

In accordance with the Committee's recommendations, the Bill amends ASIO's compulsory questioning framework to retain a questioning power for ASIO. The Department used the key findings from the Committee's review to develop these reforms.¹⁰ While the reforms are largely consistent with the Committee's findings, elements of the reformed framework deviate to ensure the proposed powers are effective in the current security environment, and to support the unique functions and operational requirements of ASIO.

As described in more detail later in this submission, the Bill amends ASIO's existing powers in Division 3 of Part III of the ASIO Act by:

- repealing ASIO's existing detention power and introducing an alternative apprehension power to ensure attendance at questioning, prevent the tipping off others or the destruction of security relevant records or other things. Unlike the detention power, once a subject has been brought to the place where they will be questioned, the apprehension power does not permit ASIO to detain the subject and they are free to leave (although there are separate offences for refusing to comply with a warrant).
- enabling the use of adult questioning warrants in relation to threats from espionage, politically motivated violence, and acts of foreign interference – not just in relation to terrorism offences
- removing the current issuing authority role (a judge issuing the warrant acting in a personal capacity) and consistent with ASIO's other warrants, enabling the Attorney-General to issue, vary or revoke questioning warrants and authorise apprehension
- enabling the Director-General of Security to orally request, and the Attorney-General to orally authorise, questioning warrants (including apprehension) in certain circumstances
- enabling searches and the seizure of items found on the subject of a questioning warrant to ensure the safety of those involved in questioning and ensure the integrity of questioning
- amending the eligibility requirements and introducing additional measures to ensure the independence of those appointed as a prescribed authority to supervise the execution of a questioning warrant
- lowering the minimum age of questioning from 16 to 14 years of age where the minor is the target of an investigation in relation to politically motivated violence, subject to strong safeguards
- enabling the execution of a questioning warrant following the laying of charges against the subject, or where charges are imminent, with strong safeguards to protect the subject's right to a fair trial, and
- strengthening the right to legal representation, with appropriate limitations to protect information disclosed during questioning and prevent undue delay.

¹⁰ Committee's 2018 Report, (n 3), 41 [2.70].

The Bill retains provisions in the current framework in relation to secrecy, and existing accountability and safeguard mechanisms, including oversight by the IGIS.

These proposals are analysed in further detail against the findings of the Committee below.

2.1.2. Why the questioning powers are necessary

While the threat environment in Australia has evolved significantly since the introduction of the powers in 2003, the threat from terrorism remains unacceptably high. In addition to the threat from terrorism, Australia is currently the target of sophisticated and persistent espionage and foreign interference activities from a range of nations. This threat, which targets Australia's universities, government officials, media institutions and parliament, is unprecedented, and has been described by the Director-General of Security as greater now than at the height of the Cold War.¹¹

The general terrorism threat level for Australia remains at **PROBABLE**—credible intelligence, assessed to represent a plausible scenario, indicates an intention and capability to conduct a terrorist attack in Australia.

The threat of terrorism in Australia is likely to remain elevated for the foreseeable future. A variety of factors influence the security environment including offshore groups, aspirational and prevented travellers to conflict zones, and possible returnees from Syria and Iraq. ASIO's role in countering terrorism remains critical.

Within this complex and elevated security environment, it is important that ASIO has a range of investigative and operational tools, including legislated powers, that it is able to deploy quickly and safely when required to protect Australia and Australians from terrorism.

Foreign interference is an enduring and increasingly complex feature of the security landscape in Australia. ASIO investigations have identified foreign interference operations directed at decision-makers in government and industry, the media and members of diaspora communities.

Australia continues to be a target of espionage and foreign interference—activities that can harm Australia's interests by undermining its national security and sovereignty; damaging its reputation and relationships; degrading its diplomatic and trade relations; inflicting substantial economic damage; compromising nationally vital assets, defence capabilities and critical infrastructure; and threatening the safety of Australians.

This Bill introduces necessary and proportionate reforms to the existing questioning warrant framework in Division 3 of Part III of the ASIO Act to optimise the powers for the current security environment and ensure ASIO may utilise these powers to protect Australians from the most serious threats to security.

2.1.3. Balancing the need for compulsory questioning powers against civil liberties

The Department of Home Affairs and ASIO understand the extraordinary nature of these powers. Finding an appropriate balance between protecting Australians from serious threats to security and protecting civil liberties was central in developing the Bill. Consistent with the Committee's findings,¹² the Bill includes all of the safeguards and oversight mechanisms included in the existing

¹¹ <https://www.asio.gov.au/director-generals-annual-threat-assessment.html> [Accessed 21 May 2020 at 19:17].

¹² Committee's 2018 Report, (n 3), 84 [3.177].

questioning and detention warrant framework. In addition to this, the Bill removes the ability for a subject to be detained, resulting in greater protection for civil liberties.

The Bill engages a number of human rights, including the right of the child to have their best interests as a primary consideration, the right to freedom from arbitrary detention and the right to protection against arbitrary and unlawful interferences with privacy. Where these rights have been positively engaged, the Department has ensured that proportionality has been carefully considered and appropriate safeguards and oversight mechanisms are included. The Department also consulted with the Attorney-General's Department, including the Office of International Law to ensure the Bill complies with Australia's international and human rights obligations.

Removing the detention power

The Bill proposes to remove ASIO's detention power, and replace it with a more limited power to apprehend. The apprehension framework is limited to ensuring that individuals are brought to the place of questioning – after which they are free to leave (subject to potentially committing offences for failing to comply with the warrant). The removal of the detention power recognises the need to balance ASIO's questioning powers with civil liberties more generally. For further information, please see sections 2.2.5 and 2.2.7 of this submission.

Why is it necessary to question minors and how are they protected?

The Bill will enable the Attorney-General to issue a questioning warrant in relation to minors aged 14 years old and above, only where they themselves are the subject of an investigation concerning politically motivated violence. These powers are necessary to address the threat posed by minors involved in politically motivated violence, as illustrated by the 2015 shooting of a New South Wales Police Force employee by a 15 year old. There are other examples which illustrate the need for these powers – please see section 2.2.6.

These warrants are limited to minors who are the target of an investigation in relation to politically motivated violence. In addition to this, the Attorney-General must consider the best interests of the minor before issuing a minor questioning warrant. Further safeguards in relation to the questioning of a minor include that a minor may only be questioned under the warrant in the presence of a lawyer¹³, the ability for a parent or guardian or other suitable support person to be present during questioning¹⁴ and the questioning of a minor may only occur for continuous periods of 2 hours or less, separated by breaks directed by the prescribed authority.¹⁵

As a result of the legislative thresholds and safeguards built into the proposed legislation,¹⁶ the Department and ASIO expect that minors will only be questioned in exceptional circumstances.

For further information, please see sections 2.2.6, 2.2.7 and 2.2.8.

Why is it necessary to exclude particular lawyers in some circumstances?

Under the existing questioning and detention warrant framework, a person may be questioned in the absence of a lawyer¹⁷ and ASIO has the ability to monitor contact between the subject of the

¹³Australian Security Intelligence Organisation Amendment Bill 2020 cl 34FA(1) 34BD(2)(a).

¹⁴Ibid cl 34BD(2)(a).

¹⁵Ibid cl 34BD(2)(b).

¹⁶Ibid cl 34BB.

¹⁷Australian Security Intelligence Organisation Act 1979, s 34ZP.

warrant and their lawyer.¹⁸ In contrast, the Bill provides that the subject of a questioning warrant may only be questioned in the absence of a lawyer where the subject voluntarily chooses to do so, or in limited circumstances, subject to a direction of the prescribed authority.¹⁹ The Bill also removes the ability for ASIO to monitor contact with the subject's lawyer. A minor must not be questioned under a questioning warrant in the absence of a lawyer.²⁰

The Bill provides the prescribed authority with an ability to restrict the subject's contact with a *particular* lawyer in limited circumstances.²¹ This is designed to prevent questioning subjects from deliberately frustrating the questioning process, for example by insisting on engaging a lawyer who is not available at the relevant time, or seeking to engage a lawyer where contact with that lawyer may cause a person to be alerted to ASIO investigation; or security relevant records or things to be destroyed, damaged or altered. These provisions are not designed to prevent a subject from access to legal advice, and the legislation includes a number of mechanisms to maximise a subject's opportunity to obtain legal advice. Please see section 2.2.9 for further information.

Why is it appropriate for the Attorney-General to issue a questioning warrant and not an issuing authority?

Under ASIO's existing questioning and detention powers, a warrant can only be issued by an issuing authority (a judge acting in their personal capacity) after the Attorney-General's consent is received. Under the proposed new framework, there will be no issuing authority and the Attorney-General may issue warrants directly. This streamlined warrant issuing process is designed to ensure the efficient and timely execution of questioning warrants, particularly where there is an imminent threat to public safety. As noted in section 2.2.3, this approach involves a higher level of authorisation than other comparable domestic compulsory questioning regimes, is consistent with the authorisation of ASIO's other special powers, and was supported by the Committee.²²

How does the Bill prevent misuse or abuse of the powers?

The proposed questioning warrant legislative threshold is one of the highest legislative thresholds associated with ASIO warrants. Under the new framework, an adult questioning warrant cannot be issued unless the Attorney-General is satisfied that there are reasonable grounds for believing that a questioning warrant will substantially assist in the collection of intelligence that is important in relation to matter that relates to the protection of, and of the people of, the Commonwealth, States and Territories from any of the following, whether directed from, or committed within, Australia or not:

- espionage
- politically motivated violence, or
- acts of foreign interference.

Unlike ASIO's other warranted powers, a questioning warrant may only be sought in relation to three heads of security, as defined in section 4 of the ASIO Act. This is reflective of the significant threat posed to Australia's security by these activities. The Attorney-General is also required to be

¹⁸ Australian Security Intelligence Organisation Amendment Bill 2020 s 34ZQ(2).

¹⁹ Ibid cl 34FA.

²⁰ Ibid cl 34FA(1).

²¹ Ibid cl 34F(4).

²² Committee's 2018 Report, (n 3), 77 [3.122] – [3.123].

satisfied that it is reasonable in all the circumstances for the warrant to be issued, and in doing so the Attorney-General must have regard to other methods of collecting the intelligence that are likely to be as effective.²³ Other methods of collecting the intelligence may include ASIO's other warranted powers.

Additional protections are provided to those who have been, or are about to be charged with an offence, or in relation to whom a confiscation proceeding has or is about to commence. In these circumstances, the Attorney-General must also be satisfied that the issuing of the warrant is necessary for the purposes of collecting the intelligence. There are a number of provisions which ensure that the information provided by the subject cannot be used against them in a criminal proceeding related to the questioning.

Other safeguards in the framework include:

- offences for anyone exercising authority under the warrant for contravening safeguards, including police and ASIO officers²⁴, and
- the ability to make complaints in relation to the misuse of powers under the warrant. This includes for contravening the written statement of procedures and existing complaint mechanisms through the Ombudsman and the Inspector-General of Intelligence and Security or other relevant complaints agency.²⁵

Safeguards built into other instruments

In addition to the safeguards included in the Bill, ASIO is also required to comply with the guidelines given by the Attorney-General to the Director-General under section 8A of the ASIO Act (the **Attorney-General's Guidelines**).²⁶

Before requesting a questioning warrant, ASIO considers the application of the Attorney-General's Guidelines. They require ASIO, in the conduct of its inquiries and investigations, to ensure that:

- the means used to obtain information are proportionate to the gravity of the threat posed and the probability of its occurrence
- the more intrusive the investigation technique, the higher the level of officer required to approve its use
- wherever possible, the least intrusive techniques of information collection should be used before more intrusive techniques, and
- ASIO should conduct inquiries and investigations into individuals and groups:
 - with as little intrusion into individual privacy as is possible consistent with the performance of its functions, and
 - with due regard for the cultural values and sensitivities of individuals of particular cultural or racial backgrounds, consistent with the national interest.²⁷

²³ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34BA(1)(c).

²⁴ Ibid cl 34GE.

²⁵ Ibid cl 34H.

²⁶ Attorney-General's Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its function of obtaining, correlating, evaluating and communicating intelligence relevant to security (including politically motivated violence ('*The Attorney-General's Guidelines*')).

²⁷ The Attorney-General's Guidelines, (n 41), 10.4.

In addition, the *Inspector-General of Intelligence and Security Act 1986 (IGIS Act)* authorises the IGIS to inquire into any matter relating to compliance by ASIO with laws of the Commonwealth, the States and Territories or with ministerial directions or guidelines. The IGIS may also enquire into the propriety of ASIO's actions and the effectiveness and appropriateness of procedures relating to legality or propriety. The IGIS has significant powers to compulsorily obtain information and documents and enter premises, as well as obligations to provide procedural fairness and reporting obligations. Sections 9A and 19B of the IGIS Act further provide that the IGIS may enter any place where a person is being questioned or apprehended in relation to a questioning warrant at any reasonable time.

2.2. The reformed framework

2.2.1. Scope of questioning

Committee findings

In its 2018 report, the Committee noted that ASIO's current questioning and detention powers were introduced as an emergency response to the heightened threat from terrorism during the aftermath of 11 September 2001.²⁸ The Committee further noted the emerging threat from espionage and foreign interference, concluding that broadening the scope of ASIO's questioning power may be considered by Government in the development of an amended compulsory questioning framework.²⁹

Proposal contained in the Bill

The Bill will expand the scope of a questioning warrant from terrorism offences to politically motivated violence (which includes terrorism), espionage and foreign interference.³⁰ The Bill provides for a more limited scope in relation to minors, limiting the availability of a minor questioning warrant to investigations in relation to politically motivated violence only.³¹

Note: Separate legislative requirements apply in relation to minor questioning warrants.³² These are discussed in section 2.2.6 below under the heading 'Questioning of minors'.

