



**Australian Government**  
**Department of Home Affairs**



# **Department of Home Affairs submission to the review of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979**

Parliamentary Joint Committee on Intelligence and Security

1 February 2024

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# 1. Summary of this submission

The following is a submission from the Department of Home Affairs (the Department) to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) Review of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act). Division 3, Part III sets out a compulsory questioning warrant regime for use by the Australian Security Intelligence Organisation (ASIO) in certain circumstances.

In summary, the Department's submission makes the following key points:

- Reflecting on the 20 year history of the compulsory questioning warrant regime, the Department considers that the regime strikes a sound balance between providing ASIO with a necessary tool for obtaining information relevant to security in relation to the most concerning security threats facing Australia, and the attendant impact on the rights and liberties of subject individuals.
- The 2018 expansion of compulsory questioning warrants to also include espionage and foreign interference matters did not unduly disturb this balance. In light of Australia's changing security environment, a further expansion of these powers could be a sensible step to include compulsory questioning warrants for sabotage, attacks on Australia's defence systems, and the promotion of communal violence.
- Equally, it would be appropriate to remove the ability of ASIO to seek compulsory questioning warrants in relation to minors in matters involving politically motivated violence, in the interests of continuing to maintain a sound balance between security and freedom.

The Department's submission also addresses a range of other matters in relation to the compulsory questioning warrant regime. Notably:

- The Department considers apprehension in the execution of a compulsory questioning warrant should remain the responsibility of law enforcement as currently set out in Division 3, Part III, and not be extended as a power of ASIO. However, the Department notes that it may be appropriate in certain circumstances for ASIO to enter private premises to provide notice of a questioning warrant, as ASIO already maintains the capability to enter private premises in respect of search warrants.
- The Department suggests that it may now be appropriate to normalise Division 3 Part III as part of the ASIO Act, rather than the laws being subject to a sunset clause, as the compulsory questioning warrant regime has been in use for more than 20 years. In doing so, a five yearly review of the laws could be legislated. Such reviews could consider the use of the compulsory questioning warrants during the review period, as well as any other relevant factors, with a view to determining if the laws remain necessary and fit-for-purpose.

The Department considers these and other changes suggested in this submission will ensure the compulsory questioning warrant regime remains fit for purpose in coming years.

## 2. Introduction

1. The Department thanks the PJCIS for the opportunity to make a submission to the review of Division 3, Part III of the ASIO Act. The Department's submission is structured as follows:
  - A brief overview of the history of the questioning warrants.
  - A brief overview of the current questioning warrant framework.
  - Discussion of the current security environment as context for the questioning warrant framework.
  - Suggestions to ensure Division 3, Part III of the ASIO Act remains fit-for-purpose.
  - Comments on other aspects of Division 3, Part III.
2. The Department is the policy department responsible for administering the ASIO Act, and works closely with the Attorney-General's Department (AGD) and ASIO to ensure that the legislative frameworks which govern its powers remain up-to-date in the evolving security environment.
3. ASIO is Australia's security intelligence service, whose primary role is to collect and analyse intelligence that will enable it to warn the government about activities or situations that might endanger Australia's national security. In comparison with law enforcement agencies, ASIO does not focus on the collection of evidence, nor on the identification of criminal conduct, although these may be by-products of the performance of its functions. The thresholds for the information gathering powers available to ASIO, and the limitations placed on intelligence officers when gathering information, recognise these different functions.
4. Division 3, Part III was inserted in the ASIO Act in 2003 following an internal review of Australia's legal and operational counter-terrorism capabilities in the aftermath of the terrorist attacks in the United States on 11 September 2001 and in Bali on 12 October 2002. The insertion of the compulsory questioning powers acknowledged that ASIO had no ability to question people who are unwilling to cooperate voluntarily, despite its range of other warrant-based intelligence collection powers available to it under Division 2, Part III and in other Acts.
5. The compulsory questioning powers were developed to protect Australia from threats to security, and provide a mechanism for ASIO to identify and investigate activities that may prejudice Australia's security. The measure is extraordinary and impacts on individual rights and liberties, but ASIO has rightly been judicious in its use of these powers over the last 20 years. The Department considers the record of careful use of these powers in practice has shown that the powers, and the robust application process and framework that govern their use, strike a sound balance between protecting individual rights, and the liberties of the individuals involved in such activities, with the interests of national security.

