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**Australian Government**  
**Australian Security**  
**Intelligence Organisation**

## **ASIO response to August 2017 written questions**

Additional response to the Parliamentary Joint Committee  
on Intelligence and Security Review of ASIO's questioning  
and detention powers

**4 September 2017**

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### Section 1—Introduction

1. The Australian Security Intelligence Organisation welcomes the opportunity to provide further detail to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) review of the operation, effectiveness and implications of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (questioning and detention powers).
2. Answers to the questions received on 18 August 2017 are set out in Section 3. These answers complement other evidence to the inquiry:
  - classified submission to the inquiry, submitted on 28 April 2017;
  - unclassified submission to the inquiry, submitted on 9 May 2017;
  - classified and unclassified supplementary submission to the inquiry, submitted on 8 June 2017;
  - classified and unclassified response to written questions (June 2017), submitted on 8 June 2017; and
  - classified and unclassified joint ASIO – Attorney-General's Department (AGD) response to written questions (July 2017), submitted on 24 July 2017.

### Section 2—Role of the Australian Security Intelligence Organisation

3. ASIO is Australia's national security intelligence service. Our purpose is to protect Australia, its people and its interests from threats to security through intelligence collection and assessment, and the provision of advice to Australian Government, government agencies and industry.
4. ASIO's work is anticipatory in nature. We seek to identify, investigate and assess potential security threats and work with domestic and international security partners to prevent harm from occurring.
5. ASIO's key strategic priorities are:
  - countering terrorism and the promotion of communal violence;
  - countering espionage, foreign interference and malicious insiders;
  - countering serious threats to Australia's border integrity; and
  - providing protective security advice to government and industry.
6. We harness our expertise in security, unique intelligence collection capabilities, strong national and international partnerships, and all-source intelligence analysis capabilities to provide trusted, actionable advice.
7. ASIO's role and functions are determined by law. ASIO must act lawfully, in line with the provisions of the ASIO Act and other relevant legislation and guidance. ASIO must also act with propriety: our activities must be conducted effectively, efficiently, ethically and without bias.



## Unclassified

8. ASIO is accountable to the Attorney-General and subject to parliamentary and independent oversight and scrutiny. This is to provide assurance that ASIO acts independently, lawfully and properly discharges its functions.

### Section 3—Answers to written questions, August 2017

#### Question 1

Could you provide a specific counter-terrorism scenario in which ASIO would seek to use a detention power?

#### Answer

9. Below are two hypothetical examples of where ASIO could use a tactically flexible questioning and detention power in a counter-terrorism scenario.

#### **Counter-terrorism scenario 1: unexpected arrival in Australia of a returnee from Syria**

10. Around 110 Australians are currently fighting or engaged with terrorist groups in Syria and Iraq. While the Australian Government has consistently stated that anyone fighting with, providing material support to or associating with organisations on either side of the conflict is committing a serious crime and will be subject to the full force of the law upon their return to Australia, evidence collection in a conflict zone is extremely challenging.
11. In this context, the role of intelligence collection is vital. For example, we could see use of a questioning and detention warrant in a case involving an individual who was identified at the Australian border as a member of the Islamic State of Iraq and the Levant (ISIL) who had been active with the group in Syria, but where detail of activity was limited and based on intelligence reporting. With a more tactically flexible regime—and if the requirement for linkages to specific terrorism-related offences were removed—ASIO could use a questioning and detention power to detain the individual and question them in relation to their ISIL role in order to determine the extent of any capability obtained, what contacts they had formed, their intended location, what activities they might undertake once in Australia, and other relevant information to support an assessment of the threat they pose to the community. This questioning might also identify that, from their ISIL activities, the individual had knowledge of or involvement in current attack planning in Australia; capacity to obtain this information would enable ASIO to provide advice to other agencies in order to activate mitigation measures to meet the assessed level of threat.
12. In such circumstances, an emergency oral warrant may be required, and immediate pre-emptive detention necessary, in the case where ASIO thought they had knowledge of current attack planning, to ensure the individual was not able to contact others involved in the conspiracy and cause them

## Unclassified

to accelerate their attack, or to ensure the individual did not destroy electronic records related to their activities in Syria before being required to produce them to ASIO under compulsory questioning. Further, immediate pre-emptive detention would enable force to be used to ensure the individual's attendance at questioning in circumstances where it may otherwise be unlikely they would attend as required.

### **Counter-terrorism scenario 2: a complex/multi-mode terrorist attack plot scenario**

13. In this scenario, a complex terrorist plot involving multiple possible attack vectors—such as explosives, in addition to edged weapons or motor vehicles—has been discovered and the main perpetrators have been arrested. However, not all the devices have been found and the arrested perpetrators are not giving law enforcement agencies information to assist ASIO in assessing the residual threat to the community.
14. If thought appropriate in the circumstances, ASIO could seek a questioning and detention warrant on another family member or associate who was assessed to hold relevant information or leads. Immediate pre-emptive detention would be necessary because we would not want that person to notify anyone else that they are being questioned by ASIO. Such notification could result in others being able to destroy or hide the devices or, worse, accelerate the attack planning.

### **Question 2**

In his 2016 review, the then Independent National Security Legislation Monitor (INSLM) Roger Gyles QC recommended ASIO adopt a questioning model based on that available to the Australian Criminal Intelligence Commission (ACIC) under the *Australian Crime Commission Act 2002*. It would assist if ASIO and the Attorney-General's Department could clarify their views on this recommendation.

### **Answer**

15. ASIO's preferred compulsory questioning model is described in the response to Question 4 below. While ASIO believes the ACIC framework could be seen as an appropriate starting point in developing a compulsory questioning model that would suit ASIO, this is not ASIO's preferred approach. ASIO would prefer a model that broadly reflects the existing framework with a range of adjustments to make it more streamlined and ensure it better reflects ASIO's intelligence collection functions.



## Unclassified

### Question 3

How does the proposed broadening of ASIO's questioning power to include questioning in relation to espionage and acts of foreign interference fit within (and complement) existing Australian Intelligence Community (AIC) efforts, strategies and policy aimed at countering those threats to security?

### Answer

16. ASIO is the lead AIC agency responsible for identifying, countering and providing advice to government on threats emanating from espionage and acts of foreign interference. As the only AIC agency with the authority to exercise special powers inside Australia, ASIO alone is empowered to investigate these threats. Information obtained and provided by other AIC agencies informs ASIO's investigative efforts; however, broadening ASIO's questioning power to include questioning in relation to espionage and acts of foreign interference would provide a critical investigative capability to assist ASIO in discovering, understanding and mitigating espionage and foreign interference threats, particularly in situations of time criticality or high harm, or where law enforcement measures are not available.
17. At the request of the Prime Minister, the Attorney-General's Department (AGD) is leading a comprehensive review of Australia's espionage and foreign interference-related laws to identify potential reforms. These reforms will positively impact on the ability to prosecute matters related to espionage and acts of foreign interference. This is separate and distinct from ASIO's intelligence-led investigative efforts, which do not, and will not, always result in law enforcement measures. The broadening of ASIO's questioning powers would assist in the gathering of intelligence to identify and understand espionage and acts of foreign interference threats. While this may assist in building a law enforcement case for prosecution, the main purpose of the questioning powers would be to gain insight into the nature and extent of the threat, to assist ASIO in determining the most appropriate harm mitigation strategies, one of which may be referring the case for law enforcement prosecution.
18. The broadening of ASIO's questioning power would provide a formal setting in which compulsory questioning is conducted, with ramifications for failing to answer or answering falsely. This framework would assist ASIO to gather intelligence that would not otherwise be obtainable via other special powers and would not be forthcoming in a voluntary ASIO interview. Additionally, the questioning could provide valuable insight to inform harm assessments in situations where prosecution may not be desirable.
19. For example, if ASIO were investigating an Australian who was in direct contact with a Foreign Intelligence Service (FIS), and ASIO's coverage via special powers (for example, telephone interception) and other investigative techniques had determined the individual was engaged in acts of foreign interference as defined by the ASIO Act (1979), the use of questioning powers would

## Unclassified

assist ASIO to gather intelligence to assess the resultant harm from the individual's activities. If elements of the case were highly classified and law enforcement outcomes were not possible, and a voluntary interview was inadequate to obtain the required intelligence without prejudicing the investigation, ASIO's questioning power would be crucial in determining the nature and extent of the prejudicial security outcomes and the best manner in which to mitigate the harm. The sanctions for revealing the questioning would assist in deterring the individual from contacting their FIS handler to tell them about the fact and nature of their contact with ASIO.

