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Australian Government

**Australian Security
Intelligence Organisation**

ASIO supplementary submission to the Parliamentary Joint Committee on Intelligence and Security

Review of the ASIO Amendment Bill 2020

24 June 2020

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Introduction

1. The Australian Security Intelligence Organisation welcomes the opportunity to provide a supplementary submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) review of the ASIO Amendment Bill 2020.
2. This supplementary submission expands upon issues raised in our submission provided to the PJCIS on 29 May 2020. This second submission provides additional detail on:
 - the safeguards surrounding compulsory questioning;
 - ASIO's considerations in conducting compulsory questioning;
 - the practical application of compulsory questioning; and
 - ASIO's proposed use of internally authorised tracking devices.

Compulsory questioning framework

Proportionality

3. ASIO acts in a targeted, proportionate and ethical way. The decision to make use of specific ASIO powers is considered in line with the gravity and immediacy of the threat; wherever possible, ASIO uses the least intrusive method available to collect security intelligence. In some cases, compulsory questioning may be the only, or the most effective, way to obtain information to help protect Australia and Australians from threats to their security.
4. ASIO's functions in relation to obtaining, correlating, evaluating and communicating intelligence relevant to security are performed in accordance with ASIO's Ministerial Guidelines. The guidelines stipulate that ASIO must operate in accordance with the following principles:
 - Any means used for obtaining information must be proportionate to the gravity of the threat posed and the probability of its occurrence.
 - Inquiries and investigations into individuals and groups should be undertaken:
 - using as little intrusion into individual privacy as is possible, consistent with the performance of ASIO's functions; and
 - with due regard for the cultural values, mores and sensitivities of individuals of particular cultural or racial backgrounds, consistent with the national interest.
 - The more intrusive the investigative technique, the higher the level of officer that should be required to approve its use.
 - Wherever possible, the least intrusive techniques of information collection should be used before more intrusive techniques.
 - Where a threat is assessed as likely to develop quickly, a greater degree of intrusion may be justified.
5. The proposed Bill does not remove these stipulations from the Ministerial Guidelines.

ASIO supplementary submission to the
Parliamentary Joint Committee on Intelligence
and Security

Considerations for the use of compulsory questioning

6. ASIO routinely conducts voluntary interviews with members of the public, including minors. Since 2003, ASIO has conducted thousands of voluntary interviews but has only sought 16 compulsory questioning warrants. Where possible, ASIO would seek to conduct a voluntary interview in preference to requesting a questioning warrant—compulsory questioning would almost never be the first option for obtaining intelligence.
7. ASIO may consider requesting a compulsory questioning warrant to obtain intelligence in the following circumstances:
 - when other methods of collecting the intelligence are likely to be ineffective;
 - when there is an urgent need to obtain the intelligence, and directly questioning the person would immediately produce directly relevant intelligence;
 - when ASIO assesses the individual may be more willing to divulge information under compulsion, potentially because of the criminal offences attached to noncompliance with the warrant;
 - when the person is likely to reveal the fact or content of ASIO’s interest to third parties, if not for the prospect of criminal prosecution for disclosure; or
 - when the person has refused a voluntary interview, or ASIO assesses that they would refuse.
8. ASIO offers the following hypothetical case studies to support the use of the proposed compulsory questioning power under our countering espionage and foreign interference mandates. ASIO believes the compulsory questioning framework will be an important intelligence collection tool in the security environment and reflects our assessment that espionage and foreign interference are at unprecedented levels in Australia.

Hypothetical case study 1: Use of compulsory questioning

Credible single-source reporting indicates an Australian intelligence officer has been recruited by a foreign intelligence service. Initial ASIO investigation identifies an assessed match for the Australian intelligence officer described; however, attempts to corroborate the reporting via alternative means have been unsuccessful.

A questioning warrant would provide ASIO with a unique opportunity to collect valuable information to enable quick corroboration of the initial reporting. This could include exploration with the intelligence officer of details relating to travel and finances.