### 3. Brief history of ASIO questioning warrants

6. ASIO's compulsory questioning powers were introduced in 2003 in response to the growing threat from terrorism after the 11 September 2001 attacks in the United States. These powers initially enabled ASIO to question under compulsion (under a questioning warrant) and detain a person for questioning (under a questioning and detention warrant), to obtain intelligence relating to terrorism. Since its introduction in 2003, Division 3, Part III has been reviewed a number of times, by:
  - The Parliamentary Joint Committee on ASIO, ASIS and DSD (PJCAAD) in 2002 and 2005.
  - The previous Independent National Security Legislation Monitor (INSLM), Mr Bret Walker SC, in his 2011 and 2012 Annual Report.
  - The Parliamentary Joint Committee on Human Rights, in the context of its review of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.
  - The previous INSLM, the Hon Roger Gyles AO QC, in his review of Certain Questioning and Detention Powers in Relation to Terrorism in 2017.
  - The PJCIS's 2017 review of ASIO's questioning and detention powers.
7. Following a comprehensive review by the PJCAAD in 2005, significant amendments were made to the compulsory questioning powers in 2006. These included amendments to clearly separate the questioning warrant and questioning and detention warrant regimes, to enhance safeguards relating to access to a lawyer, and to clarify the role of the Prescribed Authority. Amendments were also made to the provisions to reduce the risk of a subject leaving the country.
8. In 2014, the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* repealed the 'last resort' criterion for issuing a questioning warrant. This requirement was substituted with a requirement that the Minister must be satisfied that it is reasonable in all the circumstances, including whether other methods of collecting that intelligence would likely be as effective. The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* also introduced a new offence for destroying or tampering with a record or thing, and amended the provision authorising law enforcement officers to use force in the execution of a questioning warrant.
9. The regime was overhauled in response to the 2017 PJCIS review as part of the *Australian Security Intelligence Organisation Amendment Act 2020*. The Act aimed to address a number of recommendations made by the PJCIS in 2018, and made the following changes:
  - Repealing the questioning detention warrants in the Act.
  - Extending ASIO's questioning power beyond politically motivated violence to include instances relating to espionage and foreign interference.
  - Lowering the minimum age of a questioning subject in relation to terrorism from 16 to 14, while ensuring appropriate safeguards for minors.
  - Empowering the Attorney-General to issue questioning warrants, rather than other issuing bodies, including orally in emergency situations.



## 4. The current compulsory questioning warrant regime

10. As Australia's security intelligence service, the primary function of ASIO is to obtain, correlate and evaluate intelligence relevant to security. Section 4 of the ASIO Act defines the heads of security as:
  - (i) *espionage;*
  - (ii) *sabotage;*
  - (iii) *politically motivated violence;*
  - (iv) *promotion of communal violence;*
  - (v) *attacks on Australia's defence system; or*
  - (vi) *acts of foreign interference;*
    - whether directed from, or committed within, Australia or not; and*
    - (aa) the protection of Australia's territorial and border integrity from serious threats; and*
    - (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).*
11. As part of the range of powers accorded to ASIO for carrying out its functions, ASIO is empowered by Division 3, Part III of the ASIO Act to request a compulsory questioning warrant to compel an adult, or in certain circumstances a minor, to participate in questioning from ASIO.
12. Where a compulsory questioning warrant is issued, the subject is required to appear before a prescribed authority to give information, or produce a record or other thing, that is, or may be, relevant to intelligence that is important in relation to a questioning matter.
13. Warrants for compulsory questioning of minors must be in relation to politically motivated violence, or, in the case of adults, can also be in relation to espionage and foreign interference. Legal tests for the Attorney-General to issue such a warrant are set out in ss34BA and 34BB, and the broader Division provides a framework within which a compulsory questioning warrant activity must be taken out, including relevant safeguards.
14. Division 3, Part III also sets out a range of other provisions related to the application for, and carrying out of, a compulsory questioning warrant. These include secrecy offences intended to ensure the secrecy of a questioning warrant activity; requirements for individuals participating in the questioning warrant process, whether as subjects or as officials carrying out the warrant; and matters relating to court proceedings, the participation of the Inspector-General of Intelligence and Security (IGIS), and records.

