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Australian Government
**Australian Security
Intelligence Organisation**

ASIO submission to the Parliamentary Joint Committee on Intelligence and Security

Review of Division 3 of Part III of the *Australian Security
Intelligence Organisation Act 1979*

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ASIO

Vladimir Petrov defecting at Sydney Airport, 3 April 1954.

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Introduction

1. The Australian Security Intelligence Organisation (ASIO) welcomes the opportunity to make a submission to Parliamentary Joint Committee on Intelligence and Security's (PJCIS) review of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act).
2. The purpose of this submission is to outline why ASIO's compulsory questioning powers remain a vital capability in protecting Australia and Australians from threats to their security.
3. ASIO considers the compulsory questioning power framework to be largely fit for purpose, however, we have identified a number of proposed changes which are driven by the threat environment and our experience gained using the amended powers since 2020. The proposed changes are:
 - repeal the power to obtain a questioning warrant for minors (being those persons under 18 but over 14 years of age);
 - make questioning warrants available in relation to all elements of 'security' as defined in section 4 of the ASIO Act, with the exception of protecting Australia's territorial and border integrity from serious threats;
 - enable ASIO to give notice of a questioning warrant by entering private premises; and
 - extend the sunset clause for a further five years.
4. We have included a brief history of ASIO's questioning powers in Part 1. Further detail on our proposed key changes are outlined in Parts 2-5.

Part 1: A brief history of ASIO's questioning powers

5. It is critical that ASIO's powers reflect a complex, challenging and changing security environment. When new threats emerge, we need to be able to counter them; when threats recede, we review whether our powers remain necessary and proportionate.
6. After the 11 September 2001 terrorist attacks, the government put in place a range of important measures to address the threat of terrorism, including giving last resort powers to ASIO to question (and potentially detain) any person, including those not suspected of committing a terrorism offence, under warrant. The purpose of these powers was to enhance ASIO's ability to collect intelligence that could assist in the prevention of terrorist attacks.
7. Between 2003 and 2010, ASIO executed 16 questioning warrants, producing intelligence in relation to our counter-terrorism investigations. ASIO never requested, nor was issued, a questioning and detention warrant.
8. In 2020, there were changes to ASIO's compulsory questioning powers (through the passage of *Australian Security Intelligence Organisation Amendment Act 2020*), which we welcomed. Of note, these changes repealed ASIO's detention powers, lowered the minimum age of minors who can be subject to compulsory questioning in relation to politically motivated violence, and expanded the scope of questioning warrants, enabling their use in relation to espionage and foreign interference investigations.
9. These changes were driven by the threat environment. At the time, the terrorist threat level was PROBABLE. We were seeing increasing numbers of young Australians involved in onshore terrorism, including in both religiously motivated extremism and ideologically motivated extremism. At the time, up to one third of ASIO's counter-terrorism caseload involved minors, and we had undertaken counter-terrorism investigations involving children as young as 14. We recognised that the threat was amplified by the COVID crisis, with some young Australians exposed to radicalisation due to spending more time online and engaging with like-minded individuals.
10. In 2020, we also saw an escalation in espionage and foreign interference activity. For example, there was an increase in cases where members of Australian diaspora communities were being threatened with physical harm by foreign government representatives and proxies for voicing opinions of which a foreign government didn't approve. There was also an increased need to enhance our ability to conduct espionage and foreign interference investigations into sophisticated actors involved in well-hidden, often long-term activities.
11. The enhanced scope of the compulsory questioning powers allowed ASIO to address these changes to the threat environment. Specifically, since the changes came into effect in 2020, ASIO has used the powers to compulsorily question three people which yielded high-value intelligence relevant to security. The circumstances under which the relevant questioning warrants were obtained and used is classified. However, we welcomed the opportunity to provide a classified briefing to the PJCIS on these operations to demonstrate why the powers remain vital.