20. ASIO is not aware of any other efforts, strategies and policy to counter threats to security from espionage and foreign interference.

### Question 4

What is ASIO's preferred questioning model? In answering this question, please address the stated components of a proposed model and provide reasons why each proposal is preferred.

### Answer

21. ASIO's preferred compulsory questioning model broadly reflects the existing framework, with the modifications that have previously been identified in ASIO's submissions and responses to PJCIS questions. Where matters are not covered in the below description of the preferred model, ASIO proposes retention of the existing provisions dealing with those matters in the ASIO Act.

22. If a different, new model were to be adopted, ASIO would wish to see many of the elements of the existing model with suggested modifications as part of that new model.

### Compulsory attendance

23. Under existing provisions, both the questioning warrant (QW) and questioning and detention warrant (QDW) mechanisms contain an ability to detain the subject of the warrant and in effect form a compulsory attendance regime. This element of the existing framework is specifically designed to ensure:

- others are not tipped off about the relevant investigation;
- the subject attends or continues to attend questioning; and
- records or things requested to be produced under the warrant are not destroyed, damaged or altered.

24. While immediate, pre-emptive detention is not available under a QW, the prescribed authority can nonetheless direct the subject of a QW be detained if one of the above three concerns exists. Further, if the person fails to appear in accordance with a QW, a police officer can take the person into custody and bring them before a prescribed authority for the questioning to occur.



## Unclassified

25. In any future model for compulsory questioning, ASIO would want to see compulsory attendance requirements remain that are designed to achieve the same outcomes as those under the existing framework. This should include the ability to take a person into custody immediately upon service of the warrant (and if necessary use force in doing so) to ensure the subject's appearance for questioning, prevent others being tipped off or prevent required records or things being destroyed, damaged or altered.
26. ASIO is not necessarily tied to retaining this pre-emptive capability in the form of the existing QDW provisions. In particular, ASIO would be open to achieving the same objectives as a QDW through an optional additional requirement for immediate 'compulsory attendance' under a QW, that includes the ability for police to take a person into custody, along the lines suggested in response to earlier PJCIS questions (see details below under (e): 'Apprehension/detention framework', at paragraphs 48–51).

### **(a) Legislative thresholds**

27. ASIO seeks a legislative threshold for the issue of a QW or QDW that better reflects ASIO's intelligence collection function. Given that ASIO is not a law enforcement agency, the threshold for the issue of a warrant should not be linked to the investigation of a particular type of criminal offence. A threshold consistent with other special powers warrants would be appropriate. The threshold also should not limit the availability of a QW or QDW to intelligence collection in regard to a particular subset of the definition of security under the ASIO Act. Given the potential value of compulsory questioning in particular in regard to foreign interference and espionage matters, ASIO seeks that QWs and QDWs be available across all heads of security.
28. If QDWs are retained, ASIO also seeks the alignment of the QDW threshold with that for QWs by removal of the 'last resort' threshold for the issue of a QDW. Under ASIO's preferred model, the key thresholds for seeking a QW and a QDW are consistent as they are both targeted at the same overall objective: collecting intelligence in respect of a matter that is important in relation to security. If there is to be any difference between the respective thresholds for QDWs and QWs, it should reflect the reasons why it is necessary to seek pre-emptive detention—that is, to minimise the risk that:
- the subject will not appear;
  - others are tipped off about the investigation; or
  - requested records or other things are destroyed, damaged or altered.
29. If the 'last resort' threshold is maintained for QDWs, there will continue to be a gap in regard to the availability of pre-emptive detention. This gap exists because, while the thresholds for a QW may be able to be met (justifying the use of compulsory questioning), the 'last resort' threshold for

## Unclassified

a QDW may in many circumstances be unable to be met. This may be the case even though the threshold that actually relates to the need for pre-emptive detention can be met. So, while a QW may be available given comparisons with other intelligence collection methods, the preventative mechanism of pre-emptive detention under a QDW would not be available even though pre-emptive detention is necessary and justified in the circumstances.

30. ASIO's preferred thresholds for the issue of a QW and QDW (if retained) are as follows:

### *Questioning warrants*

- There are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence in respect of a matter that is important in relation to security.
- Having regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued.
- There is in force a written statement of procedures to be followed in the exercise of authority under the warrant.

### *Questioning and detention warrants*

- There are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence in respect of a matter that is important in relation to security.
- Having regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued.
- There is in force a written statement of procedures to be followed in the exercise of authority under the warrant.
- There are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person:
  - may alert a person involved in the security-relevant activity that there is an investigation into that activity;
  - may not appear before the presiding officer; or
  - may destroy, damage or alter a record or thing, or cause another person to destroy, damage or alter a record or thing, that the person may be requested in accordance with the warrant to produce.



## Unclassified

### **(b) Issuing officers**

31. ASIO's preferred issuing officer for both QWs and QDWs is the minister responsible for issuing ASIO's other special powers warrants. In ASIO's view, having the same person—being the relevant minister—issue all ASIO's special powers warrants is administratively appropriate and operationally effective.
32. The current multi-step process, requiring approval of a QW/QDW by an issuing authority following consent from the minister, is not conducive to an efficient or timely execution of a warrant in circumstances where it could be deployed to have optimal operational outcomes, particularly where there is an imminent threat to public safety and immediate action is required. ASIO needs to rely upon capabilities that are suitably tailored to a fast-paced, high-threat environment, to support time-critical opportunities to collect vital intelligence.

### **(c) What the warrant/summons authorises**

33. ASIO wishes to retain the existing provisions in regard to QWs/QDWs authorising the compulsory questioning of the subject, and requiring the production of records or things.
34. Under a QW, the subject is required to appear for questioning immediately following service of the warrant or at a time specified in the warrant—refer to s34E(2). See 'Apprehension/detention framework', below, for proposals for search and police custody powers under a QW. Under the QW, ASIO proposes that it be authorised to question the person about the matter that is important in relation to security, and maintain the ability to require the production of records or things that may be relevant to the matter that is important in relation to security. Further, ASIO is authorised to make copies and/or transcripts of a record produced, and/or retain records or things produced (see ss34E(4) and 34ZD). See 'Apprehension/detention framework' about continuing the presiding officer's capacity to detain the subject of a QW once they appear before them for questioning.
35. Under a QDW, the subject is able to be taken into custody by a police officer, brought before a presiding officer immediately for questioning and detained by police for the period authorised under the warrant (see s34G(3)). More details are provided in 'Apprehension/detention framework', below. As with a QW, under a QDW ASIO should be authorised to question the person about the matter that is important in relation to security, and require the production of records or things that may be relevant to the matter that is important in relation to security. Further, ASIO is authorised to make copies and/or transcripts of a record produced, and/or retain records or things (see ss34G(7) and 34ZD).
36. The offences and penalties specified in s34L should continue to apply to conduct in breach of the requirements of a QW or QDW, including offences of not appearing as required, failing to give

## Unclassified

requested information or produce requested records or things, and giving false or misleading information.

### **(d) Availability of emergency authorisations**

37. Given the current operating environment and the potential that a QW or QDW may be required to urgently collect critical security intelligence, there should be the ability for the Director-General to seek from the minister the issue of an emergency oral warrant (in person, by telephone or other means). Under this proposal, confirmation in writing of the issue of the warrant would be provided by the minister as soon as practicable following the issue of the warrant. A similar mechanism is available for special intelligence operations under the ASIO Act.