The change from terrorism offences to politically motivated violence

ASIO's current questioning and detention warrant powers may only be utilised for the collection of intelligence that is important in relation to a terrorism offence. The connection to an offence has proven problematic when viewed in the context of ASIO's security intelligence function that focusses on activities that, while relevant to security, may not necessarily amount to a criminal offence.

The definition of politically motivated violence in section 4 of the ASIO Act includes:

- 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

²⁸ Committee's 2018 Report (n 3), 76 [3.125].

²⁹ Ibid (n 3), 76 [3.127-3.128].

³⁰ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34BA. See also, the definition of 'adult questioning matter' at cl 34A.

³¹ Ibid cl 34BB. See also the definition of 'minor questioning matter' at cl 34A.

³² Ibid cl 34BB.

purpose of influencing the policy or acts of a government, whether in Australia or elsewhere, or

- acts that:
 - involve violence or are intended or are likely to involve or lead to violence (whether by the persons who carry on those acts or by other persons), and
 - are directed to overthrowing or destroying, or assisting in the overthrow or destruction of, the government or the constitutional system of government of the Commonwealth or of a State or Territory, or
- acts that are terrorism offences — (offences punishable under Subdivision A of Division 72, or Part 5.3 of the Criminal Code Act 1995 (the **Criminal Code**),

in addition to a number of specific offences and acts that threaten specified persons or classes of persons.

Limiting the use of ASIO's questioning power to acts that constitute a terrorism offence³³, has the unintended consequence of limiting ASIO's ability to question someone when conducting very preliminary investigations in relation to individuals who may be engaging preparatory acts of politically motivated violence outside of Subdivision A of Division 72 or Part 5.3 of the Criminal Code or where existing intelligence indicates the individual may not yet be at the threshold of a criminal offence. This creates a critical gap in ASIO's ability to gather intelligence on activities that may be prejudicial to security.

Questioning warrants for espionage and foreign interference

The focus on terrorism offences also precludes the use of the powers in relation to other serious threats within ASIO's remit, such as espionage and acts of foreign interference. While the threat from terrorism remains unacceptably high, hostile espionage and foreign intelligence activities are occurring on an unprecedented scale and pose an increasing threat to our nation and its security. ASIO's inability to use its compulsory questioning powers against persons suspected of being involved in espionage or acts of foreign interference is a serious gap in the powers available to safeguard Australia's national security.

Broadening the scope of the powers will ensure that questioning warrants may be used where appropriate to investigate those threats that pose the greatest potential harm to Australians and Australian interests. Removing the existing link to a criminal offence better aligns the powers with ASIO's functions as an intelligence agency. ASIO's investigations focus on anticipating threats to security, often before it is possible to identify 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.

2.2.2. Legislative threshold

Committee findings

Due to the intrusive and extraordinary nature of a questioning warrant, the Committee noted that the powers should not be readily accessible, and should continue to be used in a judicious and

³³ Australian Security Intelligence Organisation Act 1979, section 4, *terrorism offence*.

sparing manner. Accordingly, the Committee found that the legislative threshold should not be reduced.³⁴

Proposal contained in the Bill

Adult Questioning Warrants

Under the proposed framework, the Attorney-General may issue an adult questioning warrant if satisfied that:

- the person is at least 18 years old, and
- there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to an adult questioning matter,¹ and
- having regard to other methods, if any, of collecting intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued, and
- if the warrant is a post charge, or post confiscation application, questioning warrant—it is necessary, for the purposes of collecting the intelligence, for the warrant to be issued even though: the person has been charged or the confiscation proceeding has commenced; or that charge or proceeding is imminent, and
- there is in force a written statement of procedures to be followed in the exercise of authority under a questioning warrant.³⁵

Note: Separate legislative requirements apply in relation to minor questioning warrants.³⁶ These are discussed in section 2.2.6 below under the heading 'Questioning of minors'.

Under the existing framework, the Attorney-General may consent to the making of a request for a questioning warrant if satisfied that 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.³⁷ To that extent, the existing threshold is maintained in the new framework proposed in the Bill.

The new framework will enable the Director-General to seek a questioning warrant in relation to politically motivated violence, espionage and foreign interference, rather than just terrorism offences. Despite this, the new framework does not lower the legislative requirements that must be satisfied in order to obtain a warrant. This is consistent with the Committee's findings,³⁸ that the legislative threshold should not be reduced, to ensure the powers continue to be used in a sparing manner.

The new framework imposes a higher threshold where the warrant is a post-charge, or post-confiscation application questioning warrant, imposing an additional requirement that it is necessary, for the purpose of collecting the intelligence, that warrant be issued even though legal proceedings may be underway.³⁹ This requirement is consistent with similar requirements in the *Australian Crime Commission Act 2002*⁴⁰ and *Law Enforcement Integrity Commissioner Act*

³⁴ Committee's 2018 Report, (n 3), 85 [3.185].

³⁵ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34BA.

³⁶ Ibid cl 34BB.

³⁷ *Australian Security Intelligence Organisation Act 1979* s 34D(4)(a).

³⁸ Committee's 2018 Report, (n 3), 85 [3.185].

³⁹ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34BA(1)(d) and cl 34BB(1)(e).

⁴⁰ *Australian Crime Commission Act 2002* s 28(1)(d).

2006,⁴¹ and is intended to ensure that the warrant is issued for the purpose of collecting intelligence, and not to bolster the prosecution of any charges underway.

2.2.3. Issuing a warrant

Committee findings

The Committee found it appropriate that the Attorney-General issue questioning warrants and separately authorise apprehension when this may be required.⁴² The Committee noted this would be a higher level of authorisation than is required for some other domestic compulsory questioning regimes, some of which provide for internal authorisations.⁴³

Proposal contained in the Bill

The Bill removes the role of the issuing authority (a judge acting in their personal capacity), and consistent with other ASIO warrants, enables the Attorney-General to issue a questioning warrant and authorise the apprehension of a subject where required.⁴⁴

Note: Provisions in relation to apprehension are discussed in section 2.2.5 below under the heading 'Apprehension'.

As outlined above, the existing framework requires ASIO to seek the Attorney-General's consent before applying to an issuing authority for the issue a questioning warrant. This multi-step process is inconsistent with the authorisation of other ASIO warrants and not conducive to the efficient or timely execution of a questioning warrant.

Consistent with the Committee's views, the Bill removes the issuing authority role, and provides the Attorney-General with sole responsibility for issuing a questioning warrant.⁴⁵ This would include an express power to vary or revoke⁴⁶ a questioning warrant, and the ability to authorise the subject's apprehension.⁴⁷ This will streamline the process for requesting a questioning warrant, and align the process with the authorisation of ASIO's other special powers under Division 2 of Part III of the ASIO Act.

The issuing of intelligence warrants and authorisations is a manifestation of ministerial responsibility and accountability, which are central features of the Westminster system. In his Third Report of the Royal Commission on Intelligence and Security, Justice Hope highlighted that Ministers are required to accept clear responsibility for the intelligence community and are accountable to Parliament for the agencies within it. The Attorney-General's role in issuing ASIO warrants ensures that the Executive makes judgements about the national interest and security of the nation. It overlays that decision-making with independent oversight and review by the IGIS as to the legality and propriety of the activities or warrant/authorisation in question. To that extent, the authorisation process proposed in the Bill is capable of both ensuring ministers are responsible and accountable, and that agencies' intrusive activities are open to review.

Recent changes to the structure of the Australian intelligence framework enhanced the Attorney-General's role in overseeing the intelligence community, providing the Attorney-General's portfolio with a suite of additional oversight and integrity responsibilities, including the IGIS.

⁴¹ *Law Enforcement Integrity Commissioner Act 2006* s 83(1)(d).

⁴² Committee's 2018 Report, (n 3), 76 [3.123] – [3.124].

⁴³ *Ibid* (n 3), 77 [3.122] – [3.123].

⁴⁴ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34BA and cl 34BB.

⁴⁵ *Ibid*.

⁴⁶ *Ibid* cl 34BG(1).

⁴⁷ *Ibid* cl 34BE(2).

As noted by the Committee, this will also provide for a higher level of authorisation than other Commonwealth compulsory questioning regimes, such as the Australian Criminal Intelligence Commission, the Australian Securities and Investments Commission, the Australian Competition and Consumer Commission, and the Commonwealth Ombudsman, all of which do not require ministerial or judicial authorisation for the use of compulsory questioning powers.

Streamlining the authorisation process for issuing a questioning warrant will ensure that the powers are suitably tailored to the current operational environment. Significant changes in Australia's security environment has seen a rise in low complexity attacks by lone actors or small groups involving the use of weapons that are easy to acquire, such as knives or vehicles. This has significantly changed the pace of ASIO's investigations, as opportunities to identify and intervene are limited. Removing the multi-step authorisation process will ensure that ASIO's compulsory questioning powers are operationally efficient in a fast-paced, high-threat environment.

2.2.4. Emergency questioning warrants

Committee findings

The Committee found that the Attorney-General should have a mechanism to provide authorisation for the issue of a warrant in a manner other than writing during an emergency situation.⁴⁸ In reaching this conclusion the Committee found that:

- the legislation should clearly describe the circumstances in which an application for an emergency authorisation could be made
- the Director-General must be required to ensure that all reasonable steps are taken to alert the IGIS as to ASIO's intention to obtain a warrant before ASIO seeks the oral authorisation
- the Director-General must be required to ensure that a written record of an urgent oral warrant application is made and provided to the Attorney-General as soon as practicable, and to the IGIS within 48 hours of the warrant being issued
- the Director-General's annual report should include details on the number of emergency warrants requested and issued during the reporting period, and
- the provision should be supported by a protocol between ASIO and the IGIS.⁴⁹

Proposal contained in the Bill

The Bill enables the Director-General to request⁵⁰ that the Attorney-General issue⁵¹ or vary⁵² a questioning warrant orally in person, or by telephone or other means of communication.

There are currently two emergency authorisation frameworks in the ASIO Act, which provide for the authorisation of ASIO's special powers. In Division 2 of Part III the ASIO Act emergency warrants may be issued,⁵³ and in Division 4 special intelligence operations may be authorised in urgent circumstances.⁵⁴ However, under the existing questioning warrant framework, there is no

⁴⁸ Committee's 2018 Report, (n 3), 78 [3.142].

⁴⁹ Ibid (n 3), 78 [3.143].

⁵⁰ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34B(2)(b).

⁵¹ Ibid cl 34BF(1)(b).

⁵² Ibid cl 34BG(2)(b) and 34BG(6)(b).

⁵³ Australian Security Intelligence Organisation Act 1979 s 29.

⁵⁴ Australian Security Intelligence Organisation Act 1979 s 35C.

mechanism for ASIO to obtain a questioning warrant by any means other than in writing. When combined with the existing multi-step authorisation process, this may preclude the use of ASIO's existing questioning powers in urgent circumstances.

The current security environment requires a mechanism for the authorisation of a questioning warrant in an emergency. For example, intelligence may suggest that an Australian clearance holder may have removed hundreds of highly classified documents from his workplace. In order to question the clearance holder and prevent the clearance holder from destroying the classified material or delivering it to someone to the detriment of Australia's national security an emergency oral authorisation by the Attorney-General would allow law enforcement partners to immediately apprehend the clearance holder for questioning under a warrant.

Request for questioning warrant

The proposal contained in the Bill introduces a new ability for the Director-General to make a request to the Attorney-General to issue or vary a questioning warrant orally in person, or by telephone or other means of communication, where the Director-General reasonably believes that the delay caused by making a written request may be prejudicial to security.⁵⁵ This threshold mirrors the emergency request provisions in section 35B of the ASIO Act for the authorisation of a special intelligence operation. Consistent with the Committee's recommendation, this threshold clearly describes the circumstances in which a request may be made orally, while also providing a level of flexibility to account for the range of operational circumstances which may arise.

Additional safeguards would apply in relation to oral requests. Where a request for the issue or variation of a questioning warrant is to be made orally, the Director General must, before or as soon as practicable after the request is made, cause the IGIS to be notified that the request will be or has been made.⁵⁶ While this deviates in part from the Committee's recommendation that all reasonable steps are taken to alert the IGIS as to ASIO's intention to obtain a warrant, the effect of this requirement is intended to be the same. In an emergency situation, it may not always be practicable to alert the IGIS before making the request for a questioning warrant. While all reasonable steps may have been taken, notification may still occur at the time of making the request, or soon after. The current proposal acknowledges this, enabling notification before, or as soon as practicable after the request has been made.

The Director-General must also provide a written record of the oral request to the Attorney-General and the IGIS as soon as practicable, but no later than 48 hours after the request is made.⁵⁷ This streamlines the Committee's suggestion that the written record be provided to the Attorney-General as soon as practicable, and to the IGIS within 48 hours of the warrant being issued, by combining these requirements to create a consistent timeframe for the provision of a written record.

Consistent with the Committee's findings, the Bill requires that the Director-General's annual report given to the Minister under section 46 of the *Public Governance, Performance and Accountability Act 2013* include a statement of the total number of requests made during the period for the issue of a questioning warrant, including the number of requests made orally.⁵⁸

⁵⁵ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34B(2)(b).

⁵⁶ Ibid cl 34B(5) and cl 34BG(4).

⁵⁷ Ibid cl 34B(6) and cl 34BG(5).

⁵⁸ Ibid Schedule 1, item 11.