## 5. Current security environment

15. The Department suggests the Review of Division 3 of Part III of the ASIO Act should be considered in the context of Australia's current and forecast security environment. As noted in the Director-General of Security's 2023 Annual Threat Assessment, "Australia's security environment is complex, challenging and changing."
16. As the Director-General noted, the threats Australia faces are made more complex as they increasingly diverge from traditional distinctions of security threats and are changing in response to shifting geopolitics, emerging technologies, and broader social trends. Australia is being targeted by sophisticated foreign adversaries that are effectively unconstrained by resources, ethics, and laws, hence these threats also being challenging to combat.<sup>1</sup>
17. The Department considers it is essential that ASIO is equipped to respond effectively and quickly in this changing environment. The compulsory questioning powers provide a unique and effective tool of interception which can be critical in unearthing potential threats to Australia's security. The availability, and judicious use of, such powers also reinforces that Australia is a country with a robust approach to its security, while also remaining a country subject to the rule of law that appropriately protects the rights of individuals.
18. The sources of threats to Australia's security will likely continue to be primarily from politically motivated violence, foreign espionage, and foreign interference activities (including through cyber means). However, Australia will also continue to face a number of other threats to security, namely sabotage, the promotion of communal violence, attacks on Australia's defence system, and threats to Australia's territorial and border integrity. In the evolving environment, threats to Australia's security will be framed by changing political and economic dynamics, technological change, and motivated adversaries.

### 5.1. Politically Motivated Violence

19. The threat of politically motivated violence was the original motivation for the introduction of the compulsory questioning warrant regime and that threat remains today. Violent extremists, both religiously and ideologically motivated, continue to pose a threat to the Australian community. The recent conflict between Palestinian terrorist group Hamas and Israel and associated flaring of extremist sentiments has reinforced the ongoing potential for terrorism threats to manifest. Currently, Australia's national terrorism threat level is POSSIBLE – reflecting that credible intelligence indicates that Australia is a possible target.
20. Religiously motivated violent extremists remain an enduring threat to Australia's security and continue to be influenced by terrorist organisations, including the Islamic State of Iraq and the Levant (ISIL) and, to a lesser extent, al-Qa'ida. Terrorist organisations continue to promote attacks against the West through propaganda campaigns designed to radicalise individuals and inspire terrorist attacks.
21. Ideologically motivated violent extremists — specifically nationalist and racist violent extremists — remain focused on producing propaganda, radicalising and recruiting others, and preparing for an anticipated societal collapse.
22. The rise of simple, but difficult to prevent, low capability attacks will challenge ASIO's ability to identify and disrupt future politically motivated violence. In their 2022-23 Annual Report, ASIO identified that the most likely form of politically motivated violence in Australia is "an attack by a lone actor or small group with little to no intelligence forewarning, and featuring basic weapons, firearms and/or explosives<sup>2</sup>."

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<sup>1</sup> Australian Security Intelligence Organisation 2023, *Director-General's Annual Threat Assessment*, Canberra

<sup>2</sup> Australian Security Intelligence Organisation 2023, *Annual Report 2022-23*, Canberra

23. The emergence of nationalist and isolationist narratives globally is normalising aspects of ideologically motivated violent extremist ideology, including nationalist and racist, and specific-issue violent extremism. The subjects of politically motivated violence investigations represent a diverse spectrum of ages, ethnicities and genders.

## 5.2. Espionage and Foreign Interference

24. Australia is facing an unprecedented challenge from espionage and foreign interference. As noted by the Director-General of Security in his 2023 Annual Threat Assessment, currently “more Australians are being targeted for espionage and foreign interference than at any time in Australia’s history”<sup>3</sup>. As such, espionage and foreign interference have supplanted politically motivated violence as ASIO’s principal security concern.
25. ASIO continues to identify espionage and foreign interference activity by a growing range of state actors targeting Australian interests. Foreign powers are seeking to advance their own economic and strategic interests, at the expense of our own. We expect this trend to continue over the next decade. Such espionage and foreign interference can cause severe harm to Australia’s national security, sovereignty, democratic institutions, economic wellbeing, critical infrastructure, community and other interests.
26. Hostile foreign powers target Australia, seeking to:
- understand our strategic alliances and defence relationships;
  - gain insights into our strategic interests and positions on international diplomatic, economic and military issues;
  - gain commercial advantage on matters including our energy and mineral resources;
  - access our innovations in science and technology; and
  - shape the actions of Australian decision-makers and public opinion in favour of the adversary.
27. Cyber methods are increasingly being used by foreign powers to covertly pursue espionage and foreign interference against Australia. The range, scale and sophistication of foreign powers engaged in hostile cyber espionage activity against Australian Government and private sector systems continues to increase. An increasing number of countries are pursuing a cyber-espionage program as this offers high returns for relatively low cost and plausible deniability. The continued evolution of technology increases the sophistication and complexity of attacks, while also becoming increasingly accessible.
28. In light of the intensifying efforts of foreign powers to advance their interests at the expense of our own, the Department considers ASIO should continue to have compulsory questioning warrants as a tool for carrying out its functions. The powers’ availability, combined with judicious use, helps strengthen Australia’s resilience to espionage and foreign interference.