The apprehension power provided by a questioning warrant would ensure the officer did not destroy any potentially incriminating information. The increased compulsion provided by the questioning warrant, compared to a declared ASIO interview, would be likely to result in the collection of greater information, noting the intelligence officer would have high-level security awareness and some knowledge of ASIO modus operandi.

The results of the questioning warrant would enable ASIO to refer the case to law enforcement for potential prosecution, while ensuring the initial reporting was protected.

ASIO supplementary submission to the
Parliamentary Joint Committee on Intelligence
and Security

Hypothetical case study 2: Use of compulsory questioning

An Australia-based source of a foreign intelligence service (FIS) has actively been supporting FIS espionage and foreign interference activities conducted in Australia. This includes facilitation of high-harm FIS operations in Australia—for example, acting as a go-between in passing payment in exchange for sensitive or protected information. ASIO's awareness of these activities has been limited, with significant unanswered questions as to the scale of FIS operations facilitated by the asset.

Compared to a declared ASIO interview, a questioning warrant would increase the likelihood of developing information of value from the source, noting that FIS sources are often trained and/or have a high level of security awareness, including instruction to deny or deliver a cover story for their activities. Moreover, compulsory questioning could be used to ensure an opportunity to question the asset before any attempt to avoid questioning by departing overseas permanently.

Although referral to law enforcement would be a likely outcome in this scenario, use of a questioning warrant prior would be advantageous to ensure that related ASIO investigations, operations and sensitive reporting remained protected.

9. ASIO would generally not request a questioning warrant in a situation where:

- there is a requirement for the investigation to remain covert;
- the assessed threat does not justify the intrusion or the commitment of resources to plan and execute a compulsory questioning warrant; or
- the intelligence can be obtained by other means.

Voluntary interviews of minors

10. ASIO policies specify certain requirements and considerations for voluntary interviews of minors. Significant weight is given to the best interests and welfare of the minor, and the interview may only take place after careful consideration of these factors and with senior management approval. For voluntary interviews of minors, ASIO would ordinarily engage the parents or guardian before the questioning or at the same time, providing the opportunity for parents or guardians to participate where appropriate.

11. When seeking a voluntary interview with a minor, ASIO considers:

- the best interests of the minor and how their welfare has been considered in operational decision-making and arrangements;
- how ASIO is, or will be, satisfied that the minor understands the circumstances and the voluntary nature of the interview;
- whether it is appropriate to seek the attendance of a parent, legal guardian or other adult representative during the interview, noting that this would occur in almost all cases; and
- any other considerations relevant to the interview, having regard to the maturity and circumstances of the minor.

Policies and procedures for compulsory questioning framework

12. As the Bill is yet to be passed by Parliament, ASIO's policies for the updated compulsory questioning framework are still under development. Policies governing ASIO's engagement with adults in the proposed compulsory questioning framework will be broadly based on policies and procedures for the existing compulsory questioning framework. ASIO's engagement with minors in the proposed compulsory questioning framework will incorporate existing considerations governing voluntary engagement with minors, as well as new requirements imposed under the Bill.
13. The exercise of compulsory powers imposes a special responsibility on ASIO employees, including that all procedures related to a warrant are rigorously planned and executed with careful attention to detail. ASIO undertakes extensive operational planning for the conduct of all questioning warrants, and this process is authorised at a senior level as per ASIO policies. During the operational planning process, ASIO considers the roles and responsibilities of employees involved, coordination with other agencies, a detailed risk assessment and mitigations, and other technical considerations.
14. The facts and other grounds relied on in a warrant request are supported by rigorous analytical assessment, and warrant requests are subject to rigorous internal legal review for compliance with legislative requirements and thresholds. ASIO warrants are also subject to external independent scrutiny through the Inspector-General of Intelligence and Security's (IGIS) inspection regime.
15. For a questioning warrant for an adult, the Attorney-General must be satisfied that (among other things) there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to matters relating to espionage, politically motivated violence or acts of foreign interference, and that it is reasonable for the warrant to be issued, having regard to other methods of collecting the intelligence that are likely to be as effective.
16. In the case of a minor, a questioning warrant can only be sought in respect of politically motivated violence, and the Attorney-General must also be satisfied that the person is likely to have engaged or is likely to engage in these activities—not merely that they may have knowledge of them. The Attorney-General must also consider the best interests of the minor in deciding whether to issue the warrant and must take into account:
 - 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.

