Law Council
OF AUSTRALIA

Australian Security Intelligence Organisation Amendment Bill (No 2) 2025

Parliamentary Joint Committee on Intelligence and Security

20 October 2025

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The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 107,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

This submission is informed by contributions from the New South Wales Law Society, the Law Institute of Victoria, the Victorian Bar Association, and the Law Council's National Security Law Working Group.

Executive summary

The Law Council of Australia welcomes the opportunity to provide this submission to the Joint Parliamentary Committee on Intelligence and Security's (the **PJCIS**'s) inquiry into the Australian Security Intelligence Organisation Amendment Bill (No 2) 2025 (Cth) (the **Bill**).

The Law Council has consistently raised significant concerns with the compulsory questioning warrant powers available to the Australian Security Intelligence Organisation (**ASIO**) under Part III of Division 3 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**). These concerns are based on what we see as a longstanding failure to strike an appropriate balance between responding to the gravity of evidenced threats to national security with compliance with the rule of law, Australia's obligations under international law, and respect for human rights obligations.[1]

Despite these objections to broad aspects of how the questioning warrant scheme has historically been designed, the Law Council has continued to engage productively with successive governments in an attempt to improve the scheme with a view to maximising its compliance with human rights and fundamental freedoms.

Given the inconsistency of public statements about the utility of the questioning warrant powers, especially as they apply to minors, the Law Council cannot support these powers being rolled over in perpetuity. Periodic opportunities to publicly make the case that exceptional powers that trespass on fundamental rights are necessary and proportionate provide an essential democratic oversight function and should not be surrendered.

We maintain that ASIO must be required to regularly demonstrate to the Australian public that these powers continue to be both necessary and proportionate to the threat environment. This is especially so where questioning warrant powers stand to be substantially extended by the Bill without, at present, sufficient justification or a serious attempt at remedying the longstanding concerns raised by the Law Council and others over the course of many years.

The Law Council therefore does not support the removal of the sunset clause for these powers. However, if this step is taken (and in any event), we emphasise the need to strengthen the warrant authorisation framework by including judicial oversight, and ensuring that these warrants do not apply to minors. These necessary improvements, together with other recommended safeguards are set out further in this submission.

The Law Council makes the following recommendations in relation to the measures contained in (and missing from) Bill:

- The sunset clause at section 34JF of the ASIO Act should remain as a critical oversight measure.
- If, contrary to our position, the sunset clause is repealed, there must be regular and independent reviews of Division 3 of Part III to ensure its continuing necessity and proportionality.
- The proposed additional heads of security for which an adult questioning warrant may be sought should be further justified, noting that these would extend extraordinary compulsory questioning warrant powers across most of ASIO's functions, well beyond what was originally intended. If they remain,

[1] Law Council of Australia, Submission to Parliamentary Joint Committee on ASIO, ASIS and DSD's inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (29 April 2022); Law Council of Australia, Submission to Senate Legal and Constitutional References Committee's inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (20 November 2002).

they should be defined to provide greater certainty as to scope and application.

- Adult questioning warrants should not be extended to border integrity matters. The current proposals are a reversal of earlier ASIO and Departmental positions.
- The minor questioning warrant framework should be repealed, or at the very least, allowed to sunset. Again, the current proposals are a reversal of earlier ASIO and Departmental positions.
- Proposed paragraph 34AD(9)(a) should require that the Attorney-General is satisfied that exceptional circumstances exist to permit a prescribed authority to continue in the role where they have been found to have misbehaved.
- Further consideration should be given to the merits of a 'double lock' approach to the issuing of compulsory questioning warrants, analogous to that in the *Investigatory Powers Act 2016* (UK) in which:
  - the Attorney-General makes the primary issuing decision on the questioning warrant;
  - if the Attorney-General decides to issue the warrant, it does not take effect until it has been reviewed and confirmed by a judicial officer;
  - if the judicial officer does not confirm the issuing decision, the warrant is cancelled, and the judicial officer must give written reasons to the Attorney-General and ASIO; and
  - in urgent cases, provision should be made for the Attorney-General's issuing decision to take immediate effect, with provision for a judicial officer to conduct a subsequent review within three days. If the judicial officer does not confirm the issuing decision, the warrant is cancelled, and the judicial officer may order the destruction of the intelligence or may impose conditions on its retention.
- Provisions for the prescribed role of lawyers at the time of questioning set out in subsection 34FF(3) and the discretionary power to remove lawyers in subsection 34FF(6) should be removed. Alternatively, and at the very least, the following additional safeguards should be provided for:
  - guidance on what constitutes 'undue disruption';
  - guidance on when this power may be exercised, including having regard to the fundamental importance of the lawyer's presence as a safeguard to uphold access to justice and the rule of law;
  - a requirement to issue a prior warning to a person's lawyer before taking steps to remove the lawyer; and
  - making such directions as a last resort, noting the detrimental impact that a change of lawyer part-way through questioning could have on the person being questioned.
- Section 34FE of the ASIO Act should be amended to provide that a lawyer for a questioning warrant subject is entitled to be given sufficient information to advise the lawyer's client on the validity of the questioning warrant and acts done under the purported authority of the warrant.

Introduction

1. The Australian Security Intelligence Organisation Amendment Bill (No 2) 2025 (Cth) seeks to amend matters related to compulsory questioning warrant powers available to ASIO under Part III of Division 3 of the ASIO Act. Specifically, the Bill proposes to:

    - remove the sunset clause currently in place for compulsory questioning powers;
    - extend the scope of subject matter for which an adult compulsory questioning warrant may be issued;
    - expand the matters that disqualify a person for appointment as a prescribed authority;
    - change the grounds of termination of a prescribed authority;
    - change reporting obligations to the Attorney-General; and
    - introduce additional safeguards for compulsory questioning warrants issued either post-charge or where criminal charge is imminent.