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<sup>3</sup> Australian Security Intelligence Organisation 2023, *Director-General’s Annual Threat Assessment*, Canberra



## 6. Suggestions to ensure Division 3, Part III remains fit-for-purpose

29. In the face of the changing and complex security environment in which ASIO operates, and emerging security challenges, it is important for Australia to have a robust security posture and effective framework to act as an effective deterrent for foreign or malicious actors.
30. The questioning warrant powers provided for under Division 3 of Part III of the ASIO Act support ASIO in ASIO identifying threats to Australia's security and interests.
31. The Department has identified three changes, which it suggests should be considered to ensure Division 3, Part III remains fit-for-purpose into the future.

### 6.1. Add additional heads of security for adult questioning warrants

32. Considering the nature of the complex and changing security environment confronting Australia, it is the Department's view that Division 3, Part III of the ASIO Act should be extended to include all the heads of security in Section 4 of the ASIO Act, save for border integrity — the already included politically motivated violence, espionage, and foreign interference, as well as adding sabotage, attacks on Australia's defence systems, and promotion of communal violence.
33. The Department notes ASIO has shown it uses its existing questioning warrant powers in relation to politically motivated violence, espionage, and foreign interference only sparingly. The powers have been used only in very specific circumstances, and only in instances where the Director-General and Attorney-General have been satisfied that it will assist in collection of intelligence.
34. The Department's rationale for this suggested expansion of the application of compulsory questioning warrants is outlined below.

#### Sabotage

35. ASIO defines sabotage as damaging or disruptive activity against infrastructure — including electronic systems — which seeks to undermine Australia's national security or advantage a foreign power. Acts of sabotage are not limited to irreversible, destructive attacks on physical infrastructure; they can include small-scale, selective and temporary acts of degradation or disruption to networked infrastructure.
36. In his 2023 Annual Threat Assessment, the Director-General of Security highlighted sabotage as a key risk to Australia's security and interests. In particular, he noted that the capabilities of foreign powers have expanded such that they "can simultaneously be interfering, spying, and setting up for sabotage". Similarly, in the 2022-23 Annual Report ASIO noted that they anticipate foreign powers will increase intelligence activities that could be used to support potential cyber-enabled sabotage or other disruptive actions<sup>4</sup>.
37. ASIO has identified preparation for sabotage as a key area of concern, noting the potential for Australia's adversaries to pre-position malicious code in critical infrastructure, particularly in areas such as telecommunications and energy, for future cyber-attacks<sup>5</sup>.

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<sup>4</sup> Australian Security Intelligence Organisation 2023, *Annual Report 2022-23*, Canberra

<sup>5</sup> Australian Security Intelligence Organisation 2022, *Annual Report 2021-22*, Canberra

38. ASIO anticipates that an act of sabotage in Australia by a foreign power becomes more likely when geopolitical tensions increase. Foreign involvement or investment in Australia's critical infrastructure, or concentrations of foreign ownership in key sectors, may increase a foreign power's ability to access and control Australia's critical infrastructure. This could adversely impact Australia's economy, security and sovereignty. ASIO has also flagged the potential for Australia's adversaries to pre-position malicious code in critical infrastructure, particularly in areas such as telecommunications and energy, to damage critical networks in the future.<sup>6</sup>
39. Expanding these powers to include sabotage will provide ASIO with an additional tool for addressing the complex human aspect of efforts to undertake sabotage against Australia. While cyber-enabled sabotage is the growing focus of ASIO's efforts to counter potential sabotage, sitting behind cyber sabotage threats are human actors. Providing ASIO with the means to compel certain individuals to participate in questioning under warrant helps ensure ASIO is best equipped to tackle the human aspects of cyber, or other, forms of sabotage.
40. ASIO is operating in a security environment with numerous escalating geopolitical tensions that significantly exacerbate the likelihood of sabotage of Australia's capabilities and critical infrastructure. It is essential that ASIO are positioned to respond and prevent sabotage, and as such it is the Department's view that compulsory questioning powers be expanded to include sabotage.