Practical application of compulsory questioning framework

Serving the notice of the warrant

17. The time and place of the serving of the notice of the warrant are key considerations in operational planning, with the notice of the warrant served by an ASIO officer or a police officer. Where apprehension is authorised, a police officer would be likely to serve the notice of the warrant, as ASIO does not have apprehension powers. The notice details the person's rights, including their right to contact a lawyer and their right to make a complaint to the IGIS, the Commonwealth Ombudsman or another relevant complaints agency.
18. If the subject of the questioning warrant is a minor, ASIO would generally engage with their parents or guardian at the same time as, or before, serving the warrant. In some cases, the minor may prefer that their parents or guardian not be present for questioning, but they must have a lawyer present before questioning can commence. Consistent with the way in which ASIO currently approaches voluntary interviews with minors, significant weight would be given to the best interests and welfare of the minor in the operational decision-making and arrangements for the questioning warrant. Considerations could include the potential for the minor to find the interview distressing or overwhelming, and any situations of vulnerability pertaining to the minor. Consistent with the need for significant weight to be given to the minor's best interests, ASIO conducts voluntary interviews with minors rarely, and higher levels of approval are needed compared with voluntary interviews of adult subjects.

Apprehension

19. A person may be apprehended by police and immediately brought before the prescribed authority for questioning if apprehension is authorised under the warrant. A person may also be apprehended if, at the time of serving the notice of a warrant requiring immediate appearance, the person makes representations that they intend to tip off another person, destroy security-relevant records or things, or not appear for questioning. The person may be apprehended by police and brought immediately before the prescribed authority for questioning if they fail to appear, or reappear, for questioning at the appointed time.
20. In these circumstances, police may use their discretion to use reasonable and necessary force to apprehend the person to bring them before the prescribed authority for questioning. This includes using reasonable and necessary force to enter premises where police believe the person to be. The power of apprehension ends when the individual is before the prescribed authority.
21. If apprehended by police, the person may have their communications limited. They would still be able to contact:
 - a lawyer;
 - the IGIS, the Commonwealth Ombudsman or a similar complaints agency;
 - (if a minor) a minor's representative; or
 - any other person as permitted by the warrant or prescribed authority.

This prohibition on contacting others ends as soon as the person is brought before the prescribed authority.

ASIO supplementary submission to the
Parliamentary Joint Committee on Intelligence
and Security

Time and place of questioning

22. The notice of the warrant sets out the time and place the person must attend for questioning. An appropriate location for questioning would be determined through the operational planning process, and timing will be determined by several factors. Additionally, questioning can be conducted in periods over multiple days to allow information collected to be analysed and reviewed and/or acted upon operationally.
23. The warrant can only authorise immediate appearance if the Attorney-General is satisfied that it is reasonable and necessary in the circumstances.

Involvement of lawyers

24. Once notice of the warrant has been served, the person will have the opportunity to contact a lawyer to attend the questioning with them. If the person is required to attend questioning immediately, the prescribed authority must appoint a lawyer in the interim—but the person is provided facilities for contacting a lawyer of their choice. A person may voluntarily elect to forgo a lawyer (unless they are a minor, in which case questioning cannot proceed in the absence of a lawyer).
25. The prescribed authority may prevent the person from contacting a particular lawyer if they are satisfied this may lead to someone being tipped off about an investigation, or the destruction of security-relevant records or things. For example, there may be circumstances where associates of the subject of questioning are involved in the same activities of concern (politically motivated violence, espionage or acts of foreign interference). If those associates were made aware of the questioning and ASIO's investigation via a lawyer, they might accelerate, alter or obfuscate these activities. ASIO can make representations to the prescribed authority on this issue but cannot directly prohibit a particular lawyer from being involved.
26. Lawyers do not directly represent the person during questioning (as in a courtroom setting) but may:
 - seek a break in questioning from the prescribed authority to advise their client;
 - request clarification of an ambiguous question; and
 - address the prescribed authority on a matter during a break in questioning.