### **(e) Apprehension/detention framework (both pre-questioning and during questioning) including any person search powers**

38. ASIO wishes to retain the existing capacity under the ASIO Act for police to apprehend and detain persons subject to compulsory questioning. As stated previously, ASIO is not necessarily tied to the QDW mechanism for achieving those objectives a QDW is designed to meet. However, it does wish to see inclusion of a mechanism that would achieve the same ends.

39. Further, for QWs ASIO wishes to see inclusion of a 'pre-questioning' search power and the ability for police to take a person into custody (without specific authorisation under the warrant) in certain circumstances.

#### *Questioning warrants*

40. The current QW provisions do not allow any search or use of force against a person who is the subject of the warrant unless there is a specific direction by the prescribed authority, or the person fails to appear for questioning (s34K). This means in the usual scenario where the subject of a QW presents for questioning at the required time under the warrant, there is no ability to conduct a search of that person before they enter the building or room where questioning is to take place. In the current environment, this can present safety risks to those involved in the questioning process.

41. Consistent with ASIO's supplementary submission of 8 June 2017, a QW should allow a police officer to search, and seize items found on, a subject of a QW before they enter the place they are required to attend questioning. This is necessary to ensure the subject does not take any item into the questioning that could be used to harm any person, including ASIO staff and police officers present during questioning.

42. ASIO also suggests consideration that a QW authorise a general capability for the police officer serving the QW to take the subject of the warrant into custody where they suspect on reasonable grounds from anything said or done by the person that they intend not to comply with the warrant, including:



## Unclassified

- not attending questioning as required under the warrant;
  - alerting a person involved in the security-relevant activity that there is an investigation into that activity; and/or
  - destroying, damaging or altering a record or thing, or causing another person to destroy, damage or alter a record or thing, that has been requested or may be requested to be produced in accordance with the warrant.
43. This power should also include the ability to enter premises to take the person into custody (consistent with s34U), and the ability to carry out a search of the person. Once the police officer has taken the person into custody, they would be required to immediately bring the person to the location where questioning is to occur.
44. This proposed power is consistent with a recommendation of then INSLM Walker in 2012 and would ensure preventative steps are able to be taken by the police officer serving the warrant if the subject of the QW reacts in a way that was unforeseen at the time the warrant was issued.

### *Questioning and detention warrants*

45. ASIO's concern is to ensure the objectives that a QDW is designed to achieve can be met in any future model. It is not concerned whether those objectives are achieved through the existing QDW mechanism or an alternative mechanism, such as the model provided to the PJCIS in AGD's July 2017 responses to the PJCIS's post-hearing questions (see details below at paragraphs 48–51).
46. Under a QDW, the subject is able to be taken into custody by a police officer, brought before a prescribed authority immediately for questioning and detained by police for the period authorised under the warrant—see s34G(3). In these circumstances, a police officer may:
- use such force as is necessary and reasonable in taking a person into custody, bringing the person before the presiding officer and detaining the person (s34V);
  - enter premises to search for the person or take the person into custody (s34U); and
  - carry out a search of a person detained under a QDW.
47. As stated in ASIO's responses to the PJCIS's questions in the lead-up to the hearings in mid-June 2017, the current QW provisions would not prevent a person tipping off others as to an investigation or destroying records or the things sought under the warrant. While the subject of a QW may commit an offence if they were to tip off others, or destroy evidence, the act sought to be avoided will have been carried out, and the harm will have been done. Even where a QW requires immediate attendance at a specific location, a police officer can only take a person into custody in relation to a QW once they have failed to appear before the prescribed authority (see s 34K(7)). *In practice,*

## Unclassified

*this will involve a time delay between the service of the warrant and the trigger for detaining the person, which may allow the person to tip off others about the investigation and/or destroy material.*

48. The only way to ensure the subject does not contact others about the investigation or that they do not destroy relevant material is to have a capacity to take them into custody the moment they become aware they are required to attend questioning. ASIO requires a preventative measure to ensure that, where there is a demonstrable risk of those acts occurring, they can be prevented.
49. In AGD's July 2017 responses to the PJCIS's post-hearing questions, developed in consultation with ASIO, an alternative model for ensuring the same ends as a QDW was put forward. If QDWs were to be removed from ASIO's compulsory questioning regime, ASIO would be comfortable if that alternative model were adopted. That model provides for the minister to authorise, under a QW, the exercise of additional powers by a police officer to ensure a person's immediate attendance under the QW.

### *Alternative compulsory attendance model*

50. The minister may, in specific circumstances (outlined below), authorise a police officer to exercise one or more additional powers under a QW:
- conduct an ordinary search (as defined in the ASIO Act) of the subject of the warrant;
  - seize:
    - devices or things capable of enabling communication with another person;
    - seizable items (as defined in the ASIO Act); and
    - items relevant to the collection of intelligence that are important in relation to the security matter;
  - require the subject of the warrant to immediately accompany the officers to the location of the questioning, with the ability to use force as necessary and reasonable to ensure this occurs (consistent with current s 34V of the ASIO Act);
  - where necessary, enter premises using such force as is necessary and reasonable (consistent with current s 34U of the ASIO Act) to ensure the person does immediately accompany officers to the location of questioning.
51. The minister would have the option to specifically authorise the above actions under the QW only in circumstances where he or she is satisfied that there are reasonable grounds for believing that, if those powers are not available the person may:
- not appear before the presiding officer as required under the warrant;

## Unclassified

- alert a person involved in the security-relevant activity that there is an investigation into that activity; and/or
- destroy, damage or alter a record or thing, or cause another person to destroy, damage or alter a record or thing, that has been requested or may be requested to be produced in accordance with the warrant.

52. The existing limitations and safeguards on QWs would continue to apply, including the time limits for questioning.

### *Detention during questioning*

53. As is currently the case under s34K(1)(a) and (b), the presiding officer should retain the ability to direct the detention or further detention of the subject of the warrant. Consistent with current provisions, such a direction should be directed at preventing the same things as a QDW is aimed at preventing—see s 34K(4); there should be reasonable grounds for believing that, if the person is not detained, the person:

- may alert a person involved in the security-relevant activity that there is an investigation into that activity;
- may not continue to appear, or may not appear again, before the presiding officer; or
- may destroy, damage or alter a record or thing, or cause another person to destroy, damage or alter a record or thing, the person has been requested, or may be requested, in accordance with the warrant to produce.

54. If the alternative compulsory attendance model outlined above were adopted, the ability under the warrant for a police officer to use force to ensure the subject's attendance for questioning would only extend to bringing them to the location of the questioning. Any detention following this would have to be at the direction of the presiding officer on the same grounds as outlined above. For example, if following being brought to the location for questioning by police the subject wanted to leave before questioning began, the presiding officer could immediately make a direction requiring they be detained while questioning occurs.

### **(f) Subjects of questioning (targets/non-targets)**

55. As is currently the case, a QW or QDW should be able to be used in regard to any person who holds information of intelligence value, provided the thresholds for the issue of the warrant can be met. QWs and QDWs are intelligence collection tools, not mechanisms to punish persons. Noting this, there should not be a new artificial distinction created based on whether the person holding information of intelligence value is a target of ASIO's investigations or another person who happens to hold information of value.



## Unclassified

56. As an example, in some circumstances it may be assessed that a family member of a target of ASIO investigation is likely to hold information of intelligence value in regard to the target. While the family member may not be prepared to divulge certain information about a target in a voluntary interview due to loyalty and family ties, the possibility of criminal penalties for noncompliance with questions asked under a QW/QDW may facilitate greater openness from the family member about important matters relevant to security.

### **(g) Officers presiding over questioning (examiner/prescribed authority etc)**

57. ASIO's preferred model would have statutorily appointed presiding officers available to preside over QWs and QDWs, similar to ACIC examiners. ASIO envisages that, to qualify to be appointed for this position, they would have levels of experience similar to those of ACIC examiners—that is, having been enrolled as a legal practitioner for a minimum of five years.

58. While this is ASIO's preference, ASIO understands there may be a desire to retain the existing prescribed authority qualifications. ASIO notes that, regardless of the nature of the presiding officer, it is important they be suitably experienced legal practitioners and there be multiple officers available at all times. The current prescribed authority model whereby the first option is to appoint retired judges may not necessarily be the optimal model in terms of ensuring multiple officers are available at all times.