### **Promotion of Communal Violence**

41. As defined by the ASIO Act, promotion of communal violence means activities that are directed to promoting violence between different groups of persons in the Australian community so as to endanger the peace, order or good government of the Commonwealth.
42. Threats that are facing Australia are shaped by shifting geopolitics, emerging technologies, and broader social trends that include online radicalisation and the growth in extreme views, conspiracies and grievances. Noting rising tensions in Australia's political and security environment as a result of conflicts such as the Israel-Hamas conflict, the risk of communal violence has recently increased. The Israel-Hamas conflict also demonstrates how politically motivated violence and the promotion of communal violence can emerge in parallel, and tackling the security challenge posed requires access to equivalent tools.
43. With this in mind, it is the Department's view that greater consideration of and protections against promotion of communal violence would be an appropriate inclusion in Division 3, Part III of the ASIO Act.

### **Attacks on Australia's Defence System**

44. Similar to espionage and foreign interference, attacks on Australia's defence systems are likely to be complex endeavours. In the 2022-23 Annual Report, ASIO noted "we anticipate foreign powers will increase their efforts to conduct espionage, and target Australia's defence systems and critical infrastructure." The Department considers it is important that Australia maintain robust protections against attacks on our defence system in light of this heightened threat to ensure the ongoing protection of Australia's capabilities, interests, and communities.
45. Expanding Division 3, Part III to include attacks on Australia's defence system will ensure that ASIO are prepared for foreseeable increases in these threats and are able to respond effectively. Considering the severity of consequences of these attacks, it is critical that ASIO have a tool, such as compulsory questioning powers, which allows them to intercept and respond to threats to Australia's defence systems.

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<sup>6</sup> Australian Security Intelligence Organisation 2022, *Annual Report 2021-22*, Canberra

46. The ability to compel participation in questioning would provide an additional tool for intercepting or preventing activities of which the harm would be highly consequential for Australia's security. The Department suggests the likelihood of voluntary cooperation by individuals involved in such activities is limited. A tool such as the compulsory questioning powers provided by Division 3, Part III would provide an otherwise unavailable avenue for obtaining information to prevent such activities from occurring and harming Australia's security interests.
47. The Department also considers that Australia's ability to identify any prevent attacks on our defence system are vital as Australia's partnerships expand in this space. In light of the AUKUS partnership, it is imperative that ASIO has the requisite means to identify the planning of attacks on Australian defence systems, and that of our allies, for the benefit of Australia and its partner's defence.
48. In light of Australia's AUKUS partnership and the increase in defence capabilities, the Department sees that there is a need to expand the compulsory questioning warrant powers to cover attacks on Australia's defence system.