Person searches

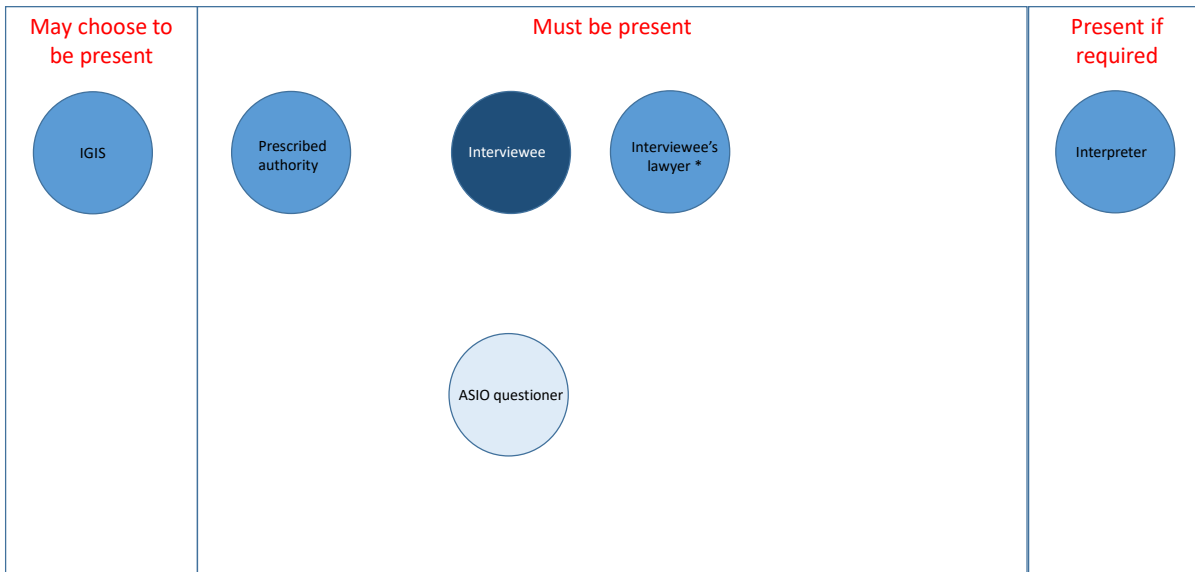
27. Police have powers to conduct security screenings and voluntary ordinary and frisk searches of individuals at the place of questioning. Dangerous items, and items that could be used to communicate the existence of the warrant or record the questioning proceeding, will be prohibited from the questioning session, and police may refuse entry to a person who wishes to possess these things during the questioning session.
28. An ordinary or frisk search may also be conducted if a person is apprehended for similar purposes. While this search is primarily for officer safety, and to ensure the integrity of questioning, police may also seize records or other things of intelligence value as part of a search of an apprehended person if the Attorney-General has expressly authorised it in the warrant.

ASIO supplementary submission to the
Parliamentary Joint Committee on Intelligence
and Security