Issue of questioning warrant

The Bill would also enable the Attorney-General to issue or vary a questioning warrant orally in person, or by telephone or other means of communication, if satisfied that there are reasonable grounds on which to believe that the delay caused by issuing a written warrant may be prejudicial to security.⁵⁹ This ensures that the Attorney-General considers the urgency of the circumstances before issuing or varying a warrant orally. This threshold mirrors the emergency authorisation provisions in section 35C of the ASIO Act for the authorisation of a special intelligence operation.

There is no requirement that the request from the Director-General be made orally in order for the Attorney-General to issue a warrant or variation orally. In effect, this provision may enable the Attorney-General to issue a warrant orally in response to a written request, or vice versa. This may be appropriate where circumstances have changed significantly in the time between the Director-General requesting the warrant and the Attorney-General issuing the warrant.

A number of safeguards also apply where a warrant is issued or varied orally. Where the Attorney-General issues a warrant or variation orally, the Director-General must cause a written record of the orally issued warrant or variation to be made as soon as practicable, but no later than 48 hours after the oral warrant or variation is issued.⁶⁰ This requirement is consistent with the proposed timeframe for providing a written record of an oral request. The written record must contain the same information as a written warrant.⁶¹

As suggested by the Committee, the emergency warrant provisions will be supported by a protocol between ASIO and the IGIS.⁶² ASIO will take steps to develop a protocol with the IGIS when the legislation is passed.

2.2.5. Apprehension

Committee findings

The Committee recommended that ASIO's current detention powers be repealed.⁶³ The Committee provided in principle support for an apprehension framework to ensure attendance at questioning and prevent contact with others or the destruction of information.⁶⁴ The Committee found that any apprehension should be limited to the power to compel the subject of a warrant to attend questioning under the warrant.⁶⁵

Proposal contained in the Bill

The revised framework repeals the current detention power and introduces an apprehension power to ensure attendance at questioning, prevent the tipping off others or the destruction of records or other things.⁶⁶

A subject may be apprehended where:

⁵⁹ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34BF(1)(b) and cl 34BG(6)(b).

⁶⁰ Ibid cl 34BF(3) and cl 34BG(7).

⁶¹ Ibid.

⁶² Committee's 2018 Report, (n 3), 79 [3.143].

⁶³ Ibid (n 3), 41 [2.68].

⁶⁴ Ibid (n 3), 41 [2.67].

⁶⁵ Ibid (n 3), 77 [3.133].

⁶⁶ Australian Security Intelligence Organisation Amendment Bill 2020 cl Subdivision C.

- the warrant requires the subject's immediate attendance at questioning, and either:
 - apprehension is authorised in the warrant by the Attorney-General,⁶⁷ or
 - the subject makes a representation that they intend to not appear, tip off others, or destroy records or things,⁶⁸
- the subject of a questioning warrant fails to attend questioning in accordance with the warrant.⁶⁹

The proposed apprehension power is limited to bringing the subject immediately before the prescribed authority for questioning and, in all circumstances, the period of apprehension will end when the subject is before the prescribed authority for questioning under the warrant. At this point, the person will be free to leave, but may be subject to an offence (for example, for failing to appear).⁷⁰

If the warrant authorises apprehension, the period of apprehension will begin when the subject is given written notice of the warrant,⁷¹ and include the time it takes to search the person (if necessary), and transport the person to the place of questioning. The apprehension power will cease to have effect when the subject appears before the prescribed authority for questioning. The apprehension power does not include a general power to detain a subject for questioning under the warrant. Consistent with the Committee's findings,⁷² the power is limited to compelling the subject to attend questioning in accordance with the warrant.

Where there is an immediate appearance requirement

Under the revised framework, the subject of a questioning warrant may only be apprehended pursuant to the warrant where the warrant requires their immediate attendance before the prescribed authority for questioning.⁷³ This 'immediate appearance requirement' ensures that upon apprehension, arrangements are in place to ensure questioning proceedings may begin immediately, and will prevent any delay between the execution of the apprehension power and the commencement of questioning proceedings.

A questioning warrant will include an 'immediate appearance requirement' if it requires the subject of the warrant to appear before a prescribed authority for questioning under the warrant immediately after the subject is given notice of the requirement.⁷⁴

The proposed apprehension power will operate in three circumstances, as outlined below.

Apprehension authorised in the warrant

A questioning warrant may authorise the apprehension of a subject if the Attorney-General is satisfied that:

⁶⁷ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34C(1).

⁶⁸ Ibid cl 34C(2).

⁶⁹ Ibid cl 34C(3).

⁷⁰ See for example, Australian Security Intelligence Organisation Amendment Bill 2020 cl 34GD(1).

⁷¹ In accordance with Australian Security Intelligence Organisation Amendment Bill 2020 cl 34BH.

⁷² Committee's 2018 Report, (n 3), 77 [3.133].

Australian Security Intelligence Organisation Amendment Bill 2020 cl 34BE(2).

⁷⁴ See the definition of 'immediate appearance requirement' in cl 34A of the Australian Security Intelligence Organisation Amendment Bill 2020.

- it is reasonable and necessary in the circumstances to require the subject to immediately attend questioning ('immediate appearance requirement'),⁷⁵ and
- that there are reasonable grounds for believing that, if the subject is not apprehended, the subject is likely to:
 - alert a person involved in an activity prejudicial to security that the activity is being investigated, or
 - not appear before the prescribed authority for questioning, or
 - alter, damage or destroy a record or other thing that the subject has been or may be requested to produce under the warrant, or cause another person to do so.⁷⁶

Where apprehension is authorised in the warrant, upon execution of the warrant, a police officer may apprehend the subject to bring them immediately before the prescribed authority for questioning under the warrant.⁷⁷ There is no additional requirement or threshold that the police officer must be satisfied of prior to apprehending the subject of the warrant.

ASIO may seek a questioning warrant with apprehension where it has intelligence that indicates the subject is not likely to comply with the warrant by tipping off others, not appearing, or damaging records or other things. This power could be utilised for known high-risk subjects whose predicted behaviour may seriously jeopardise an ASIO investigation.

Representation by the subject

Under the proposed framework a police officer may apprehend the subject of a questioning warrant where apprehension has not been authorised in the warrant but where:

- the Attorney-General has authorised an immediate appearance requirement, and
- at the time of notifying the subject of the warrant, the subject makes a representation that they intend to:
 - alert a person involved in an activity prejudicial to security that the activity is being investigated; or
 - not appear before the prescribed authority for questioning; or
 - alter, damage or destroy a record or other thing that the subject has been or may be requested to produce under the warrant, or cause another person to do so.⁷⁸

A 'representation' may be express or implied, made either orally or in writing, can be inferred from conduct, and does not need to be communicated or have been intended to be communicated or seen by another person.⁷⁹

In some circumstances, ASIO may not have sufficient information at the time of seeking a warrant to meet the threshold for authorising apprehension in the warrant. Alternatively, it may appear that the subject will, in all likelihood, comply with the warrant and there may not be any apparent need to seek apprehension from the Attorney-General. When notified of the warrant the subject may

⁷⁵ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34BE(1).

⁷⁶ Ibid 34BE(2)(b).

⁷⁷ Ibid cl 34C(1).

⁷⁸ Ibid cl 34C(2).

⁷⁹ Ibid cl 34C(4).

make representations to indicate that they intend to tip off others, not appear for questioning, or destroy records or other things. This power enables the police officer to apprehend the subject on the basis of information that becomes apparent upon giving the subject notice of the warrant.

For example, when a police officer notifies the subject of a questioning warrant and the requirement to attend questioning immediately the subject may be in possession of security relevant documents. While still in the presence of the police officer, the subject may begin taking steps to destroy those documents. The police officer may apprehend the subject, to prevent the destruction of the records, and bring the subject immediately before the prescribed authority for questioning in accordance with the warrant.

Apprehension for failure to appear

A police officer may also apprehend the subject of a questioning warrant where the subject has failed to appear before the prescribed authority for questioning at a time specified in the warrant, or by a prescribed authority direction.⁸⁰ The threshold requires the scheduled time for questioning to have passed. The subject may also fail to appear where the subject is refused entry to the place where questioning is scheduled to occur, for example, if the subject does not comply with a request from a police officer to undergo a screening procedure before entering the place of questioning.⁸¹

Other provisions in relation to apprehension

A police officer may use such force as is necessary and reasonable in apprehending the subject of a questioning warrant, or preventing the subject from escaping apprehension.⁸² A police officer may also enter particular premises, using such force as is necessary and reasonable in the circumstances, at any time of the day or night, for the purpose of searching the premises for the subject or apprehending the subject if the officer believes on reasonable grounds that the subject is on the premises.⁸³

Limitation on communications while apprehended

The subject of a questioning warrant who is apprehended may be prevented from contacting any person at any time throughout the course of the apprehension,⁸⁴ except for:

- a lawyer
- a minor's representative (if applicable)
- any other person the subject is permitted to contact under the warrant, or by a direction of the prescribed authority
- the IGIS
- the Ombudsman in respect of a complaint, or proposed complaint, about the Australian Federal Police, or
- a complaints agency in relation to the police force or police service of a State or Territory.⁸⁵

⁸⁰ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34C(3).

⁸¹ Ibid cl 34GD(2).

⁸² Ibid cl 34CD.

⁸³ Ibid cl 34CA.

⁸⁴ Ibid cl 34CB(1).

⁸⁵ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34CB(2).

If requested by the subject, the police officer apprehending the subject must give the subject the facilities to contact any of the parties listed above.⁸⁶

The restriction on communications is necessary to prevent the subject from tipping off others, or causing the destruction of records or other things. For example, where a subject is apprehended for making a representation that they intend to alert another person that ASIO is investigating particular activities, it is imperative that the subject cannot contact that person while being transported to questioning to ensure ASIO's investigation is not jeopardised, and, where relevant, prevent the destruction of records or other things or the escalation of planned activities.

2.2.6. Questioning of minors

Committee findings

The Committee found that, in principle—and with appropriate safeguards—lowering the minimum age of a questioning subject to 14 may be a necessary measure for protecting the community from terrorism.⁸⁷ The Committee further found that:

- any compulsory questioning of minors must be limited to those who are themselves the subject of investigation
- apprehension should not be available in relation to minors
- any minor that is the subject of a questioning warrant must have a legal representative present at all times
- any minor that is the subject of a questioning warrant must have had an assessment conducted prior to the Attorney-General's approval of the warrant as to whether the interests of the child are appropriately protected, and
- to the greatest extent possible, the interests of the child should be protected.⁸⁸

Proposal contained in the Bill

The Bill provides that the Attorney-General may issue a minor questioning warrant if satisfied that:

- the person is at least 14 years old
- there are reasonable grounds for believing that the person has likely engaged in, is likely engaged in, or is likely to engage in activities prejudicial to the protection of, and of the people of, the Commonwealth and the States and Territories from politically motivated violence, whether directed from or committed within, Australia or not (a minor questioning matter)
- there are reasonable grounds for believing that the warrant will substantially assist in the collection of intelligence that is important in relation to a minor questioning matter
- having regard to other methods, if any, of collecting intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued

⁸⁶ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34CB(2)(c).

⁸⁷ Committee's 2018 Report, (n 3), 80 [3.151].

⁸⁸ Ibid (n 3), 80 [3.155].

- it is necessary, for the purpose of collecting the intelligence, for the warrant to be issued even though the person has been charged, a confiscation proceeding has commenced, or the charge or proceeding is imminent (only required if it relates to post-charge or post-confiscation application questioning), and
- there is in force a written statement of procedures under section 34AF to be followed in the exercise of authority under a questioning warrant.⁸⁹

Scope and threshold

Currently, ASIO may seek a questioning warrant against a person as young as 16 years of age. A special threshold applies, requiring the Attorney-General to be satisfied that on reasonable grounds that it is likely the minor will commit, is committing, or has committed a terrorism offence.⁹⁰ The Bill retains an equivalent threshold, while lowering the minimum age of questioning to 14 years of age, and broadening the scope of questioning in relation to a minor from terrorism offences to politically motivated violence.⁹¹

Consistent with the Committee's findings, this threshold limits the availability of compulsory questioning to minors who are themselves the target of an ASIO investigation in relation to politically motivated violence. A minor questioning warrant cannot be issued in relation to espionage or foreign interference. A questioning warrant will have no effect if the subject is under 14 years old.⁹²

What these powers are designed to address

In the last five years, ASIO has provided critical security information to law enforcement to disrupt three major terrorist attacks involving teenagers under the age of 18. In May 2015, a 17 year old male was identified as being in contact with Australian members of Islamic State in Iraq and the Levant (ISIL) in Syria. This terrorist organisation was encouraging the minor to undertake terrorist attacks in Australia. Subsequently, the minor was arrested and pled guilty to one charge of acting in preparation for a terrorism offence.

In April 2016, another minor was arrested and charged with one count of acts in preparation for a terrorist offence. This minor was a 16 year old male who attempted to obtain firearms and explosive to support an intention to conduct a terrorist attack on Anzac Day. Further, in October 2016, counter-terrorism police arrested two 16 year olds after they were observed entering a Sydney gun shop and purchasing two bayonets. One of the teens was found with a note that linked their anticipated actions to ISIL. This investigation led to the pair being charged with acts done in preparation for, or planning, a terrorist act, and for being members of a terrorist organisation.

These cases demonstrate that minors are involved in the planning and preparation of politically motivated violence in Australia. The ability of law enforcement, in collaboration with ASIO, to detect minors who are preparing to conduct a terrorist attack highlights the need for ASIO to have compulsory questioning powers that allow the Organisation to collect intelligence quickly in a predictive and anticipatory capacity.