## 6.2. Remove questioning warrants for minors

49. As outlined above, *the Australian Security Intelligence Organisation Amendment Act 2020* lowered the minimum age of a questioning subject in relation to terrorism from 16 to 14, while ensuring appropriate safeguards for minors.
50. When minor questioning warrants were first debated in 2002, the then Coalition government defended these powers insisting that children were capable of perpetrating, and had perpetrated, terrorist acts. For example, it was stated that, while these powers were controversial, '[t]he Australian public would be appalled to think that we failed to prevent a 17-year-old terrorist bomber because ASIO was not allowed to ask him or her questions.'<sup>7</sup>
51. Since that time, the terrorist threat in Australia has seen significant evolution. Following the AFP Operation PENDENNIS arrests in 2005, and other counter-terrorism efforts globally following 11 September 2001, the nature of the terrorist threat in Australia began to change. The threat moved away from larger, slower moving, more complex plots, towards quickly emerging 'lone wolf' style attacks, for example as promoted by al-Qa'ida in the Arabian Peninsula's *Inspire* Magazine across 2009-12 and after. The Syrian civil war, emergence of al-Qa'ida aligned Jabhat al-Nusra, and subsequent rise and fall of the Islamic State of Iraq and the Levant (ISIL), saw another shift — the threat environment significantly deteriorated in Australia, and a new phenomenon of younger people being radicalised and involved in terrorist acts emerged. The culmination of this was the ISIL-inspired shooting of New South Wales Police employee Curtis Cheng, by 15 year old Farhad Jabar, on 2 October 2015.
52. The fall of ISIL, however, has seen another shift in the terrorist threat environment. ASIO has lowered the terrorist threat level from EXPECTED to POSSIBLE in the years since the fall of ISIL, reflecting the reduced threat that was a consequence of ISIL's dramatic collapse. Recent years have also seen the rise to prominence of issue motivated violent extremists, most seriously Australian terrorist Brendan Tarrant, who killed 51 people in a terrorist attack in New Zealand on 15 March 2019. The changing nature of the terrorist threat, as well as government responses, mean it is timely to consider whether it continues to be necessary for ASIO to retain an ability to compulsorily question minors.
53. The Department suggests it is also important that minor questioning warrants be considered in light of their proportionality and the need to protect the rights and interests of vulnerable people. As an intrusive and extraordinary power, the carrying out of a minor compulsory questioning warrant would be confronting and difficult for the minor involved, with potentially enduring ramifications. The powers were introduced at an exceptional moment in world and Australian affairs, and the Department suggests it is appropriate to reflect on whether it remains necessary to maintain such an extraordinary and intrusive power.

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<sup>7</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002

54. The Department also notes there are alternative arrangements or legislative options available that achieve the desired function of the minor questioning warrants powers. In addition, the Department notes ASIO has a range of other tools that enables it to engage with minors and their representatives on a voluntary basis on matters of national security. The Department suggests that to the extent compulsory questioning of minors is necessary, it is better serviced by law enforcement agencies or other partner agencies.
55. In light of the above, it is the Department's view that the need for minor questioning warrants in Division 3, Part III can be reconsidered at this time.

### **6.3. Repeal the sunset clause**

56. Division 3 of Part III of the ASIO Act is subject to a sunset clause that is due to expire on 7 September 2025. For the reasons identified below, the Department proposes that this clause be repealed and that Division 3, Part III be amended to become a permanent division within the ASIO Act. The Department suggests that Division 3, Part III could instead be the subject of legislation requiring a regular independent or Parliamentary review of its operation and effectiveness. This could be conducted on a five yearly, or similar, basis.
57. Since the establishment of ASIO's questioning powers, the questioning framework has been renewed five times before it was due to cease. This has resulted in the questioning framework being in force continuously since 2003. In its 2020 Advisory Report on the ASIO Amendment Bill 2020, the PJCIS recommended that the questioning framework should require PJCIS review prior to the current sunset date; however, this was not implemented by government.
58. Given the lasting presence of ASIO's questioning powers without interruption since 2003, there has been a continued assessment that the questioning framework is necessary and useful. ASIO has also demonstrated its judiciousness with the use of this power, as reflected in the small number of questioning warrants and executed over the last 20 years. This, combined with the in-built accountability, procedural, and oversight measures, ensure that establishing Division 3, Part III of the ASIO Act as a permanent division is a reasonable step at this juncture. The Department contends an appropriate balance between the powers and other interests has been struck, and the fundamental question of the powers continuing to be available can be resolved in the affirmative.
59. Further, given the security environment that ASIO operates in will only become more challenging in future years. Espionage and foreign interference are likely to continue to be an escalating challenge amongst the diverse range of threats which are emerging in Australia's security environment. The Department submits it remains the case that the compulsory questioning warrants are a necessary and effective measure.
60. As such, the Department proposes that the continuing renewal requirement and sunset date is repealed, and Division 3, Part III is amended to become a permanent division within the ASIO Act.
61. At the same time, the Department recognises an ongoing need for scrutiny of the use of the powers under Division 3, Part III, and of their ongoing fitness for purpose. For this reason, the Department suggests a regular independent or Parliamentary review is required, should the Division no longer be subject to sunset. Based on the history of reviews of Division 3, Part III, the Department suggests such reviews could be conducted on a five yearly, or similar, basis. Reviews could consider any instances of the use of the powers during the review period, the ongoing fitness for purpose of the provisions, and relevant changes in the security environment and the powers of other agencies which might impact on the powers. They could be conducted by an eminent, independent figure, or the Independent National Security Legislation Monitor (INSLM), or Parliament, as appropriate.