Part 2: Minors questioning warrants

12. It is important that the legislative framework enabling ASIO to perform its statutory functions provides balanced and proportionate capabilities to respond to evolving national security threats. ASIO also considers it vitally important to acknowledge when our powers may not be reasonable, necessary or in proportion to the threat. In this regard, we no longer see a strong case to support the continuance of the power to question minors under warrant. Our reason for this position is two-fold.
13. First, ASIO has never used, nor requested, a minor questioning warrant.

14. Since May 2015, one terrorist attack and three counter-terrorism disruptions in Australia involved minors, and since 2014 seven minors have been charged with terrorism offences. However, the security environment has changed since 2020, and the national terrorism threat level is now POSSIBLE. As the security environment continues to evolve, so does the role and prevalence of minors in terrorism. While at the time up to one third of ASIO's counter-terrorism caseload involved minors, ASIO's priority counter-terrorism caseload now includes fewer minors compared to 2020. That is not to say the threat posed by minors has dissipated in its entirety, but that ASIO acknowledges the need for our powers to be reasonable, necessary or in proportion to the threat and our security environment, which remains complex, challenging and changing. In line with our functions, ASIO has a range of alternative methods available to investigate minors should they be engaging in activities that are prejudicial to security.
15. Second, the legislative test for the Attorney-General to issue a questioning warrant for a minor is necessarily high. The Attorney-General must be satisfied that there are reasonable grounds to believe that the person *has likely engaged in, is likely engaged in, or is likely to engage in* activities prejudicial to the protection of, and of the people of, the Commonwealth from politically motivated violence. This test is based on the premise that the individual and their activities are known to either ASIO and/or a law enforcement partner. Based on our experience since 2020, we consider that by the time a minor engages in activities that reach this threshold, it is a matter for law enforcement to lead. Law enforcement responses may include considering disruption options and/or inclusion of the minor in a countering violent extremism or intervention program.

Part 3: Extend the application of questioning powers to all elements of 'security' as defined in section 4 of the ASIO Act (except border security)

16. Following the September 11 attacks, terrorism was ASIO's principal security concern. At the height of Australia's war on terror we faced groups of very organised, motivated people who would work together on terrorism plots with the aim of causing maximum destruction and loss of life. That is why the questioning powers have been in effect for two decades. While the national terrorism threat level was lowered to POSSIBLE in 2022, threat to life and terrorism remains a priority for ASIO. The ability to question suspected terrorists as a last resort remains an important capability, which should be retained. Case study box 1 provides an example of how ASIO could utilise a questioning warrant in response to politically motivated violence.
17. The threat environment was the key driver for expanding the scope of the questioning powers to espionage and foreign interference in 2020. ASIO can attest that the questioning powers have proven to be a highly effective capability in this context when less intrusive means have been ineffective in responding to this threat. Espionage and foreign interference remain our principal security concerns, and ASIO strongly supports the requirement for this power to be retained. Case study boxes 2 and 3 provide examples of how ASIO could utilise a questioning warrant in response to espionage and foreign interference.
18. 'Security' is defined in section 4 of the ASIO Act as the protection of Australia and its people from:
 - espionage;
 - sabotage;
 - politically motivated violence;
 - promotion of communal violence;
 - attacks on Australia's defence system, or
 - acts of foreign interferencewhether directed from, or committed within, Australia or not; and
 - the protection of Australia's territorial and border integrity from serious threats.

19. The Attorney-General cannot currently issue a questioning warrant where there are reasonable grounds for believing the warrant will substantially assist in the collection of intelligence in relation to sabotage, attacks on Australia's defence system or the promotion of communal violence. As the threat environment remains increasingly volatile and shaped by diverse drivers that range from geopolitical to technical and ideological, ASIO is proposing the questioning warrant framework be extended to enable the Attorney-General to issue questioning warrants, at ASIO's request, in relation to all elements of the definition of 'security' under section 4 of the ASIO Act, with the exception of protecting Australia's territorial and border integrity from serious threats. ASIO does not consider the use of questioning warrants in relation to our border security activities to be necessary or reasonable.
20. The hypothetical scenarios presented in boxes 1-6 below are realistic, and illustrate the significant value of the compulsory questioning power. They demonstrate circumstances where ASIO may need to request, and the Attorney-General issue, a questioning warrant in relation to all of ASIO's heads of security (except border security). It is important to highlight that across all of these hypothetical scenarios, a common feature is that ASIO always applies the least intrusive investigative methods first, before requesting a questioning warrant as a last resort, and only if it is reasonable, necessary and proportionate to the threat.