⁸⁹ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34BB(1).

⁹⁰ *Australian Security Intelligence Organisation Act 1979* s 34ZE(4)(a).

⁹¹ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34BB(1)(b).

⁹² *Ibid* cl 34BC.

Since 2003, when these powers were first introduced, ASIO has seen an increase in the number of minors involved in terrorism. Specifically, one of the seven terrorist attacks conducted in Australia since 2014 was carried out by a young person of school age, and three of the 18 disrupted plots have involved minors.

- In 2015, NSW police employee Curtis Cheng was murdered by a radicalised fifteen year old.
- Since May 2015, ASIO have undertaken three major disruptions involving teenagers under 18 years of age which led to minors being charged with preparing for a terrorist act.

ASIO is particularly concerned that vulnerable and impressionable young people, including children as young as 14, will continue to be at risk of being ensnared in extremist material on the internet.

- Islamist extremist groups and supporters continue to disseminate propaganda designed to radicalise, recruit and inspire terrorist attacks in the West, including Australia. ISIL's approach to propaganda set the standard among Islamist extremists, but right-wing extremists will also continue to produce internet-savvy, sophisticated messaging.
- Extreme right-wing online forums proliferate on the internet, and attract international memberships, including from Australians. These online forums share and promote extremist right-wing ideologies, and encourage and justify acts of violence. ASIO expect such groups will remain an enduring threat, making more use of online propaganda to spread their messages of hate.

It is important to note this power can only be used if the 14 year old is the subject of a politically motivated violence investigation. Within this context, it is important that ASIO's security intelligence tools, which enable ASIO to access valuable and accurate security intelligence, reflect this reality. ASIO has ensured a number of safeguards have been included in the framework to enable ASIO to appropriately question minors.

ASIO's ability to compulsorily question minors engaged in activities prejudicial to security can also provide further information into the intent of adult leadership figures of terrorist organisations with whom they are associated. As the internet becomes a significant factor in the radicalisation of younger people, so does the ability of terrorist actors to conceal or obfuscate their identity and location through encryption or other anonymising technologies. Therefore, minors known to be involved in politically motivated violence may hold particularly unique human intelligence that ASIO would not otherwise have access to.

In a hypothetical, there is a known a network of associates, a number of whom are aged between 14 and 16, and who are known to support overseas Islamist extremist groups and politically motivated violence more broadly. The individuals are radicalised by an adult leader of the group who encourages the minors to conduct martyrdom operations. ASIO assesses that a number of group members are planning an imminent onshore attack, but does not have the short-term information to clarify the individuals' intentions and no basis is formed to reach thresholds for counter-terrorism offences.

In these circumstances, a minor questioning warrant would allow ASIO to seek insights into the prejudicial activities of the minors as well as the intent of the adult leadership figure and provide the opportunity for ASIO to hold the subject accountable for dishonest answers. This human intelligence would be invaluable for the protection of Australia's national security.

Best interests of the child

As suggested by the Committee, the Bill inserts an additional requirement that the Attorney-General in deciding whether to issue a minor questioning warrant must consider the best interests of the child by,⁹³ taking into account the following matters:

- the age, maturity, sex and background (including lifestyle, culture and traditions) of the person
- the physical and mental health of the person
- the benefit to the person of having a meaningful relationship with the person's family and friends
- the right of the person to receive an education
- the right of the person to practise the person's religion, and
- any other matter the Attorney-General considers relevant.⁹⁴

These matters will be considered against the obligations and conditions to be imposed on the minor by the warrant, and other legitimate matters, such as public safety and national security. Information about these matters will be provided to the Attorney-General as part of the request for a minor questioning warrant. The Attorney-General must take these matters into account only to the extent that they are known to the Attorney-General and relevant.⁹⁵

2.2.7. Apprehension of minors

The apprehension power provided for in the Bill applies equally for adult and minor questioning warrants, notwithstanding the Committee's findings to the contrary.⁹⁶ Importantly, higher legislative thresholds for obtaining a minor questioning warrant, coupled with the requirement that the Attorney-General consider the best interests of the child before issuing a questioning warrant, ensure that apprehension is only likely to occur in relation to a minor as a matter of last resort.

ASIO currently has the ability to question and detain minors aged 16 years and over in relation to a terrorism offence. In the absence of detention, ASIO requires a mechanism to ensure that any minor who is the subject of a questioning warrant does not abscond, tip-off others, or destroy records or other things. Age does not reduce the threat posed by the subject. In fact, a minor may be less likely to respond rationally when faced with a questioning warrant, and may be more inclined to ignore the serious consequences for failing to comply with a warrant.

The exclusion of persons under 18 years of age from the proposed apprehension power would leave a critical gap in ASIO's compulsory questioning powers. This may have significant operational consequences, particularly in circumstances where a minor is involved in planning an imminent terrorist attack. The ability to apprehend a minor where required may prevent behaviour that would seriously jeopardise an ASIO investigation.

⁹³ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34BB(2).

⁹⁴ Ibid cl 34BB(3).

⁹⁵ Ibid cl 34BB(4).

⁹⁶ Committee's 2018 Report, (n 3), 80 [3.155].

Case Study: Apprehension of minors

In a hypothetical situation, the apprehension of a minor may be required where ASIO reporting captures a 14 year old individual posting extreme right wing material online indicating they are aware of an intended attack against a religious school in the coming days. It is unclear if the individual is ideologically supportive of such an attack and the level of their involvement or awareness. However, if the 14 year old refused to be interviewed by police, a questioning warrant would compel the minor to provide additional details on the purported threat, including the identity of the possible attacker, sourcing of the reporting and others who may have awareness of the attacker's intent.

The information obtained by ASIO during the questioning warrant could then be provided to law enforcement partners to assist them in disrupting the threat posed by individuals, against the school. This method of obtaining information would also provide the opportunity to hold the subjects accountable for dishonest answers.

2.2.8. Additional safeguards for minors

In addition to a higher legislative threshold, the Bill contains the following additional safeguards for minors who are the subject of a questioning warrant:

- the prescribed authority must explain additional matters to the minor, such as their rights in relation to a lawyer and a minor's representative⁹⁷
- a minor may only be questioned under the warrant in the presence of a lawyer⁹⁸
- questioning may only occur with a minor's representative present (for example, a parent or guardian; or, in some limited circumstances a lawyer)⁹⁹
- the minor may contact a minor's representative at any time after being notified of the warrant,¹⁰⁰ and
- questioning of a minor may only occur for continuous periods of 2 hours or less, separated by breaks directed by the prescribed authority.¹⁰¹

Minor's representative

A minor's representative is a parent or guardian of the subject, or another person who is able to represent the subject's interests, and as far as practicable in the circumstances, is acceptable to the subject and the prescribed authority.¹⁰² The Bill provides that the subject of a minor questioning warrant may contact a minor's representative at any time after the subject is given notice of the warrant.¹⁰³ In certain circumstances, the subject's lawyer may act as the minor's representative where a non-lawyer representative is not present at questioning.¹⁰⁴

The ability to question a minor in the presence of a lawyer, but without a non-lawyer representative is necessary to ensure that questioning is not frustrated where, for example, a particular representative is unwilling or unable to attend, the subject does not want to contact a non-lawyer

⁹⁷ Australian Security Intelligence Organisation Amendment Bill 2020 cl s 34DD.

⁹⁸ Ibid cl 34FA(1) 34BD(2)(a).

⁹⁹ Ibid cl 34BD(2)(a).

¹⁰⁰ Ibid cl 34F(1)(b).

¹⁰¹ Ibid cl 34BD(2)(b).

¹⁰² Ibid cl 34AA.

¹⁰³ Ibid 34F(1)(b).

¹⁰⁴ Ibid cl 34F(1) 34FD and cl 34FG.

representative, or where questioning must occur immediately. There may be serious operational consequences where the questioning of a target involved in terrorist activity is delayed. Given the heightened risk, it is appropriate that questioning may commence, or continue in limited circumstances, in the presence of a lawyer acting as the minor's representative.

Legal representation

Consistent with the Committee's findings, the Bill provides that the subject of a minor questioning warrant must not be questioned under the warrant in the absence of a lawyer.¹⁰⁵ To facilitate the presence of a lawyer at all times during questioning, the Bill contains measures to enable the prescribed authority to appoint a lawyer for the subject of a questioning warrant in certain circumstances.¹⁰⁶ These measures are discussed in further detail in section 2.2.9, under the heading 'Involvement of lawyers'.

2.2.9. Involvement of lawyers

Committee findings

The Committee noted that any person subject to compulsory questioning should be afforded appropriate access to legal counsel.¹⁰⁷ The Committee was of the view that the existing provisions in the ASIO Act should be repealed and replaced with provisions consistent with those relating to legal representation in the *Australian Crime Commission Act 2002*.¹⁰⁸

Proposal contained in the Bill

The provisions in the Bill relating to legal representation are largely consistent with similar provisions in the *Australian Crime Commission Act 2002* (ACC Act), subject to specific variations necessary in the context of ASIO's powers. The Bill retains certain aspects of existing provisions in Division 3 of Part III of the ASIO Act relating to legal representation, and goes beyond the measures provided for in the ACC Act to ensure that ASIO's compulsory questioning powers are effective in the context of ASIO's security intelligence function.

Consistency with Australian Crime Commission Act 2002

The provisions in the Bill relating to legal representation are consistent with the ACC Act in that they:

- provide for access to a lawyer,¹⁰⁹ and
- provide for the ability of the subject to apply for the provision of assistance in respect of their appearance.¹¹⁰

The provisions are also largely consistent with the ACC Act to the extent that both frameworks provide for mechanisms to address the disruption of questioning. While the ACC Act addresses this issue by providing for an offence,¹¹¹ the Bill retains the current ability of the prescribed

¹⁰⁵ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34FA(1).

¹⁰⁶ Ibid cl 34FC.

¹⁰⁷ Committee's 2018 Report, (n 3), 81 [3.160].

¹⁰⁸ Ibid (n 3), 82 [3.162].

¹⁰⁹ Australian Security Intelligence Organisation Amendment Bill 2020 Subdivision F.

¹¹⁰ Ibid cl 34JE.

¹¹¹ *Australian Crime Commission Act 2002* 34A(e).

authority to remove a lawyer where the prescribed authority considers they are unduly disruptive during questioning.¹¹² A detailed breakdown of the Bill's provisions is provided further below.

The ACC Act does not contain equivalent provisions limiting contact with lawyers.¹¹³ However, these provisions will only apply in very limited circumstances, and are crucial in the context of a security intelligence investigation to ensure that an investigation is not jeopardised due to contact with a particular person who happens to be a lawyer. These provisions are also necessary to prevent a subject from intentionally delaying questioning.

The ACC Act also contains the ability for a lawyer to examine or cross-examine any witness on any matter the examiner considers appropriate.¹¹⁴ This is not necessary or appropriate to include in the ASIO context, and is instead addressed by enabling the lawyer to seek clarification from the prescribed authority in relation to ambiguous questions, and provide legal advice to the person during breaks in questioning.¹¹⁵

The provisions in the Bill go beyond those provided for in the ACC Act by enabling the prescribed authority to appoint a lawyer for the subject, and ensuring that the subject of a minor questioning warrant cannot be questioned in the absence of a lawyer. These measures ensure that a questioning warrant may be executed without unnecessary delay, while also providing the subject with appropriate access to legal representation.

Consistent with the ACC Act, the Bill removes existing provisions enabling a person exercising authority under a warrant to monitor the subject's contact with a lawyer.

How the Bill's legal representation provisions work

The Bill provides the subject of a questioning warrant with the ability to seek legal advice in relation to the warrant,¹¹⁶ and introduces a right for the subject to have a lawyer present during questioning, subject only to limited exceptions for adults.¹¹⁷ The Bill provides a mechanism to ensure the effective and secure conduct of questioning proceedings by enabling the prescribed authority to:

- prevent the subject from contacting a specific lawyer where the prescribed authority is satisfied, on the basis of circumstances relating to that lawyer, that contact with that lawyer may result in either a person involved in an activity prejudicial to security being alerted that the activity is being investigated, or a record or other thing that the subject has been requested to produce in accordance with the warrant being destroyed, damaged or altered¹¹⁸ and
- address the disruption of questioning by enabling the prescribed authority to direct that the lawyer be removed from questioning.¹¹⁹

In these circumstances, the subject may contact another lawyer.

¹¹² Australian Security Intelligence Organisation Amendment Bill 2020 cl 34FF(6).

¹¹³ Ibid cl 34F(2)-(5).

¹¹⁴ *Australian Crime Commission Act 2002* 25A(6)(c).

¹¹⁵ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34FF(3).

¹¹⁶ Ibid cl 34F(1).

¹¹⁷ Ibid cl 34FA.

¹¹⁸ Ibid cl 34F(4).

¹¹⁹ Ibid cl 34FF(6).

The subject of a questioning warrant may contact a lawyer at any time after they have been given notice of the warrant for the purpose of obtaining legal advice in relation to the warrant.¹²⁰ A lawyer may also be present during questioning in accordance with the warrant.