### **(h) Scope of questioning (terrorism offences/politically motivated violence/heads of security etc)**

59. QWs and QDWs should be available for intelligence collection in regard to all elements of the definition of 'security' under section 4 of the ASIO Act (all 'heads of security'). As such, ASIO's preferred model includes as one of the threshold considerations for the issue of a QW/QDW that the minister have 'reasonable grounds for believing that the warrant will substantially assist the collection of intelligence in respect of a matter that is important in relation to security'. This removes the link to intelligence collection only in regard to a terrorism offence.

60. As mentioned above, the threshold for the issue of QWs/QDWs should not limit their availability to intelligence collection in regard to a particular subset of the definition of security under the ASIO Act. ASIO contributes to protecting the people of Australia, the nation and its interests from a range of security threats beyond terrorism offences, including the promotion of communal violence, espionage, sabotage, acts of foreign interference and attacks on Australia's defence systems. While the threat of terrorism is an ongoing focus for ASIO, the threat from espionage and foreign interference also remains of serious concern.



## Unclassified

### (i) Maximum periods of questioning and life of the warrant

61. ASIO supports retention of the current time frames that apply to the operation of QWs and QDWs, notably:
- The maximum period for a warrant to be in force is 28 days (ss34E(5)(b) and 34G(8)(b)).
  - The maximum period for a person to be questioned under a warrant, without a request for extension, is eight hours, not including disregarded time (s34R(1) and (13)).
  - The presiding officer on request can extend the period for questioning from eight to a maximum of 16 hours, or from 16 hours to a maximum of 24 hours, not including disregarded time, if specified conditions are met (s34R(1)-(6) and (13)).
  - The maximum time for questioning where an interpreter is used is 48 hours, not including disregarded time (s34R(8)-(13)).
  - Where a person is detained under a QDW or at the direction of the presiding officer, they can be detained for a maximum period of 168 hours (seven days) (s34S).
62. Time that is to be disregarded in calculating the above time periods for questioning a person include, among other things:
- time for the person to make a complaint to the Inspector-General of Intelligence and Security (IGIS) or Commonwealth Ombudsman;
  - time for the person to contact a lawyer;
  - time for the person to receive medical attention;
  - time for the person to engage in religious practices;
  - time for the person to rest or recuperate; or
  - any other time determined by the presiding officer (s34R(13)).
63. While QWs and QDWs are for intelligence collection purposes, not law enforcement purposes, the maximum periods for questioning and being held in detention are similar to those surrounding the investigation period following arrest for terrorism offences under the *Crimes Act 1914* (Cth). With extensions of the investigation period, a person can be questioned by police for a maximum of 24 hours, not including disregarded time, and can be held in custody following arrest for a maximum of eight days without charge.

## Unclassified

### **(j) Questioning of minors (if any), including safeguards**

64. ASIO's preferred model would allow the use of QWs/QDWs to question minors of age 14 years and above, noting the age profile of those who have been involved in recent terrorism investigations. The threshold for obtaining a warrant that would allow questioning of a minor should be the same as for adults. Those thresholds are provided above in section (a). The existing safeguards in regard to access to a parent, guardian or other appropriate person, having that person present during questioning, and a reduced period of continuous questioning of two hours should remain (s34ZE(6)-(10)).
65. The existing QW/QDW provisions allow ASIO to question minors between 16 and 18 where it is likely that the person will commit, is committing or has committed a terrorism offence. Any ASIO compulsory questioning model must address the change in age profile of those involved in terrorism-related activities. ASIO acknowledges that the compulsory questioning of persons as young as 14, particularly in circumstances where they may not necessarily be a target themselves, is a significant step. However, ASIO considers that the formality of such a hearing, the criminal consequences of non-cooperation, and the presence of a parent or guardian, may in certain circumstances lead to valuable, accurate security intelligence being able to be collected from young persons.
66. Under the current provisions, if the warrant relates to a minor the minister must be satisfied on reasonable grounds that 'it is likely the person will commit, is committing or has committed a terrorism offence' (s34ZE(4)(a)). As with the current general threshold for obtaining a QW/QDW being linked to the investigation of a terrorism offence, there are similar reasons for adjusting this threshold to better reflect ASIO's intelligence collection functions. For example, if ASIO has a concern about a minor being engaged in activities prejudicial to security, it is possible that other friends, acquaintances or siblings who are also minors but who ASIO is not able to say are involved in those prejudicial activities, would nonetheless have information of intelligence value related to the target's activities. The current requirement which ties the warrant to the commission of an offence is more aligned to the role of a law enforcement agency.

### **(k) Post-charge questioning (if any), including safeguards**

67. ASIO's preferred compulsory questioning model includes express provision allowing a QW or QDW to be executed following the laying of charges against the person who is the subject of the questioning or where charges are imminent against that person, and would allow for the questioning to cover matters that are the subject of those charges. As an intelligence collection agency, ASIO's focus is not necessarily linked to a criminal prosecution and obtaining a conviction. While ASIO works closely with its law enforcement partners, there are fundamental differences in its operational functions and objectives. ASIO should not be constrained by law enforcement developments in



## Unclassified

continuing to gather security intelligence information relevant to current threats. As part of this, the inability to compulsorily question a person following the laying of charges has the potential to give rise to critical gaps in intelligence.

68. As is currently the case in regard to information, records or things provided by the subject under a QW/QDW, there should be an automatic direct-use immunity in regard to that information so that it cannot be used in evidence against that person in criminal proceedings apart from offences for noncompliance with the warrant (s34L(9)). This direct-use immunity would apply regardless of whether a QW/QDW is executed pre-charge or post-charge.
69. Given recent case law dealing with compulsory questioning models at Commonwealth and state levels, the potential impact of disclosure of information obtained under post-charge compulsory questioning (as well as compulsory questioning that occurs when charges are imminent) on future criminal proceedings against that person should be given consideration by an appropriate entity before such a disclosure occurs. These considerations are often described in relevant provisions as going to whether disclosure of the information might or would reasonably be expected to prejudice the person's fair trial.
70. ASIO's preferred model is that the presiding officer be empowered to give a direction in regard to disclosure of information, or records or things, obtained under a QW/QDW in the following circumstances:
- the subject of the warrant has been charged with an offence related to the questioning, or such a charge is imminent; and
  - failure to give such a direction would reasonably be expected to prejudice the subject's fair trial.
71. This is based on the formula for the discretion an examiner under the *Australian Crime Commission Act 2002* (ACC Act) has in regard to this issue. In exercising such a discretion, the presiding officer would have to take into account applicable case law about disclosure of information obtained post-charge and when charges are imminent. In particular, they would need to be aware of the risks to fair trial principles that courts have identified in communicating such information to prosecutors and police investigating that particular person (see for example *DPP(Cth) v Galloway* [2017] VSCA 120).
72. Risks to fair trial also exist in regard to material derived from information obtained in questioning post-charge or when charges are imminent (derivative material). ASIO also suggests that a similar provision apply to disclosure of such derivative material. That is, a presiding officer be empowered to give a direction in regard to disclosure of derivative information if:
- the subject of the warrant had been charged with an offence related to the questioning, or such a charge was imminent at the time of questioning; and

## Unclassified

- failure to give such a direction would reasonably be expected to prejudice the subject's fair trial.

This direction could potentially be given at the same time as the direction applying to information obtained directly from the questioning, in anticipation of the collection of derivative material, or at a later date, as required. Preferably, the same presiding officer as handled the questioning would make the direction, although this may not always be possible.