Conduct of questioning

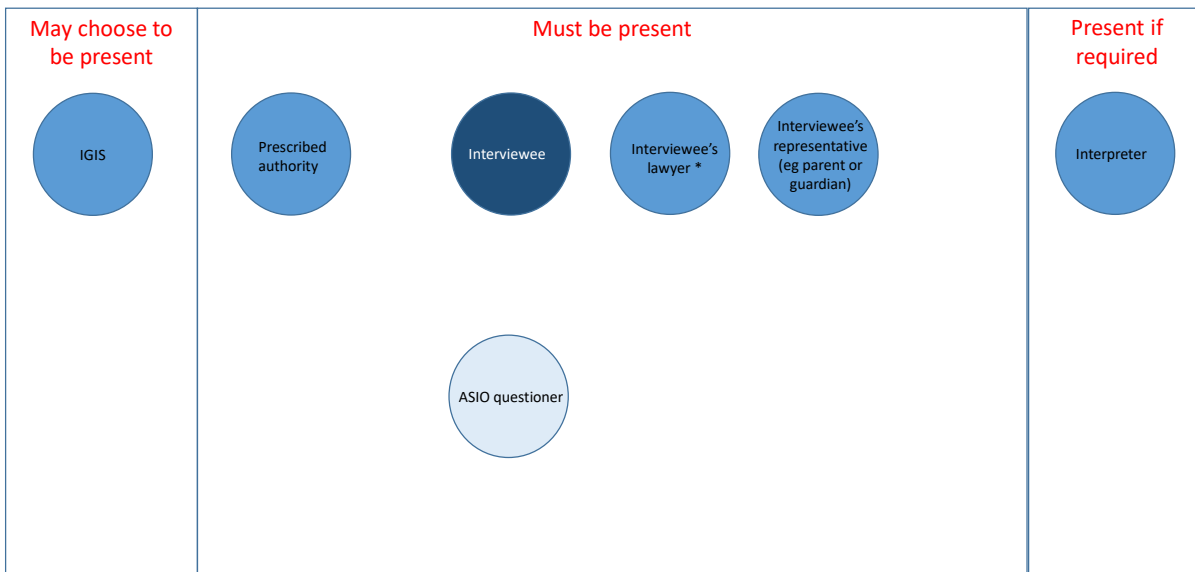
29. Questioning occurs under the supervision of the prescribed authority—a former judge, the President or a Deputy President of the Administrative Appeals Tribunal, or an experienced legal practitioner with appropriate knowledge or experience. The prescribed authority supervises the questioning in accordance with their own independent judgment—neither ASIO nor the Attorney-General can give directions to the prescribed authority, nor can they vary or revoke the prescribed authority's directions (other than in accordance with certain narrow situations specified in the Bill).
30. Before questioning starts, the prescribed authority must inform the person about the details of the warrant, including their right to a lawyer and their right to make a complaint. The prescribed authority can give directions as to how the questioning is conducted, including, but not limited to, the provision of breaks, determination of whether questioning can continue (for adults) in the absence of a lawyer, and directions to address concerns raised by the IGIS.
31. Questioning can only occur for continuous periods of up to two hours in the case of a minor. In breaks between questioning, the prescribed authority must provide a reasonable opportunity for the person's lawyer to advise them.
32. The person may leave the place of questioning during breaks. In addition, they cannot be physically prevented from departing during the actual questioning. However, failure to return after a break, or departing during questioning, would constitute an offence.
33. During the questioning, the following people could be present:
 - the prescribed authority;
 - the ASIO questioner;
 - the person's lawyer (an adult may voluntarily forgo a lawyer, but a minor cannot be questioned without a lawyer);
 - if the person is a minor, their non-lawyer representative (for example, a parent or guardian);
 - the IGIS or a member of IGIS staff (if they elect to attend); and
 - an interpreter (if required).
34. The diagrams below set out potential configurations for compulsory questioning.

ASIO compulsory questioning – adult



*unless interviewee chooses to proceed without lawyer present

ASIO compulsory questioning – minor



*interviewee cannot choose to proceed without lawyer present

Oversight

- 35. A compulsory questioning power is not unique to ASIO: similar powers are available to the Australian Criminal Intelligence Commission, the Australian Securities and Investments Commission, the Australian Building and Construction Commissioner, the Australian Taxation Office, the IGIS and the Commonwealth Ombudsman, among others.
- 36. The level of accountability imposed on ASIO in the Bill is among the highest imposed on bodies with coercive

ASIO supplementary submission to the
Parliamentary Joint Committee on Intelligence
and Security

powers in Australia. Oversight of the proposed compulsory questioning framework will occur in the following ways:

- the warrants will be issued by the Attorney-General;
 - questioning must occur before an independent prescribed authority (a former judge, the President or Deputy President of the Administrative Appeals Tribunal, or an experienced legal practitioner with appropriate knowledge or experience);
 - the IGIS or a member of staff of the IGIS may be present at questioning or for the apprehension of a person, and questioning may be suspended by the independent prescribed authority should the IGIS have any concerns about the propriety or legality of the exercise of the questioning powers;
 - ASIO must provide the IGIS with information to facilitate oversight of ASIO questioning warrants, including a copy of the warrant request and instrument (or a written record of any oral request and instrument) and any variations, a video recording of any questioning, information regarding any seizure or apprehension, and a statement describing any action the Director-General has taken in respect of a concern (if any) of the IGIS;
 - for each warrant, ASIO must provide a report to the Attorney-General setting out details of the extent to which the warrant has assisted ASIO in carrying out its functions, and any apprehension and seizure; and
 - statistics relating to ASIO's use of compulsory questioning warrants will be provided in ASIO's annual report.
37. This oversight is in addition to the many safeguards contained in the Bill, including the ability for a person to:
- have a lawyer present;
 - have an interpreter present;
 - make a complaint to the IGIS, the Commonwealth Ombudsman or other relevant complaints agency; or
 - seek a remedy from the courts relating to a questioning warrant or the treatment of a person in connection with such a warrant.
38. Additional safeguards are also in place for minors (aged 14–17), such as:
- a requirement for the Attorney-General to consider the best interests of the minor in determining whether to issue the warrant;
 - a requirement that the Attorney-General be satisfied on reasonable grounds that the minor is the target of an investigation into politically motivated violence;
 - a requirement for a lawyer to be present for the minor during questioning;
 - a requirement for a parent, guardian or other support person (in some circumstances, this could be their lawyer) to be present during questioning; and
 - a requirement to afford a break in continuous questioning at least every two hours.
39. There are offences for contravention of certain safeguards by officials exercising the authority of a questioning warrant.

ASIO supplementary submission to the
Parliamentary Joint Committee on Intelligence
and Security

Internally authorised tracking devices

40. ASIO does not have the power to conduct surveillance on ordinary members of the public going about their normal business, with or without a warrant, unless it is for the purpose of obtaining intelligence relating to a security threat.
41. Tracking devices perform the same role as a surveillance team does in the field, but they enhance the safety of ASIO officers from physical threats. The devices may tell us where a particular vehicle has been and when, but they do not record conversations or video imagery. ASIO will still require a warrant to install or recover tracking devices which involve entry to premises or interference with the interior of a vehicle without permission.
42. The type and placement of a tracking device used to assist ASIO to achieve intelligence outcomes can vary greatly, dependent on the requirements of a specific operation.
43. Surveillance is used for a variety of purposes across agencies. However, ASIO investigations use surveillance for intelligence purposes only.
44. The Bill gives ASIO the authority to deploy a tracking device using internal approval processes similar to those in the existing law enforcement framework. This is particularly necessary in the current security environment, where effective threat response is managed through close operational engagement between ASIO and law enforcement partners. The discrepancy in authorisation arrangements is noticeable in terms of ASIO's reduced operational agility in cases when ASIO and police are jointly responding to time-critical threats or progressing Joint Counter-Terrorism Team (JCTT) operations.
45. ASIO is sometimes asked to assist JCTT investigations by supplementing JCTT surveillance resources. In high-threat investigations where surveillance resources are finite, targets are sometimes shared across ASIO and JCTT agencies. In these instances, the need for a tracking device may arise suddenly—under the current legislative framework, ASIO may be the only agency that would be unable to urgently deploy a tracking device.
46. Additionally, ASIO conducts multiple investigations for security intelligence purposes across Australia outside the JCTT framework. In these investigations, ASIO requires this tracking device amendment because surveillance operations in relation to these investigations would often not be conducted in concert with police partners.

Conclusion

47. ASIO supports the ASIO Amendment Bill 2020 as it will provide additional operational tools that can be deployed quickly in high-threat environments to protect Australia and Australians from terrorism and foreign interference.
48. As security threats evolve, ASIO's ability to respond must also evolve. The Bill represents a balanced and proportionate response to evolving security threats.