Scenario 1. Politically motivated violence

ASIO commences an investigation after a Melbourne-based individual was identified in contact with offshore members of the Islamic State of Iraq and the Levant (ISIL), who were encouraging him to undertake a mass casualty terrorist attack in Australia in the near future. ASIO warranted activities identify the individual researching precursor materials for improvised explosive device construction at the direction of the ISIL members. However, the individual does not undertake any independent action of security relevance; it is only at the behest of the offshore ISIL members that the individual pursues online research consistent with planning a terrorist attack. A voluntary interview is conducted, but the individual misrepresents their interactions with the ISIL members and refuses to answer questions relevant to the planning of a terrorist attack.

A questioning warrant is then executed to compel the individual to answer questions truthfully and obtain an accurate representation of their intentions. During interview, the individual admits planning a terrorist attack in Australia. The results of the interview are shared with police and are used in support of prosecution efforts.

Without the questioning warrant power, these outstanding concerns may not be able to be addressed, making it more difficult for ASIO to assess the individual's involvement in planning a terrorist attack.

Scenario 2. Espionage

ASIO commences an investigation after receiving lead information that an individual working in a sensitive Australian Government office was in an established relationship with intelligence officers from a hostile foreign intelligence service. ASIO investigates the activities of this individual, including through a number of warranted activities. These activities confirm contact between the subject of investigation and the foreign intelligence officers, however, due to the tradecraft deployed there is limited insight into the nature of the contact and what information has been passed.

ASIO assesses the approach most likely to be successful is to engage the individual directly. The individual declines to attend a voluntary interview, requiring ASIO use a compulsory questioning warrant. Under questioning the individual reveals they were being pressed to supply cabinet documents to the foreign intelligence service and to identify other individuals with access to equally sensitive and privileged information who might be vulnerable to recruitment.

In this scenario a questioning warrant is an effective mechanism to put specific information to the individual under the protection of the associated secrecy provisions, and to leverage the compulsory powers to require answers regarding the individual's suspected engagement in espionage activity. Without the questioning warrant powers, the nature of information being sought by the hostile foreign intelligence service would not be known, and harmful espionage by the foreign intelligence service would not be prevented.

Scenario 3. Foreign interference

ASIO commences an investigation following receipt of reporting that there is a credible threat to safety—a forced repatriation of an Australia-based individual—involving the potential use of undeclared foreign officials and Australia-based facilitators. The reporting is highly sensitive and lacking specific details on both the activity and the foreign officers involved.

The gravity of the threat, coupled with the sensitive nature of the reporting, requires an agile response of covert collection and investigative activity, with the ultimate aim of a law-enforcement-led disruption, informed by ASIO's intelligence and assessments.

A questioning warrant is executed against the Australia-based facilitators, the outcomes of which assists ASIO to work with law enforcement to locate the targeted individual to ensure their ongoing safety, while disrupting the activities of the foreign government.

Scenario 4. Attacks on Australia's defence system

ASIO commences an investigation following receipt of reporting that a recently-recruited Defence contractor may have deliberately tampered with an Australian defence asset. A suite of covert investigative options have failed to determine whether the report is accurate, but the individual is found to have circumvented standard security practices in their day-to-day duties and to also have ongoing contact with officials from a foreign country which is hostile to Australia's interests.

The defence asset is confirmed to have been rendered inoperable under certain conditions, consistent with a sophisticated attack on the asset—and the damage is unable to be remediated.

The individual will not willingly engage with ASIO on the matter. However, through compulsory questioning ASIO is able to determine that the individual was working for a foreign intelligence service to degrade Australia's military capability. Steps are taken to remove any chance of further attacks on the defence system by the individual, and also to understand other potential vectors of access that the foreign intelligence service might have to use against Australia's defence system.