73. Any other agencies who received QW/QDW information, or derivative information, obtained from post-charge questioning or when charges were imminent would be similarly constrained in their ability to on-disclose such information without a direction from the presiding officer enabling that to occur.
74. ASIO notes the recently enacted framework in the ACC Act requiring a court order to enable the disclosure to prosecutors of post-charge examination material, and derivative material from post-charge examinations. This framework operates in addition to the requirement, mentioned above, for examiners to make directions about disclosure if there is a risk the examinee's fair trial would be prejudiced. Given ASIO's intelligence collection function and that the purposes for which it would wish to use information obtained under post-charge questioning will be for purposes other than gathering evidence and supporting the prosecution of that person, ASIO does not consider that framework to be necessary in the context of its work.
75. It is important to ensure any limitations on ASIO's ability to communicate post-charge information do not unduly limit ASIO's ability to fulfil its function of communicating intelligence to appropriate agencies (such as law enforcement agencies) for purposes relevant to security. Information obtained from post-charge questioning is likely to be useful in assisting law enforcement in pursuing public safety functions and to further other investigations.

### **(I) Access to lawyers and legal professional privilege**

76. ASIO wishes to retain existing provisions in the ASIO Act dealing with access to lawyers and legal professional privilege. Among other things, these provide for the following:
- Where a person is subject to a QW, and *the presiding officer has not directed that they be detained*, the person is permitted to contact a single lawyer of their choice at any time (s34E(3)(a)). Contact between the person and their lawyer in these circumstances *cannot be monitored* (s34ZQ(3)).
  - Where a person is *subject to a QDW*, or *detained at the direction of the presiding officer* under a QW, the person is permitted to contact a single lawyer of their choice provided there has been opportunity for ASIO to consider whether to request the presiding officer direct that the person be prevented from contacting that particular lawyer under s34ZO (ss 34E(3)(b) and 34G(6)).



## Unclassified

Contact between the person and the lawyer in these circumstances *can be monitored* (s34ZQ(2)).

- Where a person is *subject to a QDW*, or *detained at the direction of the presiding officer* under a QW, the prescribed authority may direct that the person be prevented from contacting a particular lawyer if satisfied that if such contact occurs:
  - a) a person involved in a terrorism offence may be alerted that the offence is being investigated; or
  - b) a record or thing that the person may be requested in accordance with the warrant to produce may be destroyed, damaged or altered.

If prevented from contacting a particular lawyer, the person can contact another lawyer of their choice (s34ZO).

- A person can be questioned in the absence of a lawyer of the person's choice (s34ZP).
- The lawyer is to be given a copy of the warrant, and reasonable opportunity given for the lawyer to advise their client during breaks in questioning (s34ZQ(4) and (5)).
- The lawyer must not intervene in questioning except to request clarification and can request the presiding officer to allow an opportunity to address them during a break in questioning (s34ZQ(6) and (7)).
- The lawyer can be removed from questioning if the presiding officer considers they are unduly disrupting questioning, but the person must be allowed to contact another lawyer in this circumstance (s34ZQ(9) and (10)).
- The law relating to legal professional privilege is not affected by the QW/QDW provisions in the ASIO Act (s34ZV). This means that a person cannot be required to answer questions under a QW/QDW where the answer would disclose a communication subject to legal professional privilege.

77. The ability to prevent contact with a particular lawyer is an unusual power that is only available in the extreme circumstances where the person has been detained and there are concerns about others being tipped off about the investigation or the destruction of relevant material. The purpose of detaining the person could potentially be rendered useless if concerns are held about the integrity of the lawyer identified by the person and the likelihood they will adhere to applicable secrecy laws. For similar reasons, it is important that contact between a detained person and their lawyer is able to be monitored to minimise the risk of others being tipped off or relevant material destroyed. The PJCIS should note these extraordinary powers are only available *where the person has been detained* and go towards achieving the same ends as the detention.

## Unclassified

78. In accordance with s34ZV, legal professional privilege in the communications between the lawyer and their client is not waived as a result of any monitoring of that contact.
79. The limited role of lawyers in the questioning process is necessary because questioning under a QW/QDW is an inquisitorial process directed at eliciting intelligence in as time-effective way as possible, sometimes in time-critical circumstances. If the lawyer were to have a more active role in the questioning, this would change the nature of the process to an adversarial one and would interrupt the flow of questioning and the elicitation of vital intelligence.
80. This is a point of distinction between the ASIO Act model and the ACC Act model, which is closer to an adversarial process that reflects a witness giving testimony before a court, and allows examination and cross-examination by respective sides.
81. ASIO's preference is to retain the existing QW/QDW model for involvement of lawyers. The lawyer may still during a break in questioning request an opportunity from the presiding officer to address the presiding officer on a matter. ASIO considers this appropriate given the nature of the QW/QDW process.
82. Note also that, under the ASIO Act, direct-use immunity applies automatically to responses to questioning. As such, consultation with a lawyer is unnecessary to ensure a claim for use immunity is made prior to answering a question, as may be the case in an examination under the ACC Act.

### **(m) Availability of judicial review**

83. ASIO supports retaining the current availability of judicial review in regard to the issue of a QW or QDW, and the treatment of a person in connection with a QW or QDW. Judicial review may be available in the Federal Court or the High Court if there are material errors in the warrant, or the treatment of a person under the warrant is not authorised under the terms of the warrant or relevant provisions in the ASIO Act.

### **(n) 'Use of information', including relevant immunities (use/derivative use/third party)**

84. ASIO supports retaining automatic direct-use immunity in regard to information provided under a QW/QDW, and records or things provided under a QW/QDW, as specified in s34L(9). Subject to the proposals outlined above regarding information obtained under QW/QDW following the laying of charges or where charges are imminent, there should be no further constraints placed on the use of information obtained under a QW/QDW in regard to investigating the subject's activities or the activities of third parties other than the general communication provisions in the ASIO Act (see in particular ss18, 19 and 19A).
85. The prohibition on derivative use of information obtained in an ACIC examination against the examinee was repealed many years ago, and ASIO opposes a similar provision now being



## Unclassified

introduced in the ASIO Act. It would unnecessarily constrain the ability for ASIO and law enforcement to use information obtained under a QW/QDW in protecting the community from activities prejudicial to security. Because of the nature of derivative information, in any package of intelligence it may be extremely difficult to differentiate between information 'derived' from compulsory questioning and information obtained through other collection methods.

86. ASIO also does not support restricting the use of information obtained under a QW/QDW in regard to third parties. While direct-use immunity is an accepted trade-off in regard to obtaining information from persons under compulsion, it would be most unusual to seek to restrict the use of information obtained that potentially incriminates a third party. Such a requirement would also unnecessarily constrain ASIO and law enforcement in the performance of their functions.

### **(o) Ability of subject/lawyer to disclose information**

87. See 'Secrecy offences' below.

### **(p) Secrecy offences**

88. ASIO considers the existing constraints on disclosure of information by persons involved in a QW/QDW, including secrecy offences with five-year maximum penalties, are necessary to ensure that the secrecy and operational integrity of ASIO's security intelligence investigations are maintained.
89. ASIO notes that these offences allow for a range of 'permitted disclosures', including relating to the making of complaints to the IGIS, the Commonwealth Ombudsman or the AFP, and for legal proceedings related to seeking a remedy in regard to the warrant. A disclosure to the IGIS under the *Public Interest Disclosure Act 2013* would not be subject to these secrecy offences either.
90. One adjustment to the secrecy offences that ASIO proposes is to the length of time secrecy obligations remain in force. The length of time under the current offences in s34ZS is too short in ASIO's view. These offences currently require the existence of a QW/QDW to be kept secret only until the expiry of the warrant (that is, a maximum of 28 days from the issue of the warrant). Operational information must be kept secret while the warrant remains in force and for two years after its expiry.
91. A preferable time period for secrecy obligations to remain in place in regard to the existence of a QW/QDW, and operational information obtained as a result of the issue of, or questioning under, the warrant, would be up to five years from the issue of the warrant. Given ASIO intelligence investigations often continue for several years, a disclosure as to the existence of a QW/QDW or related operational information could potentially jeopardise an investigation at any stage during that period. A five-year time frame for secrecy offences to apply from the issue of the warrant would be



## Unclassified

consistent with the time frames for when secrecy obligations are imposed regarding ACIC examinations.