A lawyer acting for the subject of a questioning warrant in connection with the warrant may request, and if they do so, must be given, a copy of the warrant and any variations to the warrant, or in the case of an orally issued warrant, a copy of the written record.¹²¹ This right is subject to the Director-General of Security making such deletions from the document as the Director-General considers necessary in order to avoid prejudice to security, the defence of the Commonwealth, the conduct of the Commonwealth's international relations, or the privacy of individuals.¹²²

A lawyer for the subject must not intervene in the questioning of the subject or address the prescribed authority before whom the subject is being questioned except to:

- request clarification of an ambiguous question, or
- request a break in questioning to provide advice to the subject.¹²³

The prescribed authority must provide a reasonable opportunity for the lawyer to advise the subject during breaks in the questioning.¹²⁴

The Bill removes provisions in the existing framework enabling a person exercising authority under a warrant to monitor the subject's contact with a lawyer.

Appointment of lawyers

The Bill also provides a framework for the appointment of a lawyer in certain circumstances.¹²⁵ These measures are intended to ensure that questioning can commence promptly where the subject is required to attend immediately ensuring the person is given no opportunity to abscond, tip off others or cause the destruction of records or things.

Where an adult questioning warrant contains an immediate appearance requirement the prescribed authority must appoint a lawyer for the subject where:

- a lawyer is not present at questioning, and
- the subject requests that a lawyer be present during questioning.¹²⁶

ASIO must also provide the subject with facilities to contact a lawyer of their choice.¹²⁷ Questioning may commence in the presence of the appointed lawyer until the subject's lawyer of choice arrives. When the subject's lawyer of choice arrives, the prescribed authority must defer questioning for a reasonable time to enable the appointed lawyer to brief the subject's lawyer of choice, and allow the subject's lawyer of choice to provide advice to the subject.¹²⁸

Where the subject is required to attend questioning immediately, or has been apprehended, it is unlikely that the subject will have sufficient time to arrange for a lawyer to be present at questioning immediately upon their arrival. In these circumstances, any delay to questioning may seriously

¹²⁰ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34F(1)(a).

¹²¹ Ibid cl 34FE.

¹²² Ibid cl 34FE(4).

¹²³ Ibid cl 34FF(3).

¹²⁴ Ibid cl 34FF(2).

¹²⁵ Ibid cl 34FB.

¹²⁶ Ibid.

¹²⁷ Ibid cl 34FB(2)(b).

¹²⁸ Ibid cl 34FB(4).

jeopardise ASIO's investigation and provide the subject with an opportunity to abscond, tip off others, or destroy documents or other things.

Equivalent provisions apply where a minor questioning warrant contains an immediate appearance requirement.¹²⁹ The prescribed authority may also appoint a lawyer for the subject of a minor questioning warrant in certain circumstances where the warrant does not contain an immediate appearance requirement to enable questioning to commence.¹³⁰

Where a minor questioning warrant does not contain an immediate appearance requirement, the prescribed authority must appoint a lawyer for the subject where questioning has been deferred to enable the subject to obtain a lawyer, and after a reasonable time, a lawyer does not attend.¹³¹ This may be necessary where, for example, the subject refuses to contact a lawyer in order to delay questioning, or is unable to obtain a lawyer.

Subject of adult questioning warrant may be questioned in absence of lawyer

The subject of an adult questioning warrant may only be questioned in the absence of a lawyer where:

- the subject has voluntarily waived the right to have a lawyer present,¹³² or
- in limited circumstances, as directed by the prescribed authority.¹³³

Where an adult questioning warrant does not contain an immediate appearance requirement, the prescribed authority must direct that the subject may be questioned without a lawyer present where questioning has been deferred to enable the subject to obtain a lawyer, and after a reasonable time, a lawyer is not present for the subject.¹³⁴

Similarly, where the subject's lawyer has been removed for unduly disrupting questioning, and the subject requests another lawyer, the prescribed authority must direct that the subject may be questioned in the absence of a lawyer where questioning has been deferred to enable the subject to obtain another lawyer, and after a reasonable time, a lawyer is not present for the subject.¹³⁵

It is necessary to ensure that the subject of an adult questioning warrant can be questioned in the absence of a lawyer where the subject has had ample time to arrange for a lawyer to be present and has not done so. This is to address circumstances where the warrant does not contain an immediate appearance requirement and the subject will have sufficient notice to arrange for a lawyer to be present at questioning, but has not done so. In the absence of such a provision, a questioning subject would be able to frustrate the questioning warrant.

Lawyer may be removed from questioning

A lawyer may be removed from questioning if the prescribed authority considers the lawyer's conduct is unduly disruptive.¹³⁶ Where the lawyer for the subject has been removed from questioning, the subject will have the opportunity to contact another lawyer. As outlined above, if the warrant is an adult questioning warrant, the subject may:

¹²⁹ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34FC.

¹³⁰ Ibid cl 34FC(3).

¹³¹ Ibid cl 34FC(3)(b).

¹³² Ibid cl 34FA(2)(a).

¹³³ Ibid cl 34FB(3)(b) and cl 34FF(7)(c)(i).

¹³⁴ Ibid cl 34FB(3)(b).

¹³⁵ Ibid cl 34FF(7)(c)(i).

¹³⁶ Ibid cl 34FF(6).

- choose not to contact another lawyer, or
- if a reasonable time has passed and another lawyer for the subject is not present, be questioned in the absence of a lawyer.¹³⁷

If the warrant is a minor questioning warrant, questioning cannot continue until another lawyer is present.¹³⁸ To avoid a prolonged delay during questioning, if the subject chooses not to contact another lawyer, or a reasonable time has passed and another lawyer is not present, the prescribed authority must appoint a lawyer for the subject.

Limit on contacting lawyers

To ensure the secure and efficient execution of a questioning warrant, the Bill provides the prescribed authority with the ability to limit the subject's contact with a particular lawyer in certain circumstances. This may occur where:

- the prescribed authority is satisfied, on the basis of circumstances relating to the lawyer that if a particular lawyer is contacted this may result in a person involved in an activity prejudicial to security being alerted that the activity is being investigated, or may result in a record or other thing being destroyed, damaged or altered that has been or may be requested to be produced in accordance with the warrant, or
- the subject already has a lawyer present at questioning.¹³⁹

Where the subject is prevented from contacting a particular lawyer on security grounds the subject will not be prevented from contacting another lawyer, unless there are security concerns in relation to that other lawyer.

If the subject already has a lawyer present at questioning, the prescribed authority may prevent the subject from contacting another lawyer if:

- the lawyer was not appointed for the subject, or
- if the lawyer was appointed, the prescribed authority is satisfied the subject has had reasonable opportunity to contact a lawyer of choice.¹⁴⁰

The provisions and the prescribed authority's ability to issue a direction limiting contact with lawyers are intended to prevent unnecessary delays in questioning the subject where the subject makes repeated requests to contact a lawyer, or a new lawyer, where the subject's lawyer of choice is already present at questioning, or the subject has had ample opportunity to contact a lawyer to be present at questioning. In the absence of these provisions, the subject of a questioning warrant may frustrate questioning under the warrant by making repeated requests to contact a different lawyer, despite already having a lawyer of choice present at questioning.

Financial assistance

The Bill retains existing provisions enabling the Attorney-General to authorise the provision of financial assistance in respect of the subject's appearance before a prescribed authority for questioning under the warrant.¹⁴¹

¹³⁷ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34FF(7).

¹³⁸ Ibid cl 34FF(7)(c)(iv).

¹³⁹ Ibid 34F(2)-(5).

¹⁴⁰ Ibid cl 34F(2).

¹⁴¹ Ibid cl 34JE.

2.2.10. Searches, screening and seizure

Committee findings

The Committee made no express recommendation in relation to person searches. The Committee noted ASIO's proposal to search a person upon arrival at questioning was primarily for officer safety, and not intelligence collection. The Committee further noted that the proposed person search would be carried out by police officers.¹⁴²

The Committee considered that this matter should be brought forward for consideration in any proposed legislation amending the questioning framework.¹⁴³

Proposal contained in the Bill

The Bill provides for two separate person search frameworks. These frameworks distinguish between the:

- subject of a questioning warrant who has been apprehended,¹⁴⁴ and
- persons (including the subject) who are seeking to enter the place of questioning.¹⁴⁵

For searches of persons seeking to enter the place of questioning, the framework further distinguishes between those who are the subject of a questioning warrant, and others who may be involved in questioning, such as a minor's representative or a lawyer. This approach ensures that the provisions apply in a manner that takes into account the varying levels of risk posed by different individuals involved in the questioning process.

Search and seizure where subject is apprehended

The Bill provides a police officer with the power to conduct an ordinary¹⁴⁶ or frisk search¹⁴⁷ of the subject of a questioning warrant where the subject is apprehended in connection with the warrant.¹⁴⁸ If practicable, the search must be conducted by a police officer of the same sex as the subject.¹⁴⁹ A police officer may use reasonable and necessary force in the conduct of the search.¹⁵⁰

The purpose of this search is twofold: to ensure the safety of those involved in questioning; and prevent the subject from communicating the existence of the warrant or recording the questioning proceedings. If found, the following items may be seized by the police officer conducting the search:¹⁵¹

¹⁴² Committee's 2018 Report, (n 3), 83 [3.172].

¹⁴³ Ibid (n 3), 83 [3.173].

¹⁴⁴ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34CC – 34CE.

¹⁴⁵ Ibid cl 34D – 34DA.

¹⁴⁶ See s 4 of the *Australian Security Intelligence Organisation Act 1979*, which defines an ordinary search as a search of a person or of articles on his or her person that may include requiring the person to remove his or her overcoat, coat or jacket and any gloves, shoes and hat, and an examination of those items.

¹⁴⁷ See s 4 of the *Australian Security Intelligence Organisation Act 1979*, which defines a frisk search as a search of a person conducted by quickly running the hands over the person's outer garments, and an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person.

¹⁴⁸ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34CC(2).

¹⁴⁹ Ibid cl 34CC(3).

¹⁵⁰ Ibid cl 34CD(b).

¹⁵¹ Ibid cl 34CC(4).

- a 'seizable item',¹⁵² or
- a 'communication device'.¹⁵³

A seizable item may be retained by a police officer for such time as is reasonable.¹⁵⁴ If returning a communication device would be prejudicial to security, the device may be retained by a police officer until returning it would no longer be prejudicial to security. Where returning the device would not be prejudicial to security, the device may be retained only for such time as the prescribed authority considers reasonable to inspect, examine, make copies or transcripts.¹⁵⁵

If authorised by the Attorney-General in the warrant,¹⁵⁶ records or things found during the search may also be seized where the police officer conducting the search reasonably believes the item is relevant to the collection of intelligence that is important in relation to a questioning matter.¹⁵⁷ This may be important where, for example, ASIO has intelligence to suggest that the subject of the warrant carries security relevant material on their person and it is likely the subject will destroy this material when notified of the questioning warrant. This may only be authorised in relation to the search of a person who is apprehended.¹⁵⁸

ASIO may retain any item seized relevant to the collection of intelligence to inspect or examine it, make copies or transcripts, or do anything reasonably incidental to those things.¹⁵⁹ If returning the item would be prejudicial to security, ASIO may retain the item until returning the item would no longer be prejudicial to security. If returning the item would not be prejudicial to security, ASIO may retain the item only for such time as is reasonable to inspect, examine, make copies or transcripts.¹⁶⁰

Screening at the place of questioning

The Bill also provides for screening measures at the place of questioning.¹⁶¹ These measures will apply to anyone (including the subject) who seeks to enter the place where the subject of a questioning warrant is due to appear, or is appearing, for questioning under a warrant, including lawyers and minor's representatives.¹⁶² The measures are intended to ensure the safety of those involved in questioning, and prevent the communication or recording of information disclosed during the questioning process.

Certain items must not be taken into the place where the subject is appearing for questioning under a warrant. The Bill provides that a person must not possess a communication device or a dangerous item¹⁶³ while the subject is appearing for questioning.¹⁶⁴ A person may be screened or

¹⁵² See s 4 of the *Australian Security Intelligence Organisation Act 1979*, which defines 'seizable item' as anything that could present a danger to a person or that could be used to assist a person to escape from lawful custody.

¹⁵³ 'Communication device' is defined in cl 34A to mean a device that a person may use to communicate information to another person; or a surveillance device (within the meaning of Division 2). This could include, among other things, a phone, a laptop or any other smart device, as well as covert recording equipment.

¹⁵⁴ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34CE(3).

¹⁵⁵ Ibid cl 34CE(4).

¹⁵⁶ Ibid cl 34BE(3).

¹⁵⁷ Ibid cl 34CC(5).

¹⁵⁸ Ibid cl 34BE(3)(a).

¹⁵⁹ Ibid cl 34CE(1).

¹⁶⁰ Ibid cl 34CE(2).

¹⁶¹ Ibid cl 34D – 34DA.

¹⁶² Ibid cl 34D(1).

¹⁶³ The term 'Dangerous Item' is defined in Australian Security Intelligence Organisation Amendment Bill 2020 cl 34A to mean a weapon, or any other items that could be used in a dangerous or threatening way.

¹⁶⁴ Ibid cl 34DA(2).

searched by a police officer to ensure that these items are not taken into questioning.¹⁶⁵ A police officer may request a person to do any of the following:

- undergo a screening procedure¹⁶⁶
- produce items in the person's possession for inspection or examination, or
- undergo an ordinary or frisk search.¹⁶⁷

A police officer may request that a person remove a thing in the person's possession for the purpose of screening or conducting a search, and may request that a person give a dangerous item or communication device to the officer for safekeeping while questioning is being conducted. A person may be asked to answer reasonable questions about certain things in their possession or control.¹⁶⁸

A dangerous item given to a police officer in accordance with a request may be retained by the officer for such time as is reasonable.¹⁶⁹

Where a communication device is given to a police officer, the framework distinguishes between:

- those who are the subject of the questioning warrant, and
- others who are involved in questioning but are not the subject of the warrant, for example, a lawyer or a minor's representative.