## 7. Other comments on the current compulsory questioning framework

62. The following section examines the major aspects of the current compulsory questioning framework that are not otherwise addressed above. The Department is broadly supportive of maintaining the remainder of Division 3, Part III.

### Issuing Authority

63. The Department is supportive of the current arrangements for the issuing of questioning warrants by the Attorney-General. This allows for an appropriate balance between legal oversight and timeliness in the issuing of a questioning warrant.
64. The Department's view is it remains appropriate for this power to sit with an authority who is independent of ASIO. As Australia's first law officer, and as a Minister accountable to the Australian Parliament and people, the Department considers that Attorney-General is the most appropriate person to determine the appropriateness of questioning warrant requests.
65. The Department notes public discussion — such as proposals by the Law Council of Australia — advocating for a double lock process should be applied to ASIO warrants. The Department does not consider a double lock process is required for compulsory questioning warrants. This is on the basis that the compulsory questioning warrant framework extensively prescribes the way such warrants are to be conducted, and incorporates the role of prescribed authority in the conduct of the warrant. Prescribed authorities can be described as having a judicial-type role and status, and under the s34AE of the ASIO Act are accorded the same protection and immunities as a Justice of the High Court in conducting the role; this provides an independent, judicial-like safeguard in the warrant's conduct.
66. The Department notes the Law Council and others highlight that the decision to issue a compulsory questioning warrant is not subject to judicial review, and that judicial review may provide a higher level of assurance in the grounds for issuing the warrant. The Department acknowledges that considerable weight is placed on the safeguard provided by the role of the Attorney-General in reviewing the warrant to provide that assurance. The Department suggests, however, that the role of the prescribed authority in the conduct of the warrant mitigates against the prospect of an unreasonable or unlawful execution of the warrant, which is where the greatest infringement on the rights of the subject could occur. In combination, the role of the Attorney-General in deciding on the issue of the warrant as first law officer, and as a Minister accountable to the Parliament and people, as well as the role of the prescribed authority, provide a uniquely robust safeguarding of the rights of the subject of a compulsory questioning warrant.

### Apprehension framework and entry to private premises

#### *Apprehension framework*

67. The Department is supportive of the current apprehension powers under section 34C for a police officer to apprehend a suspect to bring them before the prescribed authority if the questioning warrant authorises the apprehension of the subject, or if it is apparent the subject will not comply with the questioning warrant. In apprehending the subject, a police officer is able to enter premises and use force as necessary and reasonable in apprehending and searching the subject.
68. Under current arrangements, the subject is not detained and is only brought before the prescribed authority for no longer than the questioning warrant allows. The Department supports previous reform that repealed the questioning detention warrants due to their lack of use and far-reaching power.



### *Entry to private premises by ASIO*

69. In the carrying out of a warrant, entry to private premises may be required. As it currently stands, ASIO is unable to enter private premises in order to carry out the execution of a questioning warrant.
70. As per section 34CA of the ASIO Act, only a police officer is authorised to enter private premises to apprehend the subject of a questioning warrant, provided the officer believes on reasonable grounds that the subject is on the premises. The officer may enter the 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.
71. Noting that when appropriately authorised, ASIO already maintains the capability to enter private premises to carry out search warrants, the Department is of the view that there may be grounds to authorise ASIO to enter private premises to provide notice of a questioning warrant.

### **Emergency Authorisations**

72. Emergency authorisations allow for the Attorney-General to provide oral authorisation for a warrant rather than requiring written authorisation. In emergency situations, the time difference between a verbal and written authorisation, and any delays in receiving the authorisation, could significantly impact the timeliness of the collection of critical intelligence required to protect any threats against Australia's national security.
73. The Department supports retention of the current provision for the Attorney-General to orally authorise a questioning warrant in emergency situations. The Department notes that it is appropriate for this power to be vested only with the Attorney-General, and not with another authorising officer.