### **(q) Contravention of safeguards by ASIO/law enforcement officers**

92. Section 34ZF contains offences that would apply to persons purportedly exercising authority under a QW or QDW but where an identified safeguard has been knowingly breached. Among other things, the offences apply to conduct that:

- breaches a condition or restriction in the warrant;
- breaches lawful directions given by the presiding officer under the warrant;
- does not allow the subject access to facilities to contact the IGIS, the Ombudsman, the AFP or another complaints body as appropriate;
- does not allow access to an interpreter or continues questioning when an interpreter is required;
- breaches the requirement for the subject to be treated humanely;
- results in questioning beyond the time limits provided; and
- breaches search provisions.

The maximum penalty for each of the offences in s34ZF is two years imprisonment.

93. While it is rare for specific offences such as these to apply to the conduct of officials under other compulsory questioning or detention models, ASIO notes that these offences only apply to conduct that *knowingly* involves a contravention of the warrant, directions by a prescribed authority or other requirements under the ASIO Act. These offences would not apply to unintentional breaches of relevant requirements.

94. It is vital that ASIO ensure its execution of QWs and QDWs occurs consistently with the conditions and restrictions in the warrant, and safeguards to protect the interests of subjects under the ASIO Act. ASIO considers it is appropriate to retain the existing safeguards, and accompanying offence provisions, that would apply to knowing contraventions of those protections.

95. The maximum penalties for these offences of two years imprisonment have been set having regard to the gravity of harm that could be caused and the level of deterrence required, so should be retained.

## Unclassified

### **(r) Accountability arrangements, including the Inspector-General of Intelligence and Security**

96. The current level of accountability imposed on ASIO is among the highest imposed on bodies with coercive powers in Australia. Under ASIO's preferred model, the very high level of accountability would continue. Oversight of the obtaining and execution of a QW/QDW would occur in the following ways:

- issue of the warrant by the minister responsible for issuing ASIO warrants;
- questioning occurring before a statutorily appointed presiding officer;
- the IGIS or a member of staff of the IGIS entitled to be present at questioning or when the person is taken into custody;
- mandatory video recording of the person's appearance before the presiding officer for questioning, and if practicable any complaint made by the person when they are not before the presiding officer;
- ASIO to provide the IGIS with information, including the draft request, the warrant, a video recording of any questioning, and information regarding any seizure, the taking of the person into custody or their detention; and
- questioning may be suspended should the IGIS have any concerns about the propriety or legality of the exercise of the questioning and detention powers.

97. This oversight would be in addition to the ability for a person to:

- contact a lawyer to have them present during questioning;
- have an interpreter present during questioning;
- make a complaint to the IGIS, the Ombudsman, the AFP or other relevant complaints agency;
- seek a remedy from the courts relating to a QW/QDW, or the treatment of a person in connection with such a warrant.

98. Additional safeguards would continue in place for minors, such as having a parent or guardian present, and shorter questioning periods. Further, as outlined above, there would be offences for knowing contravention of safeguards by officials exercising powers under the Act.

## Unclassified

### **(s) Any other relevant components, such as the identified person warrant regime, not addressed above**

99. The key components of ASIO's preferred compulsory questioning model are broadly addressed above. If there is an issue that has not been specifically addressed, the PJCIS should assume that ASIO wishes to retain the existing provisions in the ASIO Act to the extent they fit with any of the adjustments to the status quo identified above.
100. The inclusion of an ability to include conditional approval for compulsory questioning as part of the identified person warrant (IPW) mechanism would be a very useful inclusion that sits with other suggested adjustments as a streamlining measure. Under this idea, conditional approval for compulsory questioning would be able to be obtained from the relevant minister at the same time as other special powers warrants under the ASIO Act. If conditional approval were granted under an IPW, the Director-General or the minister could authorise compulsory questioning at a time during the life of the IPW (maximum of six months). The framework for execution of the questioning, including safeguards, would all reflect the framework in place for a QW.
101. ASIO does not proposed that conditional approval for detention linked to compulsory questioning would be able to be obtained under an IPW.



**Unclassified covering SECRET**

Issue	Proposed questioning model	Current provisions in Division 3 of Part III of the <i>ASIO Act 1979</i>
<p><b>Legal thresholds</b></p>	<p><b>QW:</b></p> <ul style="list-style-type: none"> <li>Reasonable grounds for believing that the warrant will substantially assist the collection of intelligence in respect of a matter that is important in relation to security.</li> <li>Having regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued.</li> <li>There is in force a written statement of procedures to be followed in the exercise of authority under the warrant.</li> </ul> <p><i>If compulsory attendance requirement adopted instead of QDW</i></p> <ul style="list-style-type: none"> <li>The minister would have the option to authorise specified actions under the QW in circumstances where satisfied that there are reasonable grounds for believing that, if those powers are not available the person may:                             <ul style="list-style-type: none"> <li>not appear before the presiding officer under the warrant;</li> <li>alert a person involved in the security-relevant activity that there is an investigation into that activity; and/or</li> <li>destroy, damage or alter a record or thing, or cause another person to destroy, damage or alter a record or thing, that has been requested or may be requested to be produced in accordance with the warrant.</li> </ul> </li> </ul> <p><b>QDW:</b></p> <ul style="list-style-type: none"> <li>Reasonable grounds for believing that the warrant will substantially assist the collection of intelligence in respect of a matter that is important in relation to security.</li> <li>Having regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued.</li> </ul>	<p>The Attorney-General may consent to the warrant being requested if satisfied that:</p> <ul style="list-style-type: none"> <li>there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important to security;</li> <li>(for a QW) having regard to other methods (if any) of collecting intelligence that are likely to be as effective, it is reasonable in the circumstances for the warrant to be issued;</li> <li>(for QDWs) relying on other methods of collecting intelligence would be ineffective;</li> <li>there is in force a written statement of procedures to be followed in the exercise of authority under the warrant;</li> <li>(for QDWs) there are reasonable grounds for believing that, if the subject is not immediately taken into custody and detained, he or she may alert others involved in a terrorism offence that the offence is being investigated, fail to appear before the prescribed authority for questioning or destroy, damage or alter a record or thing that the subject may be requested to produce.</li> </ul> <p>An issuing authority may issue a QW or a QDW if satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence; and that the request is in the correct format.</p> <p>Additional thresholds apply for a subject who has previously been the subject of a QDW.</p>

**Unclassified**

Issue	Proposed questioning model	Current provisions in Division 3 of Part III of the <i>ASIO Act 1979</i>
	<ul style="list-style-type: none"> <li>• There is in force a written statement of procedures to be followed in the exercise of authority under the warrant.</li> <li>• Reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person:               <ul style="list-style-type: none"> <li>a) may alert a person involved in the security relevant activity that there is an investigation into that activity;</li> <li>b) may not appear before the presiding officer; or</li> <li>c) may destroy, damage or alter a record or thing, or cause another person to destroy, damage or alter a record or thing, the person may be requested in accordance with the warrant to produce.</li> </ul> </li> </ul>	
<b>Issuing authorities</b>	The minister responsible for issuing ASIO special powers warrants	With the <b>Attorney-General's</b> consent, ASIO may request a warrant from an <b>issuing authority</b> (a sitting judge).
<b>What the warrant or summons authorises</b>	<p><b>QW:</b></p> <ul style="list-style-type: none"> <li>• Subject is required to appear for questioning immediately following service of the warrant or at a time specified in the warrant.</li> <li>• ASIO is authorised to question the person about the matter that is important in relation to security, and require the production of records or things that may be relevant to the matter that are important in relation to security.</li> <li>• ASIO is authorised to make copies and/or transcripts of a record produced, and/or retain records or things produced.</li> </ul> <p><i>If compulsory attendance requirement adopted instead of QDW</i></p> <ul style="list-style-type: none"> <li>• In addition to above QW powers, the minister may specifically authorise a police officer to search and seize, and require immediate attendance before the presiding officer with accompanying use of force powers.</li> </ul>	The subject is required to appear for questioning immediately or at a time specified. The person must give information, or produce records or things, as requested. ASIO is authorized to question the subject, and to make copies and/or transcripts of anything said or produced.