Where a communication device is given to a police officer by the subject of the questioning warrant, the officer may retain that device:

- if returning the device would be prejudicial to security—only until returning the device would no longer be prejudicial to security, or
- if returning the device would *not* be prejudicial to security—only such time as the prescribed authority before whom the subject is appearing for questioning under the warrant considers reasonable.¹⁷⁰

Where a communication device is given to a police officer by a person who is not the subject of the questioning warrant, the officer may only hold the device in safekeeping while the person is at the place where questioning is being conducted.¹⁷¹ The person may request that the police officer return the device when they are no longer at the questioning place, for example, where the person has left the room where questioning is occurring. The officer must comply with this request.

Where a device is held in safekeeping it cannot be accessed or used for any purpose unless authorised by a warrant. These measures ensure that sensitive information disclosed during questioning cannot be transmitted by anyone present, and provide a proportionate mechanism for controlling the use of a communication device by the subject of a questioning warrant.

A police officer may refuse a person entry to questioning if they do not comply with a request from the officer under the screening provisions.¹⁷² If the subject of the questioning warrant is refused

¹⁶⁵ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34D(2).

¹⁶⁶ 'Undergo a screening procedure' is defined in cl 34A.

¹⁶⁷ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34D(2).

¹⁶⁸ Ibid cl 34D(9).

¹⁶⁹ Ibid cl 34D(6).

¹⁷⁰ Ibid cl 34D(7).

¹⁷¹ Ibid cl 34D(8).

¹⁷² Australian Security Intelligence Organisation Amendment Bill 2020 cl 34D(10).

entry to the questioning place for failing to comply a police officer's request, the person will be taken to have failed to appear for questioning under the warrant.¹⁷³

2.2.11. Eligibility and function of the prescribed authority

Committee findings

The Committee accepted that a model reliant on retired judges may lead to a shortage of persons willing and able to perform the role of the prescribed authority.¹⁷⁴ The Committee found that, as a minimum requirement, the prescribed authority must hold a current practicing certificate or be a retired judicial officer of a State Supreme Court, the Federal Court of Australia or the High Court of Australia.¹⁷⁵ The Committee was of the view that in the ASIO context, the prescribed authority should have substantially more than five years' experience as a legal practitioner and would be a person of some eminence.¹⁷⁶

The Committee further found that consideration should be given to the person's current employment and any other positions held to ensure any perceived conflicts of interest are avoided. Similarly, the Committee considered it is essential that the prescribed authority not be subject to directions from, nor have his or her decisions overruled by, the Director-General of Security or the Minister.¹⁷⁷

Proposal contained in the Bill

The Bill provides that the Attorney-General may, in writing, appoint as a prescribed authority a person who:

- has served as a judge in one or more superior courts for a period of at least 5 years, and no longer holds a commission as a judge of a superior court
- holds an appointment to the Administrative Appeals Tribunal as President or Deputy President, and has been enrolled as a legal practitioner of a federal court or of the Supreme Court of a State or Territory for at least 5 years, or
- is enrolled as a legal practitioner of a federal court or of the Supreme Court of a State or Territory, and has engaged in practice as a legal practitioner for at least 10 years, and holds a practising certificate granted under a law of a State or Territory.¹⁷⁸

The prescribed authority supervises questioning to ensure that the warrant is executed within the confines of the law and may make a number of directions in relation to the conduct of all people involved in the execution of a questioning warrant. A prescribed authority has the same protection and immunity as a Justice of the High Court in the performance of the prescribed authority's duties under a questioning warrant.¹⁷⁹

¹⁷³ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34GD(2).

¹⁷⁴ Committee's 2018 Report, (n 3), 79 [3.144].

¹⁷⁵ Ibid (n 3), 79 [3.146].

¹⁷⁶ Ibid (n 3), 79 [3.147].

¹⁷⁷ Ibid (n 3), 79 [3.148].

¹⁷⁸ Ibid cl 34AD(1).

¹⁷⁹ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34AE.

Eligibility

The Bill broadens the eligibility criteria for the appointment of a prescribed authority to increase the pool of suitable candidates and facilitate the development of institutional expertise in supervising compulsory questioning under a questioning warrant. The Bill amends the existing eligibility criteria in section 34B of the ASIO Act by:

- removing the requirement that an insufficient number of people be available in a particular category of eligibility before persons from another category may be appointed
- removing the category of currently serving State or Territory Supreme Court or District Court judges, and
- creating a new category for legal practitioners of a federal court or of the Supreme Court of a State or Territory that hold a practising certificate and have engaged in practice for at least 10 years.

Before appointing a legal practitioner, the Attorney-General must be satisfied that the person has the knowledge or experience necessary to properly perform the duties of a prescribed authority.¹⁸⁰ Consistent with the Committee's expectation, this additional requirement is intended to ensure that the person is of some eminence, or has particular skills and experience, that makes them suitable for appointment.

Independence and conflicts of interest

The Bill introduces additional measures to ensure the independence of those appointed as a prescribed authority, and avoid perceived conflicts of interest. A person will not be eligible for appointment as a prescribed authority, despite meeting the eligibility requirements, if that person is an ASIO employee or affiliate, the Director-General, an AGS lawyer, an IGIS official, or a staff member of a law enforcement agency (including the AFP) or an intelligence or security agency.¹⁸¹

Before appointing any person as a prescribed authority, the Attorney-General must have regard to whether the person engages in any paid or unpaid work, or has any interests (pecuniary or otherwise) that conflict, or could conflict, with the proper performance of the person's duties as a prescribed authority.¹⁸² The Bill also provides for an ongoing duty to disclose interests for persons appointed as a prescribed authority.¹⁸³

Termination of appointment

The Attorney-General may terminate the appointment of a prescribed authority due to:

- misbehaviour
- an inability to perform the duties of a prescribed authority due to physical or mental incapacity
- bankruptcy
- failure, without reasonable excuse, to comply with the obligation to disclose interests, or

¹⁸⁰ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34AD(3).

¹⁸¹ Ibid cl 34AD(2).

¹⁸² Ibid cl 34AD(5).

¹⁸³ Ibid cl 34AD(6)-(8).

- paid or unpaid work, or an interest, pecuniary or otherwise, that, in the Attorney-General's opinion, conflicts or could conflict with the proper performance of the prescribed authority's duties.¹⁸⁴

Authority of prescribed authority to make directions

At any time when the subject of a questioning warrant is appearing before a prescribed authority for questioning under the warrant, the prescribed authority may give a direction, including to:

- to defer questioning, or
- for the subject's further appearance at a specified time, or
- for the subject to be excused or released from further attendance at questioning.¹⁸⁵

Consistent with the Committee's findings, the prescribed authority is generally not subject to direction from the Attorney-General or Director-General. However, there are two circumstances where the Attorney-General or Director-General may override a decision of the prescribed authority:

- where the Attorney-General issues a variation to an existing questioning warrant requiring the subject's immediate appearance where the prescribed authority has previously issued a direction for appearance at a later time,¹⁸⁶ or
- where the subject and the prescribed authority have been excused from further attendance and the Director-General varies or revokes a direction given by the prescribed authority in relation to the use or disclosure of questioning material.¹⁸⁷

These narrow exceptions are necessary for the efficient execution of questioning under a warrant.

Should the Attorney-General be satisfied that it is reasonable and necessary in the circumstances, the warrant may, despite any direction given by the prescribed authority under subsection 34DE(1) to the contrary, require the subject's further appearance for questioning under the warrant, and include an immediate appearance requirement in relation to the further appearance.¹⁸⁸ The ability for the Attorney-General to vary a warrant by requiring a subject's immediate appearance may have the effect of overriding a direction given by the prescribed authority that the subject returns for questioning at a specified time. Rather than complying with the prescribed authority's direction, the subject would be required to appear for questioning immediately when notified of the variation.

From a practical perspective, there may be some circumstances where it may be necessary to require the subject to attend questioning at an earlier time than the time directed by the prescribed authority, or require the subject to reappear for questioning after the prescribed authority has excused or released the subject from further attendance at questioning. For example, ASIO may

¹⁸⁴ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34AD(9).

¹⁸⁵ Ibid cl 34DE.

¹⁸⁶ Ibid cl 34BE(5).

¹⁸⁷ Ibid cl 34DF(3)(b).

¹⁸⁸ Ibid cl 34BE(5).

become aware that the subject has purchased a plane ticket to leave Australia before they are due to reappear for questioning.

Where the subject, and consequently, the prescribed authority have been excused from further attendance at questioning the Director-General may vary or revoke a direction given by the prescribed authority relating to the use or disclosure of questioning material under clause 34DF of the Bill. As the prescribed authority's involvement in the execution of the warrant has ceased, it is necessary to enable the Director-General to vary or revoke such a direction where it is no longer necessary. This is consistent with similar provisions in the *Australian Crime Commission Act 2002* (the **ACC Act**) and the *Law Enforcement Integrity Commissioner Act 2006* (the **LEIC Act**). Any decision of the Director-General to revoke or vary a direction relating to the use or disclosure of questioning material may be subject to oversight by the IGIS.

2.2.12. Offences for non-compliance with questioning warrant

Committee findings

The Committee provided no commentary in relation to offences for non-compliance with a questioning warrant.

Proposal contained in the Bill

The Bill retains a number of existing offences for non-compliance with a questioning warrant, including offences for:

- failure to appear for questioning in accordance with the warrant or direction of the prescribed authority
- failure to give information, or produce a record or other thing
- knowingly making false or misleading statements, and
- rendering records or things illegible.¹⁸⁹

The Bill also retains offences for failing to surrender travel documents, and leaving Australia without permission.

These offences are each punishable by a maximum penalty of five years' imprisonment, consistent with corresponding offences under the existing framework.

The Bill does not introduce any new offences for failing to comply with a questioning warrant, but rather maintains the offences in the existing framework.

These offences encourage compliance with a questioning. Criminal sanctions for non-cooperation may encourage the subject of a questioning warrant to provide information that ASIO would not otherwise have obtained. These offences also deter the wilful destruction of, or tampering with, records or things that have been requested under a questioning warrant.

¹⁸⁹ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34GD.

Privilege against self-incrimination

The subject of a questioning warrant will not be excused from providing information, records, or other things requested under a questioning warrant on the grounds that the information may incriminate the subject in relation to an offence.¹⁹⁰ However, anything said or produced by the subject in accordance with the warrant will not be admissible in evidence against the subject in a criminal proceeding, other than an exempt proceeding.¹⁹¹

Surrender of travel documents

A person may be required to surrender travel documents where a questioning warrant has been requested, or issued, in relation to that person.¹⁹²

The person must be notified of the request for, or issue of, a questioning warrant, and the effect of the requirement to surrender travel documents. A person will only commit an offence where they have been notified and fail to deliver the documents.

These offences encourage compliance with the requirement to surrender travel documents, and ensure that a person cannot leave Australia to avoid complying with a questioning warrant.

Leaving Australia without permission

The Bill also prohibits a person from leaving Australia without written permission from the Director-General where a questioning warrant has been requested, or issued, in relation to that person.¹⁹³

The person must be notified of the request for, or issue of, a questioning warrant and the effect of the requirement that they seek permission to leave Australia. A person will only commit an offence where they have been notified and subsequently leave Australia without written permission from the Director-General.

These offences are intended to deter the subject of a questioning warrant from absconding by leaving Australia before questioning occurs. These provisions are particularly significant given the proposed expansion of the powers to investigate threats of espionage and foreign interference.

Other offences

Other offences for non-compliance with a questioning warrant in the Bill (and which exist under the current framework) include:

- failure to appear for questioning in accordance with the warrant
- failure to give information
- false or misleading statements, and
- rendering records or things illegible.¹⁹⁴

Offences also existing for contravening safeguards¹⁹⁵ and secrecy provisions¹⁹⁶.

¹⁹⁰ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34GD(5).

¹⁹¹ Ibid cl 34GD(6).

¹⁹² Ibid cl 34G and cl 34GB.

¹⁹³ Ibid cl 34GA and cl 34GC.

¹⁹⁴ Ibid cl 34GD.

¹⁹⁵ Ibid cl 34GE.

¹⁹⁶ Ibid cl 34GF.

2.2.13. Post-charge questioning

Committee findings

The Committee considered it beyond the scope of the review to make a definitive finding on whether post-charge questioning should be allowed under the questioning warrant framework.¹⁹⁷ However, it did consider that if the Government were to bring forward such a power it must be introduced with adequate safeguards. The Committee considered that, at a minimum, the following conditions and restrictions from the ACC Act should be provided for in the ASIO context:

- the ability of the prescribed authority to issue directions restricting the use or disclosure of questioning material if the failure to do so would reasonably be expected to prejudice the subject's fair trial
- provisions preventing the disclosure of post-charge questioning material to prosecutors unless on court order, which may occur if the court is satisfied that such a disclosure is required in the interests of justice, and
- the provisions should not restrict a court's power to make any orders necessary to ensure the person's fair trial is not prejudiced.¹⁹⁸

Proposal contained in the Bill

The provisions in the Bill relating to the use and disclosure of questioning material post-charge and post-confiscation application closely mirror equivalent provisions in the *Australian Crime Commission Act 2002* (ACC Act) and the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act).