Scenario 5. Sabotage

ASIO commences an investigation as a result of reporting that an individual is damaging a telecommunications network by destroying or damaging cell towers. The individual is found to have lit small-scale fires at cell towers near Australian Government premises. Although this is originally treated as a criminal matter, ASIO investigations identify the individual was ideologically driven to damage and disrupt infrastructure around Australian Government premises.

ASIO investigations, including covert collection activities, fail to identify whether the individual is part of a broader movement with the intent and capability to damage or disrupt infrastructure. The individual refuses to speak with ASIO, in large part owing to their anti-government ideology.

A compulsory questioning warrant is then executed to compel the individual to answer questions truthfully. The individual reveals that there is a second person, within a broader cohort, who is also seeking to damage and disrupt Australian infrastructure. This information supports a new investigation, which in turn supports activities by law enforcement to prevent further acts of sabotage.

Scenario 6. Promotion of communal violence

An ASIO investigation commences as a result of an Australian individual adhering to a nationalist and racist violent extremist (NRVE) ideology promoting violence against anti-fascist community groups. The individual calls for violence against these groups as revenge against community groups critical of fascist behaviors in the community. The individual's initial posts generate over 100,000 responses on NRVE chat forums, escalating the likelihood for real-world violence.

To obtain specific information about the individual's intent to undertake and promote communal violence against anti-fascist groups, a decision is made to engage with the individual directly.

The individual refuses to participate in a voluntary intelligence-collection interview. In this scenario, a questioning warrant would be an effective mechanism to put specific questions to the individual, under the protection of the secrecy provisions, to understand whether there is an impending risk of communal violence. Without the questioning warrant power for this head of security, these outstanding concerns may not be able to be addressed and ASIO may be less effective in mitigating the risk of communal violence.

Part 4: Enable ASIO to give notice of a questioning warrant by entering private premises

21. ASIO notes that the questioning warrant framework currently requires the Director-General to give the subject of the warrant written notice. The written notice may be given either before, or if immediate appearance is required, at the time that, the subject is required for questioning. Where immediate appearance is not required, the notice must include (amongst other things) details of the place, date and time on which the person is required to appear. While questioning warrants remain in force for 28 days, there is currently no prescribed minimum timeframe for notice to be provided.
22. Since 2020, ASIO has used the questioning powers on three occasions, complying with the mandatory written notice requirements on each occasion. The process of planning how and when to provide notice to a person required to appear is an extensive process, and finding the appropriate opportunity requires careful consideration. ASIO recognises that it is in the best interests of the subject to be provided with as much notice of the questioning warrant as possible (subject to operational considerations), and plans its operations with that consideration in mind.
23. However, ASIO has identified a number of circumstances that could delay giving notice, including the location of the subject at private premises. That is because the compulsory questioning framework does not currently enable ASIO to enter private premises for the purpose of providing notice of a questioning warrant. If the questioning warrant framework included a provision authorising ASIO to access a private property in order to provide notice of a questioning warrant, opportunities for ASIO to expedite that process would increase, enabling more subjects to have greater notice before being required to appear for questioning.
24. ASIO acknowledges that privacy and confidentiality are also key considerations in serving a questioning warrant. The power to access private property to serve notice may assist ASIO to serve the warrant in a manner that does not draw undue attention to the subject or ASIO activities. We are not seeking access to a property for any other purpose other than giving notice. We recognise that apprehension powers may be included in a questioning warrant under section 34C of the ASIO Act, however, we consider this option is a disproportionate course of action if a subject is not deliberately or willingly avoiding ASIO.

Part 5: Sunsetting

25. ASIO notes that the compulsory questioning powers will sunset in September 2025. The security environment remains complex, challenging and changing. We consider it necessary that ASIO retains the compulsory questioning framework for a further five years to September 2030, with our proposed updates to repeal minor questioning warrants, broaden the scope to all elements of security (except border security) and enable notice to be given on private premises, as outlined in this submission.