**Unclassified**

Issue	Proposed questioning model	Current provisions in Division 3 of Part III of the <i>ASIO Act 1979</i>
	<p><b>QDW:</b></p> <ul style="list-style-type: none"> <li>• Subject is able to be taken into custody by a police officer, brought before a presiding officer immediately for questioning and detained by police for the period authorised under the warrant</li> <li>• ASIO is authorised to question the person about the matter that is important in relation to security, and require the production of records or things that may be relevant to the matter that is important in relation to security.</li> <li>• ASIO is authorised to make copies and/or transcripts of a record produced, and/or retain records or things.</li> </ul>	
<b>Emergency provisions</b>	<p>Director-General can seek from the minister the issue of an emergency oral warrant (in person, by telephone or other means). Confirmation in writing of the issue of the warrant provided by the minister as soon as practicable following the issue of the warrant.</p>	<p>No current provisions.</p>
<b>Powers of apprehension or detention</b>	<p><b>QW:</b> <i>Failure to appear or direction by presiding officer</i></p> <ul style="list-style-type: none"> <li>• A police officer can take a person into custody if they fail to appear before presiding officer as required by the warrant or a direction given by presiding officer.</li> <li>• A police officer can use force that is necessary and reasonable to take person into custody, prevent escape, bring the person before a presiding officer for questioning or detaining in connection with warrant.</li> <li>• A police officer can enter premises for purposes of taking person into custody or searching for that person where the person has failed to appear under a QW.</li> </ul> <p><i>Police suspects there will be noncompliance with QW</i></p> <ul style="list-style-type: none"> <li>• A police officer serving the QW can take the subject of the warrant into custody, and bring them immediately before the</li> </ul>	<ul style="list-style-type: none"> <li>• Under a questioning and detention warrant (QDW), a person can be detained for a maximum of 168 hours (seven days).</li> <li>• Under a questioning warrant (QW), the prescribed authority may, at any time when a subject is before them for questioning, order the detention of the subject where satisfied that there are reasonable grounds for believing that, if the subject is not detained, the subject:             <ul style="list-style-type: none"> <li>• may alert a person involved in a terrorism offence that the offence is being investigated; or</li> <li>• may not continue to appear, or may not appear again, before a prescribed authority; or</li> </ul>             may destroy, damage or alter a record or thing the person has been requested, or may requested, in accordance with the warrant, to produce.           </li> </ul>



Unclassified

Issue	Proposed questioning model	Current provisions in Division 3 of Part III of the <i>ASIO Act 1979</i>
	<p>presiding officer for questioning, where they suspect on reasonable grounds from anything said or done by the person that they intend not to comply with the warrant, including:</p> <ul style="list-style-type: none"> <li>- not attending questioning as required under the warrant;</li> <li>- alerting a person involved in the security-relevant activity that there is an investigation into that activity; and/or</li> <li>- destroying, damaging or altering a record or thing, or causing another person to destroy, damage or alter a record or thing, that has been requested or may be requested to be produced in accordance with the warrant.</li> </ul> <ul style="list-style-type: none"> <li>• Where a police officer exercises the above power they also have the authority to enter premises to take the person into custody, and can carry out a search of the person (consistent with QDW powers).</li> </ul> <p><i>If compulsory attendance requirement adopted instead of QDW</i></p> <ul style="list-style-type: none"> <li>• The minister may authorise a police officer to exercise one or more additional powers under a QW:                         <ul style="list-style-type: none"> <li>• conduct an ordinary search of the subject of the warrant;</li> <li>• seize:                                 <ul style="list-style-type: none"> <li>• devices or things capable of enabling communication with another person;</li> <li>• seizable items; and</li> <li>• items relevant to the collection of intelligence that are important in relation to the security matter;</li> </ul> </li> <li>• require the subject of the warrant to immediately accompany the officer to the location of the questioning, with the ability to use force as necessary and reasonable to ensure this occurs;</li> </ul> </li> </ul>	

**Unclassified**

Issue	Proposed questioning model	Current provisions in Division 3 of Part III of the <i>ASIO Act 1979</i>
	<ul style="list-style-type: none"> <li>• where necessary, enter premises using such force as is necessary and reasonable to ensure the person does immediately accompany officers to the location of questioning.</li> <li>• The minister would have the option to specifically authorise the above actions under the QW in circumstances where satisfied that there are reasonable grounds for believing that, if those powers are not available the person may:                             <ul style="list-style-type: none"> <li>• not appear before the presiding officer as required under the warrant;</li> <li>• alert a person involved in the security-relevant activity that there is an investigation into that activity; and/or</li> <li>• destroy, damage or alter a record or thing, or cause another person to destroy, damage or alter a record or thing, that has been requested or may be requested to be produced in accordance with the warrant.</li> </ul> </li> </ul> <p><i>Search and seizure prior to entering place of questioning</i></p> <ul style="list-style-type: none"> <li>• In all cases a police officer can search a person subject to a QW, and seize items found on them that could be used to harm another person, before they enter the place they are required to attend questioning.</li> </ul> <p><b>QDW:</b></p> <ul style="list-style-type: none"> <li>• The subject is able to be taken into custody by a police officer, brought before a prescribed authority immediately for questioning and detained by police for the period authorised under the warrant.</li> <li>• A police officer can use force that is necessary and reasonable to take person into custody, prevent escape, bring the person before a presiding officer for questioning or detaining in connection with warrant.</li> </ul>	

**Unclassified**

Issue	Proposed questioning model	Current provisions in Division 3 of Part III of the <i>ASIO Act 1979</i>
	<ul style="list-style-type: none"> <li>• A police officer can enter premises for purposes of taking person into custody or searching for that person where the person is the subject of a QDW.</li> <li>• A police officer can carry out a search (ordinary or strip search) of a person detained under a QDW.</li> </ul> <p><b>Detention during questioning:</b></p> <ul style="list-style-type: none"> <li>• Presiding officer can direct a person to be detained, or further detained, if satisfied that there are reasonable grounds for believing that if not detained, they:               <ul style="list-style-type: none"> <li>- may alert a person involved in a terrorism offence that the offence is being investigated; or</li> <li>- may not continue to appear, or may not appear again, under the QW; or</li> <li>- may destroy, damage or alter a record or thing, or cause another person to destroy, damage or alter a record or thing, the person has been requested, or may requested to produce.</li> </ul> </li> <li>• A police officer can carry out a search (ordinary or strip search) of a person detained following a direction by the presiding officer.</li> </ul> <p>Maximum period a person can be detained in all cases is 168 hours (seven days).</p>	
<b>Subjects of questioning</b>	Any person who holds information of intelligence value provided the thresholds for the issue of the warrant can be met (see thresholds above).	A warrant may be issued against any person (targets/suspects or third parties).
<b>Officer presiding over questioning</b>	Statutorily appointed presiding officer with similar qualifications to ACIC examiner (minimum 5 years enrolled as legal practitioner).	<b>Prescribed authority</b> (generally, a retired judge).



**Unclassified**

Issue	Proposed questioning model	Current provisions in Division 3 of Part III of the <i>ASIO Act 1979</i>
<b>Scope of questioning</b>	QWs/QDWs to be available for intelligence collection in regard to all elements of the definition of 'security' under s4 of the ASIO Act (all 'heads of security').	Information in relation to a terrorism offence.
<b>Periods of questioning, detention and length of warrant</b>	<ul style="list-style-type: none"> <li>• Maximum period for a warrant to be in force is 28 days.</li> <li>• Maximum period for a person to be questioned under a warrant, without a request for extension, is eight hours, not including disregarded time.</li> <li>• Presiding officer on request can extend the period for questioning from eight to maximum 16 hours, or 16 hours to maximum 24 hours, not including disregarded time.</li> <li>• Maximum time for questioning where an interpreter is used is 48 hours, not including disregarded time.</li> <li>• Where a person is detained under a QDW or at the direction of the presiding officer, they can be detained for a maximum period of 168 hours.</li> </ul>	<ul style="list-style-type: none"> <li>• A warrant may remain in effect for up to 28 days.</li> <li>• A person may be detained for up to 7 days.</li> <li>• Questioning may continue for 8 hours but can be extended to 24 hours (48 hours if an interpreter is used).</li> </ul>
<b>Questioning of minors</b>	<ul style="list-style-type: none"> <li>• Allow the use of QWs/QDWs to question minors of age 14 years and above</li> <li>• Same threshold for obtaining a warrant as for adults.</li> <li>• Existing safeguards in regard to access to a parent, guardian or other appropriate person, having that person present during questioning, and a reduced period of continuous questioning of two hours should remain.</li> </ul>	Allowed, with special safeguards, for minors 16 years and older.
<b>Questioning post-charge</b>	<ul style="list-style-type: none"> <li>• Express provision allowing QW/QDW over a person the subject of criminal charges, or where such charges are imminent, and questioning can cover the subject matter of the charges.</li> </ul>	The ASIO Act is silent on this issue.