The Bill:

- introduces provisions to authorise questioning following the laying of charges or after confiscation application proceedings have commenced against a person who is the subject of questioning, or where charges or a confiscation proceeding are imminent against that person, and allows questioning to cover matters that are the subject of those charges or proceedings,
- requires the prescribed authority to give directions to limit the use or disclosure of questioning material in order to protect the subject's fair trial, and
- otherwise regulates the use and disclosure of questioning material and derivative material.¹⁹⁹

Directions in relation to the use or disclosure of questioning material

The prescribed authority must give a direction that questioning material must not be used or disclosed to specified persons in specified ways or on specified conditions²⁰⁰ if the prescribed authority is satisfied that failure to give the direction:

¹⁹⁷ Committee's 2018 Report, (n 3), 81 [3.157].

¹⁹⁸ Ibid (n 3), 81 [3.158].

¹⁹⁹ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34BA(1)(d), cl 34BB(1)(e), cl 34DB(1), and Subdivision E.

²⁰⁰ Ibid cl 34DE(1).

- might prejudice a person's safety, or
- would reasonably be expected to prejudice the fair trial of the subject, if the subject has been charged with a related offence or such a charge is imminent.²⁰¹

If the subject of a questioning warrant has been charged with an offence before a federal court or a court of a State or Territory, and the court considers that it may be desirable in the interests of justice that particular questioning material, in respect of which a prescribed authority has given a direction as outlined above, be made available to the person or to a lawyer representing the person, the court may give to the Director-General a certificate to that effect. If the court does so, the Director General must make the questioning material available to the court.²⁰²

If the Director General makes questioning material available to a court in accordance with a certificate, the court may examine the questioning material and make it available to the person charged with the offence concerned, or a lawyer representing the person, if satisfied that the interests of justice so require.²⁰³

Use and disclose of questioning material and derivative material

The Bill prevents the post-charge disclosure of questioning material and the post-charge disclosure of derivative material obtained from post-charge questioning to prosecutors of the subject unless under court order.²⁰⁴ A court may order that questioning material or derivative material may be disclosed to prosecutors of the subject if the court is satisfied that the disclosure is required in the interests of justice. The provisions in the Bill do not restrict a court's power to make any orders necessary to ensure the person's fair trial is not prejudiced.²⁰⁵

The Bill also provides for the use and disclosure of questioning material for the purpose of obtaining derivative material, and the lawful use or disclosure of questioning material or derivative material to a proceeds of crime authority.²⁰⁶

2.2.14. Secrecy Provisions

Committee findings

The Committee found that restrictions on the disclosure of information obtained as a result of the warrant should continue.²⁰⁷ However, the Committee did not support extending the length of time that the current secrecy obligations remain in force.²⁰⁸ The Committee also found that the subject of a warrant (or their legal representative) should be able to request permission from the prescribed authority to contact specified persons, and that it would be appropriate for the prescribed authority to take into account the personal circumstances of the subject, and submissions by ASIO and the subject in deciding whether to allow the subject to make certain disclosures to explain their absence.²⁰⁹

²⁰¹ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34DF(1).

²⁰² Ibid cl 34DF(5).

²⁰³ Ibid cl 34DF(6).

²⁰⁴ Ibid cl 34EA and cl 34EB.

²⁰⁵ Ibid cl 34EC(3).

²⁰⁶ Ibid cl 34EF.

²⁰⁷ Committee's 2018 Report, (n 3), 82 [3.164].

²⁰⁸ Ibid (n 3), 83 [3.169] – [3.170].

²⁰⁹ Ibid (n 3), 82 [3.166].

Proposal contained in the Bill

The Bill retains existing secrecy offences relating to warrants and questioning, including the ability of the prescribed authority, the Director-General, and the Attorney-General to authorise the disclosure of information in certain circumstances.²¹⁰

During the specified life of a questioning warrant, a person must not disclose the existence of the warrant, any fact relating to the content of the warrant or a person's questioning or apprehension, or any operational information. In the two years following the specified expiry of the warrant, a person must not disclose any operational information.

Both offences apply on a strict liability basis in relation to the subject and their lawyer and carry a penalty of five years imprisonment. The offences will not apply where the disclosure is a permitted disclosure. If the disclosure is in relation to operational information, the person must have obtained the information either as a direct or indirect result of the questioning warrant.

Given ASIO's intelligence investigations often continue for several years, a disclosure as to the existence of a questioning warrant, or operational information relating to that warrant, may jeopardise an investigation at any stage during that period. Strong secrecy provisions are required to protect ASIO's tradecraft and sources of information, and the identity and reputation of individuals investigated by ASIO.

Consistent with the Committee's findings, the Bill does not extend the length of time that the current secrecy offences remain in force.

Permitted disclosures

Offences will not apply if the disclosure is a permitted disclosure. The Bill provides for a number of permitted disclosures, including:

- a disclosure to a lawyer for the purpose of obtaining legal advice
- a disclosure for the purpose of making an application for financial assistance
- a disclosure for the purpose of making a complaint to the IGIS, the Commonwealth Ombudsman or a complaints agency, and
- a disclosure permitted by the prescribed authority, the Director-General or the Attorney-General.²¹¹

The prescribed authority may also permit the subject, the subject's lawyer, or a minor's representative to disclose specified information to a specified person. The Director-General or the Attorney-General may also provide written permission for a disclosure. Consistent with the Committee's findings, in deciding whether to give permission to disclose certain information the prescribed authority, the Director-General or the Attorney-General, as the case requires, must take into account:

- the person's family and employment interests (to the extent known),
- the public interest,
- the risk to security if the permission were given, and

²¹⁰ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34GF.

²¹¹ Ibid cl 34GF(5).

- any submissions made by the person, the person's lawyer, or ASIO.²¹²

2.2.15. Oversight and accountability

Committee findings

The Committee found that all existing provisions contained in the ASIO Act and the IGIS Act relating to IGIS's oversight of Division 3 of Part III of the ASIO Act should be retained. The Committee further found that all existing accountability and safeguard provisions contained in Division 3 of Part III of the ASIO Act should be retained.²¹³

Proposal contained in the Bill

The Bill retains all existing oversight, accountability and safeguard provisions in Division 3 of Part III of the ASIO Act.

Oversight by the Inspector-General of Intelligence and Security

Consistent with the Committee's findings, the Bill retains all existing provisions relating to IGIS oversight, providing the IGIS with extensive powers to oversee the exercise of powers under a compulsory questioning warrant. These measures operate alongside the IGIS's broad powers to oversee all operational activities of ASIO (and other Australian intelligence agencies) under the IGIS Act.

The Bill retains the following provisions in relation to IGIS oversight:

- a requirement for the Director-General to consult the IGIS in the development of a written statement of procedures²¹⁴
- a requirement for the notice of the warrant and prescribed authority to inform the subject that they may make a complaint to the IGIS²¹⁵
- a requirement for the subject to be provided with facilities to contact the IGIS²¹⁶
- exceptions to non-disclosure provisions to enable disclosures to the IGIS and the exercise of any power or the performance of a function under the IGIS Act²¹⁷
- the ability of the IGIS, or IGIS staff, to be present at the questioning or apprehension of the subject²¹⁸
- the ability for the IGIS to raise concerns with the prescribed authority, who must consider the IGIS's concern and make directions accordingly²¹⁹
- specific provisions providing that contravention of the written statement of procedures may be the subject of an IGIS complaint,²²⁰ and

²¹² Australian Security Intelligence Organisation Amendment Bill 2020 cl 34GF(10).

²¹³ Committee's 2018 Report, (n 3), 84 [3.177]-[3.178].

²¹⁴ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34AF(2).

²¹⁵ Ibid cl 34DC(1)(i)(i).

²¹⁶ Ibid cl 34CB(2)(c)(ii).

²¹⁷ Ibid cl 34GF(5) – paragraph (a)(iv) of the definition of 'permitted disclosure'.

²¹⁸ Ibid cl 34JB.

²¹⁹ Ibid cl 34DM.

²²⁰ Ibid cl 34H(1)(a).

- a requirement that the Director-General provide the IGIS with certain documents to facilitate the performance of the IGIS's oversight role.²²¹

The Bill also amends the IGIS Act to enable the IGIS to enter any place where a person is being questioned or apprehended in relation to a questioning warrant for the purposes of an inspection or inquiry.²²²

Accountability and safeguard provisions

The Bill also retains a robust framework of accountability and safeguard mechanisms currently contained within Division 3 of Part III of the ASIO Act, including:

- a written statement of procedures²²³
- the availability of, and access to, complaint mechanisms²²⁴
- offences for contravention of safeguards²²⁵
- access to an interpreter²²⁶
- a requirement to treat the person humanely²²⁷
- an obligation to video record questioning²²⁸
- reporting to the Attorney-General²²⁹
- the provision to apply for financial assistance,²³⁰ and
- annual reporting requirements for the Director-General.²³¹

Time limits for questioning

The Bill provides that questioning may occur for up to eight hours, which may be extended by the prescribed authority to a maximum of 24 hours,²³² or 40 hours where an interpreter is present during questioning.²³³ A questioning warrant may remain in force for a period of no longer than 28 days.²³⁴

Notification requirements

Where the Attorney-General issues a questioning warrant, the Director-General is required to cause a written notice to be provided to the subject of the questioning warrant.²³⁵ The written notice must include a detailed list of matters including:

- the existence of the warrant

²²¹ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34HB.

²²² Ibid items 25 and 26 (ss 9B and 19A of the IGIS Act).

²²³ Ibid cl 34AF.

²²⁴ Ibid cl 34CB(2)(b), 34CB(2)(c), 34DC(1)(i), and 34DI.

²²⁵ Ibid cl 34GE.

²²⁶ Ibid cl 34DK, 34DN and 34DO.

²²⁷ Ibid cl 34AG.

²²⁸ Ibid cl 34DP.

²²⁹ Ibid cl 34HA.

²³⁰ Ibid cl 34JE.

²³¹ Ibid Schedule 1, item 11.

²³² Ibid cl 34DJ.

²³³ Ibid cl 34DK.

²³⁴ Ibid cl 34BF(4).

²³⁵ Ibid cl 34BH.

- the place, time and date the subject is required to attend questioning (which may be 'immediately' upon being provided with the notice)
- that the subject is able to contact a lawyer at any time
- if it is a minor questioning warrant, that the subject may contact a minor's representative at any time and may only be questioned in the presence of a minor's representative
- the subject's obligations to give information and produce records or things
- the subject's secrecy obligations, including permitted disclosures, and
- the subject's right to make complaints and seek remedies.

The notice informs the subject of their rights and obligations under a questioning warrant. The notice explains the information contained in the warrant, including the subject's obligations, clearly and in plain language. The notice is an appropriate and accessible mechanism for informing the subject of their obligations under the warrant. Providing the subject with a notice may prevent potential misunderstandings or frustration as a result of the subject incorrectly interpreting a legal instrument.

Strict procedures under a warrant

To ensure the subject is aware of their rights and obligations under the warrant, the prescribed authority must inform the subject of the following matters:

- what the warrant authorises ASIO to do
- the period the warrant is in force
- the circumstances in which the subject may be apprehended during the period the warrant is in force
- the role of the prescribed authority, and specifically the prescribed authority's powers to supervise questioning and give directions
- the subject's right to contact a lawyer
- the requirement of the subject to give information and produce things (including that offences may apply for non-compliance)
- the subject's secrecy obligations, including offences and the ability to make permitted disclosures
- the subject's right to apply to the Attorney-General for the provision of financial assistance
- the subject's right to make a complaint to the IGIS in relation to ASIO, to the Ombudsman in relation to the Australian Federal Police, or to a relevant complaints agency in relation to a police force of a State or Territory, and
- the subject's right to seek a remedy from a federal court in relation to the warrant or their treatment under the warrant.²³⁶

²³⁶ Australian Security Intelligence Organisation Amendment Bill 2020 cl 34DC.

2.2.16. Sunsetting

Committee findings

The Committee considered that any proposed legislation should include an appropriate sunset clause. The Committee was also of the view that it would be appropriate to require the Committee to conduct a further review of the compulsory questioning framework prior to the sunset date.²³⁷

Proposal contained in the Bill

The Bill provides that the powers will cease to have effect on 7 September 2030.

Given the nature of the proposed powers, it is appropriate that ASIO's new compulsory questioning powers include an appropriate sunset clause. Given successive reviews in relation to the existing powers have continued to recommend that ASIO retain a compulsory questioning power, the Department and ASIO are of the view that the powers should not expire for 10 years from enactment. At this time, it would be appropriate for the Committee to review the operation, effectiveness and continued need for the powers.

Existing framework sunset contingency

As a consequence of the COVID-19 pandemic's effect on parliamentary sittings, parliament passed legislation to enable Ministers to extend sunset provisions in existing legislation by up to six months.

Should the Bill not be passed by the Parliament before the existing questioning and detention warrant framework sunsets on 7 September 2020, the Minister for Home Affairs may extend the sunset date accordingly. This would be a contingency measure to ensure that ASIO does not lose a vital intelligence collection tool while the Parliament is scrutinising the Bill.

²³⁷ Committee's 2018 Report, (n 3), 86 [3.189].

3. Tracking device reforms

3.1. Background and context

3.1.1. Summary of the proposals

The Bill²³⁸ also amends the surveillance device framework in the ASIO Act by:

- enabling ASIO to use tracking devices with an internal authorisation in certain circumstances, rather than under a warrant
- clarifying that the surveillance device framework is permissive and does not require ASIO to obtain a warrant where conduct would not otherwise be unlawful, and
- updating the definition of 'tracking device', 'device' and 'track' and in doing so modernising ASIO's powers and capabilities.

3.1.2. Why these amendments are necessary

The current surveillance device framework in the ASIO Act limits ASIO's ability to monitor potential security threats. It is also inconsistent with, and imposes a significantly higher burden on ASIO, than equivalent surveillance device regimes do for law enforcement agencies across the country.