### **Prescribed Authority**

74. The Department supports the current arrangements relating to the Prescribed Authority. In order for an individual to meet the eligibility requirements to become a Prescribed Authority, they must be:
  - A former judge who has served in one or more superior courts for at least 5 years;
  - A President or Deputy President of the Administrative Appeals Tribunal who is currently enrolled as a legal practitioner of a federal court or Supreme Court, and have been so enrolled for at least 5 years; or
  - A currently enrolled legal practitioner of a Federal Court or of Supreme Court, have engaged as a legal practitioner for at least 10 years, and currently hold a practicing certificate granted under a state or territory law.
75. We note that Administrative Review Bill 2023 proposes consequential amendments to section 34AD(1)(b) of the ASIO Act, ensuring only the President or Deputy President of the Administrative Appeals Tribunal (proposed in future to be known as the Administrative Review Tribunal) to be appointed as a Prescribed Authority. These amendments would act as a further safeguard, ensuring that a person nominated as a Prescribed Authority has the requisite experience and qualifications to effectively perform the role and its functions. Additionally, the Department does not believe this will unduly impact on the ability of ASIO to obtain the services of a prescribed authority when required.

### **Access to Lawyers**

76. The Department supports the current arrangements for access to lawyers. It is appropriate to give reasonable opportunity to the subject of a warrant to contact a lawyer of their choice, and to have a lawyer appointed to them pending the arrival of their preferred lawyer, in cases including an immediate appearance requirement. It is also appropriate, while questioning warrants continue to be available in relation to minors, to maintain arrangements for ensuring a minor is not questioned under warrant without a lawyer present.



## Disclosure

77. The Department supports the current arrangements that allow the prescribed authority to permit disclosure of information relating to the questioning warrant to a specific person. Such directions made by the prescribed authority must be consistent with the warrant or be approved by the Attorney-General. This function is normally used to permit the subject of a warrant to disclose information other than specified information to a person with a particular legal or close familial relationship to the subject.

## Offences

78. The Department supports the current offences and associated penalties for secrecy offences under Division 3, Part III of the ASIO Act. These include five years imprisonment for offences relating to the subject complying with the warrant or making disclosures relating to the warrant that are not permitted by the prescribed authority; and two years imprisonment for any person who knowingly contravenes the conditions and safeguards of the warrant. The Department deems these penalties to be sufficient and proportionate to the severity of the offence.
79. The Department notes the recent Review of Secrecy Provisions conducted by AGD may impact on these offences. The Department is currently working with ASIO and AGD on how the principles of this Review could be applied to secrecy offences contained within the ASIO Act.

## Searches

80. The Department supports the current arrangements for person searches relating to the subject of a questioning warrant. Under Section 34D of the ASIO Act, a police officer may request that a person undergo a screening procedure, produce a thing in the person's possession for inspection or examination, and to undergo an ordinary search or frisk search. Police may also retain a dangerous item or communication device from a person while the questioning is being conducted. These searching powers are necessary for the safety and security of the persons present during questioning, and are not undertaken for intelligence collection purposes.

## Accountability

81. The Department supports the current arrangements for accountability and due process. This includes a number of measures in Division 3, Part III of the ASIO Act and as outlined within the Statement of Procedures. These include:
- written statement of procedures made by the Director-General of Security, in consultation with the IGIS and Commissioner of the AFP and approved by the Attorney-General;
  - complaint mechanisms;
  - offences of knowingly contravening safeguards, carrying a penalty of 2 years imprisonment;
  - access to an interpreter;
  - humane treatment of subject of questioning warrant, including that the subject is treated with respect to human dignity, and must not be subjected to torture or cruel and degrading treatment;
  - video recording of all questioning under the warrant to ensure a record of the conduct of questioning is made;
  - reporting to the Attorney-General in writing, outlining the outcome and execution of the questioning warrant, including if the subject was apprehended and whether any force was used; and
  - provision of financial assistance to the subject of a questioning warrant.

82. As a portfolio agency of the Department of Home Affairs, ASIO is also accountable to the Minister for Home Affairs. ASIO is under the control of the Director-General of Security and, subject to Section 8 of the ASIO Act, in the performance of the Director-General's functions they are subject to the directions of the Minister.

## Appendix A: Reference List

Australian Federal Police 2021, *AFP Child Safe Handbook*, Canberra, [AFPChildSafeHandbook.pdf](#)

Australian Federal Police 2012, *AFP National Guide on Persons in Custody and Police Custodial Facilities and People in Custody*, Canberra, [AFP National Guide on Persons in Custody and Police Custodial Facilities and People in Custody 10MAY2012.pdf](#)

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Australian Security Intelligence Organisation 2023, *Director-General's Annual Threat Assessment*, Canberra, [Director-General's Annual Threat Assessment | ASIO](#)

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