Unclassified

Issue	Proposed questioning model	Current provisions in Division 3 of Part III of the <i>ASIO Act 1979</i>
	<ul style="list-style-type: none"> <li>• Automatic direct use immunity for information given under a QW/QDW (regardless of whether questioning occurs post-charge or not).</li> <li>• The presiding officer empowered to give a direction in regard to disclosure of information, or records or things, obtained under a QW/QDW, and in regard to derivative material following QW/QDW, if:               <ul style="list-style-type: none"> <li>- the subject has already been charged with a related offence at the time of the QW/QDW or such a charge is imminent; and</li> <li>- failure to give such a direction would reasonably be expected to prejudice the subject's fair trial.</li> </ul> </li> </ul>	
<p><b>Access to lawyers and Legal professional privilege</b></p>	<ul style="list-style-type: none"> <li>• Where a person is subject to a QW, and <i>the presiding officer has not directed that they be detained</i>, the person is permitted to contact a single lawyer of their choice at any time. Contact between the person and their lawyer in these circumstances <u>cannot be monitored</u>.</li> <li>• Where a person is <i>subject to a QDW, or detained at the direction of the presiding officer</i> under a QW, the person is permitted to contact a single lawyer of their choice provided there has been opportunity for ASIO to consider whether to request the presiding officer direct that the person be prevented from contacting that particular lawyer. Contact between the person and the lawyer in these circumstances <u>can be monitored</u>.</li> <li>• Where a person is <i>subject to a QDW, or detained at the direction of the presiding officer</i> under a QW, the prescribed authority may direct that the person be prevented from contacting a particular lawyer if satisfied that if such contact occurs:</li> </ul>	<p>Person may be represented, but the lawyer may not participate in the questioning process. Lawyer may be refused on security grounds. Conversations between lawyer and subject can be monitored.</p>

**Unclassified**

Issue	Proposed questioning model	Current provisions in Division 3 of Part III of the <i>ASIO Act 1979</i>
	<p>a) a person involved in a terrorism offence may be alerted that the offence is being investigated; or</p> <p>b) a record or thing that the person may be requested in accordance with the warrant to produce may be destroyed, damaged or altered.</p> <p>If prevented from contacting a particular lawyer, the person can contact another lawyer of their choice.</p> <ul style="list-style-type: none"> <li>• A person can be questioned in the absence of a lawyer of the person's choice.</li> <li>• The lawyer is to be given a copy of the warrant, and reasonable opportunity given for the lawyer to advise their client during breaks in questioning.</li> <li>• The lawyer must not intervene in questioning except to request clarification, and can request the presiding officer to allow an opportunity to address them during a break in questioning.</li> <li>• The lawyer can be removed from questioning if the presiding officer considers they are unduly disrupting questioning, but must allow the person to contact another lawyer in this circumstance.</li> <li>• The law relating to legal professional privilege is not affected by the QW/QDW provisions.</li> <li>• Legal professional privilege in the communications between the lawyer and their client is not waived as a result of any monitoring of that contact.</li> </ul>	
<b>Judicial review</b>	Retain the current availability of judicial review in the Federal court and High Court in regard to the issue of a QW/QDW, and the treatment of a person in connection with a QW/QDW.	Limited (39B Judiciary Act; 75(v) Constitution).



**Unclassified**

Issue	Proposed questioning model	Current provisions in Division 3 of Part III of the <i>ASIO Act 1979</i>
<b>Use of information immunities</b>	<ul style="list-style-type: none"> <li>• Automatic direct use immunity</li> <li>• Subject to proposed considerations of presiding officer about use of derivative information obtained from post-charge questioning or where charges are imminent, no derivative use immunity.</li> <li>• No third party immunities.</li> </ul>	Automatic use immunity. No derivative use or third party use immunity.
<b>Ability of subject/lawyer to disclose information</b>	Retain existing constraints on disclosure of information.	Very limited ability to advise family/employers. Disclosure only allowed if authorized by the Attorney-General/warrant, or by the prescribed authority if in accordance with the terms of the warrant/with the approval of the Attorney-General. Other disclosures relating to complaints/legal review are permitted.
<b>Secrecy offences</b>	<p>Retain offences for breach of secrecy requirements, with five year imprisonment maximum penalties, but extend the period that the existence of a warrant and relevant operational information is to be kept secret to five years from the issue of the QW/QDW.</p> <p>(Note that strict liability only applies for the subject/lawyer in regard to the element of the offence that the information relates to the existence of the warrant or operational information. A fault element of <i>intention</i> applies to the conduct that would trigger the offence of disclosing the information, and where the relevant information is operational information <i>recklessness</i> applies to the connection between the disclosed information and the issue of the warrant or questioning under the warrant.)</p>	Five years imprisonment, on a strict liability basis, for the subject/lawyer to disclose information relating to the warrant/operational information.
<b>Contravention of safeguards</b>	Retain existing safeguards, and accompanying offence provisions, that would apply to knowing contraventions of those protections, with two years imprisonment maximum penalties.	Two years imprisonment for ASIO/law enforcement officers who contravene safeguards.
<b>Accountability arrangements</b>	<ul style="list-style-type: none"> <li>• Issue of the warrant by the minister responsible for issuing ASIO warrants.</li> </ul>	IGIS has full access to warrant documentation and can attend questioning/detention. IGIS may make complaints, and the subject may make complaints to the IGIS. ASIO must report on use of the warrants to the minister and in annual report.

**Unclassified**

Issue	Proposed questioning model	Current provisions in Division 3 of Part III of the <i>ASIO Act 1979</i>
	<ul style="list-style-type: none"> <li>• Questioning occurring before a statutorily appointed presiding officer.</li> <li>• IGIS or a member of staff of the IGIS entitled to be present at questioning or when the person is taken into custody.</li> <li>• Mandatory video recording of the person's appearance before the presiding officer for questioning, and if practicable any complaint made by the person when they are not before the presiding officer.</li> <li>• ASIO to provide the IGIS with information including, the draft request, the warrant, a video recording of any questioning, and information regarding any seizure, the taking of the person into custody or their detention.</li> <li>• Questioning may be suspended should the IGIS have any concerns about the propriety or legality of the exercise of the questioning and detention powers.</li> <li>• Subject can contact a lawyer to have them present during questioning.</li> <li>• The subject can make a complaint to the IGIS, the Ombudsman, the AFP or other relevant complaints agency.</li> <li>• The subject can seek a remedy from the courts relating to a QW/QDW, or the treatment of a person in connection with such a warrant.</li> <li>• Offences for knowing contravention of certain safeguards by officials exercising powers under the Act.</li> </ul>	
<p><b>Any other relevant components</b></p>	<ul style="list-style-type: none"> <li>• Ability to obtain conditional approval for compulsory questioning from the minister under an identified person warrant (IPW).</li> </ul>	

**Unclassified**

<b>Issue</b>	<b>Proposed questioning model</b>	<b>Current provisions in Division 3 of Part III of the <i>ASIO Act 1979</i></b>
	<ul style="list-style-type: none"><li>• If conditional approval granted, the Director-General or the minister could authorise compulsory questioning at a time during the life of the IPW (maximum of six months).</li><li>• Detention not available under an IPW.</li></ul>	