The amendments contained in the Bill will provide ASIO with greater operational agility to respond to time critical threats, mitigate risks to ASIO surveillance operatives, and bring ASIO's powers in line with equivalent powers of law enforcement agencies.

These amendments respond to the evolving security threat environment faced by ASIO, which has seen an increase in lone actor and opportunistic attacks requiring immediately deployable capabilities.

3.1.3. Why are these tracking devices considered less intrusive than other surveillance devices that require a warrant?

The Bill provides ASIO with the ability to internally authorise the use of tracking devices that provide the same information about the movements of a person or objects as would lawful physical surveillance, such as physically following a person from a distance. An internal authorisation would not allow the use of a tracking device if it would involve:

- entry onto premises without permission
- interference with the interior of a vehicle without permission
- remote installation of tracking devices or anything authorised under a computer access warrant that is not expressly authorised under an internal authorisation, or
- the use of a tracking device to listen to, record, observe or monitor the words, sounds or signals of a person.²³⁹

²³⁹ Australian Security Intelligence Organisation Amendment Bill 2020 cl 26K.

These types or devices are surveillance devices that will continue to be authorised by the Attorney-General. The use of any tracking devices that require an ASIO officer to enter a premises or the interior of a vehicle without permission will also continue to require a warrant issued by the Attorney-General. For example, an internal authorisation would allow an ASIO employee or affiliate to deploy a tracking device on the chassis of a vehicle. However, the internal authorisation could not allow a tracking device to be placed under a seat inside the vehicle, even if a vehicle door was unlocked.

3.2. The reformed framework

3.2.1. Enabling the use of tracking devices with internal authorisation

The current regime

Under ASIO's current surveillance device framework contained in Subdivision D of Division 2 of Part III of the ASIO Act, ASIO is required to obtain a warrant from the Attorney-General to use a tracking device in circumstances where use of the device would otherwise be unlawful. The requirement to obtain a warrant applies to all tracking devices, including less-intrusive devices that would provide information akin to physical surveillance.

The Attorney-General may issue a warrant for the use of a surveillance device (including a tracking device) in respect of a person, premises, or an object or class of object. To issue a surveillance device warrant, the Attorney-General must be satisfied that the relevant person, is engaged in or is reasonably suspected by the Director-General of being engaged in, or of being likely to engage in, activities prejudicial to security. The Attorney-General must also be satisfied that the use of the device will, or is likely to, assist ASIO in obtaining intelligence relevant to security.²⁴⁰

The requirement to obtain a warrant in all circumstances can restrict ASIO from acting with sufficient speed to respond to time critical threats. It also creates a heightened level of risk to ASIO officers due to the need to maintain constant physical surveillance on potentially dangerous subjects where the warrant threshold is not met. While there is provision for an emergency warrant to be issued, this still requires that a warrant request be prepared and sent to the Attorney-General before the Director-General can exercise the power to issue an emergency warrant. This prohibits ASIO from responding expeditiously in urgent circumstances.

By contrast, section 39 of the *Surveillance Devices Act 2004* permits law enforcement officers to use a tracking device with internal authorisation in the investigation of a relevant offence where the installation or retrieval of the device does not involve entry onto premises without permission or an interference with the inside of a vehicle.

This provision recognises that in some circumstances warrants impose a disproportionately high threshold for the use of less intrusive tracking devices that can provide significant assistance in the collection of information during the early stages of an investigation.

²⁴⁰ *Australian Security Intelligence Organisation Act 1979* s 26.

Proposal contained in the Bill

The Bill will enable ASIO to use certain tracking devices under an internal authorisation, rather than under a warrant, where use of the device does not involve interference with the inside of a vehicle or trespass onto premises.²⁴¹

These amendments will bring ASIO's tracking device provisions under the ASIO Act in line with law enforcement agencies' powers under the *Surveillance Devices Act 2004*. Section 39 of the *Surveillance Devices Act 2004*, provides all Australian police forces, the Australian Criminal Intelligence Commission and state and territory integrity commissions with the ability to internally authorise the use of tracking devices in some circumstances.

The new framework enables the Director-General or a Senior Executive Services (SES) ASIO employee or affiliate (an authorising officer) to internally authorise the use of tracking devices in limited circumstances.²⁴²

Internal authorisations may be obtained to use tracking devices in relation to a person, an object or a class of objects. An internal authorisation may permit ASIO to install, use, maintain and recover tracking devices or enhancement equipment, and to do anything reasonably necessary to conceal such action or anything incidental to such action.²⁴³

An authorising officer may issue an authorisation for the use of a tracking device where satisfied that there are reasonable grounds for believing that the use of the tracking device in relation to the person, object or class of objects will, or is likely to, substantially assist the collection of intelligence in respect of a matter which is important in relation to security (the security matter).²⁴⁴

The proposed threshold will enable the use of an internally authorised tracking device in a broader range of circumstances than a surveillance device warrant issued pursuant to section 26 of the ASIO Act. Under section 26 the Attorney-General may only issue a surveillance device warrant in relation to a person if satisfied that the person is engaged in, or reasonably suspected by the Director-General as being engaged in, or likely to be engaged in activities prejudicial to security. The proposed threshold for the internal authorisation of a tracking device would enable an authorising officer to give an authorisation in respect of a *matter* that is important in relation to security, , subject to the limitations noted in section 3.1.3 above.²⁴⁵

An internal authorisation may only remain in force for such time as is reasonable and necessary, but that must not exceed 90 days.²⁴⁶ Where an authorising officer is satisfied that the grounds for the internal authorisation no longer exist, the authorising officer must take such steps as are necessary to ensure action under the internal authorisation is discontinued as soon as practicable.²⁴⁷

Recovery Warrants

The Bill also introduces a warrant for the recovery of tracking devices.²⁴⁸ This warrant may be required where recovery of a tracking is not possible under an internal authorisation because it would require entry to premises or interference with the interior of a vehicle. For example, if ASIO

²⁴¹ Australian Security Intelligence Organisation Amendment Bill 2020 cl 26G.

²⁴² Ibid cl 26G.

²⁴³ Ibid 2020 cl 26J.

²⁴⁴ Ibid 2020 cl 26G.

²⁴⁵ Ibid 2020 cl 26K.

²⁴⁶ Ibid 2020 cl 26G(4)(c).

²⁴⁷ Ibid 2020 cl 26P.

²⁴⁸ Ibid 2020 cl 26R.

installed a tracking device on a vehicle when it was located on the street pursuant to an internal authorisation, recovery of the device may require entry to a private premises without permission if the vehicle was indefinitely relocated to private premises.

The Attorney-General may only issue a warrant for the recovery of tracking devices, or enhancement equipment in relation to tracking devices, where satisfied that the failure to recover the relevant devices or equipment would be prejudicial to security. The Attorney-General must also have regard to the risk that information relating to ASIO's operations, capabilities, technologies, methods or sources will be communicated or become available to the public, without the authority of the Commonwealth, if the warrant is not issued.²⁴⁹

A recovery warrant will enable ASIO to, amongst other things:

- recover relevant devices and equipment
- use the devices or equipment only for the purpose of locating it
- enter a premises where the devices or equipment are reasonably believed to be located, or any other premises for the purposes of gaining entry to or exiting the premises where the devices or equipment are reasonably believed to be located
- do anything reasonably necessary to conceal action under the warrant, and
- do anything reasonably incidental to any of the actions ASIO is authorised to do under the warrant.²⁵⁰

Oversight and accountability

The new framework requires the Director-General to provide the Attorney-General with a written report within three months from when the internal authorisation ceases to be in force, outlining the details of:

- the extent to which the authorisation assisted ASIO in carrying out its functions
- the security matter in respect of the authorisation
- the name of any person whose location was determined by the use of the device
- the period which the tracking device was used
- the object on which the device was installed and the premises where the object was located at the time of installation
- compliance with restrictions or conditions, if any, stipulated in the authorisation, and
- variation of the authorisation.²⁵¹

The new framework also requires the Director-General to establish and maintain a register of requests for internal authorisations containing the following information in relation to internal authorisations:

- the name of the person who made the request
- the security matter in respect of the request

²⁴⁹ Australian Security Intelligence Organisation Amendment Bill 2020 cl 26R(3).

²⁵⁰ Ibid cl 26R(6).

²⁵¹ Ibid Schedule 2, item 17.

- the day on which the authorisation was given or refused
- the name of the authorising officer who gave or refused the authorisation
- the location of any record relating to the request
- if the authorisation was given:
 - the day on which the authorisation ceased to be in force, and
 - whether action under the authorisation was discontinued and if so, the day it was discontinued.²⁵²

The reporting and register requirements will facilitate effective oversight of the internal authorisation framework by both the Attorney-General and the IGIS.

3.2.2. Clarifying the surveillance device framework is permissive

Proposal contained in the Bill

The Bill clarifies that ASIO is not required to obtain a warrant or an internal authorisation where ASIO's conduct would otherwise not be unlawful.²⁵³

For the most part, criminal offences for the use of surveillance devices are contained in State and Territory laws. These laws have numerous exceptions which permit surveillance devices to be used in certain circumstances.

In broad terms the Bill simply clarifies that, if it would be lawful for a member of the public to use a device, it is also lawful for ASIO to do so. For example, in New South Wales it is an offence to use a listening device to record a private conversation, but it is not an offence to record what someone says publicly. In this instance the effect of the amendment is to confirm that ASIO could use a listening device to record a speech being made in public or a public conversation²⁵⁴ on the street.

3.2.3. Modernising the definition of 'tracking device', 'track' and 'device'

Proposal contained in the Bill

The Bill addresses the need to keep pace with technological advancements. It amends the definitions of 'tracking device', 'track' and 'device' to ensure that ASIO can seek a warrant to use modern, safe and minimally intrusive capabilities to perform its functions.

The current regime

The current definitions of 'tracking device', 'track' and 'device' support the ability to track individuals through the physical application of a tracking device. However, the definitions do not allow ASIO to track a person or object remotely without any physical application of tracking device. This narrow definition of 'tracking device' may mean that ASIO is unable to obtain a warrant to support its use of modern capabilities. This creates a legislative gap, as State and Territory laws generally provide that tracking devices can only be used where it is authorised by law – for example, under a warrant.

²⁵² Australian Security Intelligence Organisation Amendment Bill 2020 cl 26Q.

²⁵³ Ibid Schedule 2, item 16.

²⁵⁴ *Surveillance Devices Act 2007* (NSW), s 7.

New definitions

Tracking device

The Bill updates the definition of ‘tracking device’ to mean any device capable of being used (whether alone or in conjunction with any other device) to track a person or an object.²⁵⁵ This amended definition removes the requirement for a tracking device to be ‘installed’. The new definition ensures that ASIO is able to conduct its operations in the most efficient and effective way, with the ability to use modern technologies, subject to strict accountability requirements and restrictions. For example, ASIO will be able to seek a warrant to remotely track a person or an object, in circumstances where ASIO has an operational need to track the person or object in a State or Territory where it is unlawful to conduct this type of surveillance.

ASIO’s scope to obtain a warrant to facilitate remote tracking will also improve safety protections for ASIO employees and affiliates, who may become the target of violence if their identity or activities are discovered in the course of installing, maintaining or recovering a tracking device.

This amendment will also better align the definitions of different surveillance devices within the Act, and between the Act and the *Surveillance Devices Act 2004*. More closely aligning these definitions will assist ASIO employees and affiliates in the practical application of the legislation.

Track

The Bill repeals the definition of ‘track’ and replaces it with a definition to mean determining or monitoring the location of a person or object, or the status of the object.²⁵⁶ This amendment is necessary to reflect the updated meaning of ‘tracking device’.

Device

Currently, the Act defines a ‘device’ as including an instrument, apparatus and equipment. The Bill substitutes ‘equipment’ with ‘equipment and any other thing (whether tangible or intangible)’.²⁵⁷ The definition ensures that it captures all relevant things that could be used to listen, observe or track a person or object.

The new definition is technologically neutral and is intended to capture, among other things, electronic and non-electronic devices, instruments, apparatus, equipment, substances and any other things. The definition is not intended to be exhaustive and will apply to both tangible objects and non-tangible things, for example, remote tracking. This change will also apply to the definitions of listening device and optical surveillance device and ensures that ASIO will be able to use the most technologically and operationally appropriate method of surveillance to give effect to a warrant issued under Subdivision D of Division 2 of Part III of the Act.

Relationship between new definition of ‘tracking device’ and the internal authorisation of tracking devices

The new definition of ‘tracking device’ will have limited application in the context of internally authorised tracking devices. This is because the Bill specifically excludes the remote installation of a tracking device pursuant to an internal authorisation. ASIO will still require a warrant to remotely track a person or an object.

²⁵⁵ Australian Security Intelligence Organisation Amendment Bill 2020 Schedule 2, item 5.

²⁵⁶ Ibid Schedule 2, item 4.

²⁵⁷ Ibid Schedule 2, item 2.

4. Conclusion

The Department thanks the Committee for the opportunity to make a submission to its review of the Bill, and hopes that this submission assists the Committee in understanding the proposed measures. While terrorism remains an ongoing threat to the Australian community, ASIO now faces a range of steadily worsening security challenges, particularly in relation to espionage and foreign interference.

ASIO must be properly equipped to fulfil its function of protecting Australians and their interests from threats to security. The measures proposed in the Bill will ensure that ASIO has the necessary tools to continue to respond to current and emerging threats. These measures are supported by strong safeguards and oversight mechanisms that balance individual rights with the imperative to protect national security.