2. The Law Council acknowledges the important role that ASIO plays in keeping Australia safe from national security threats, and the need for its powers to adequately and appropriately support its statutory functions. In our view, the proposed changes to Division 3 of Part III of the ASIO Act represents a significant shift in approach to achieving this task. They render powers originally introduced as time-limited, exceptional powers, which were carefully confined to intelligence gathering in support of investigation into criminal offences for terrorist acts, into permanent mechanisms available to support general intelligence collection, analysis and advice responsibilities for ASIO. The Committee must be satisfied that there is adequate justification for such a profound shift and we query whether the powers should be normalised in this way.

3. These compulsory questioning powers should be recognised as extraordinary and have the potential to blur the distinction between ASIO's intelligence collection powers and the investigatory powers of law enforcement agencies. Australia is an outlier among liberal democratic jurisdictions, including five-eye jurisdictions, in conferring compulsory questioning powers on an intelligence and security agency like ASIO.

4. These powers are exceptional because they:

    - can be issued and utilised against non-suspect third parties;
    - involve coercive questioning powers with incidental powers of detention, especially where immediate questioning is sought;
    - questioning warrants can be issued and utilised when criminal charges are imminent or underway.
    - are subject to non-disclosure orders;
    - are issued by the Attorney-General on advice from the Director-General of ASIO, including orally in cases where an emergency warrant is sought;
    - impose limitations on the subject of the warrant's choice of legal representative
    - provide for questioning warrants for children as young as 14;

- contain powers to remove legal representatives who are 'unduly disrupting' the questioning process;

5. These powers were said by then Attorney-General Daryl Williams, at passage, to represent 'a measure of last resort' in order to deal with the immediate or pressing risk of mass casualty terrorism. The powers were subject to a sunset clause in recognition of this intention.

6. The Law Council is concerned that the removal of the sunset clause as proposed by the Bill risks normalising these powers, and will facilitate further incremental expansion. These powers require strong oversight and safeguards.

7. However, it is important to acknowledge that, in addition to proposals to expand current powers, the Bill also proposes additional safeguards for the compulsory questioning framework. These are welcome improvements. However, the Law Council maintains the view that there are further measures that should also be considered, especially if these extraordinary powers are to become a permanent fixture of intelligence collection.

8. As set out in this submission, we remain concerned that these powers continue to represent a substantial risk to both the right to silence and fair trial rights through coercive questioning powers relating to intelligence gathering about subject matter which for which criminal liability may arise. We also remain concerned that these warrants are issued entirely within the Executive branch of government and lack judicial oversight. Additionally, we remain troubled by the limitations placed on the provision of legal representation for a questioning warrant subject.

9. Nevertheless, we welcome the opportunity to engage with the PJCIS with the view to arriving at recommendations for improving not only the Bill, but the broader compulsory questioning framework within Division 3 of Part III of the ASIO Act.

Removal of sunset clause

10. The compulsory questioning framework in Division 3 of Part III of the ASIO Act is currently due to sunset on 7 March 2027, pursuant to section 34JF of the ASIO Act. The sunsetting of these provisions reflects the extraordinary nature of the powers, and the original intent that they only be a temporary, closely-confined addition to ASIO's suite of powers.

11. Although the provisions have been reviewed multiple times since they were due to expire, the Law Council continues to see value in the ongoing public consideration of the necessity and proportionality of extraordinary powers. It is entirely appropriate that significant intrusions into fundamental freedom remain provisional, and subject to regular public review and debate.

12. The Law Council therefore supports the continued inclusion of a sunset clause for Division 3 of Part III of the ASIO Act, a framework that has persistently been subject to 'significant scrutiny concerns … many of which have been maintained and reiterated to the various iterations of the regime over time' by the Senate Standing Committee for the Scrutiny of Bills.[2] Despite the failures of the sunset clause to prompt the Parliament to improve safeguards and human rights compliance, we believe it serves as an appropriate reminder of the extraordinary nature of these

[2] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 4 of 2025* (27 August 2025) 28.

powers, and the default intention that they remain temporary unless otherwise justified.

13. Our reluctance to forego the sunset clause is exacerbated by the proposals in the Bill to expand the scope of the compulsory questioning framework. This is especially so because many of proposals in the Bill—such as the extension of the scope of questioning adult warrant powers and retention of minor questioning warrants—have been undermined by inconsistent public statements from key stakeholders, as set out in this submission.

14. However, the Law Council also recognises that the repeated extension of sunsetting provisions (noting that this has occurred on five separate occasions) is not ideal, and may not reflect the in-principle support for these powers (subject to limitations) from both the PJCIS and the former Independent National Security Legislation Monitor (**INSLM**) in addressing enduring terrorism-related security threats in Australia.[3]

15. We do not support repealing the sunset clause at section 34JF of the ASIO Act. Should the Committee agree to repeal it, contrary to our position, it must only be repealed on the condition that the use of these powers remain subject to continuous independent review. This is particularly important given the proposed extended scope of the powers and retention of minor questioning warrants, both of which require a high degree of scrutiny as to proportionality and necessity, should they proceed in their current form.

Recommendations:

- **The sunset clause at section 34JF of the ASIO Act should remain as a critical oversight measure.**
- **If, contrary to our position, the sunset clause is repealed, there must be regular and independent reviews of Division 3 of Part III to ensure its continuing necessity and proportionality.**

Extension of subject matter for adult questioning warrants

16. When Division 3 of Part III was first introduced to the ASIO Act, questioning warrants (along with the now repealed questioning and detention warrants scheme) were limited to situations where they would 'substantially assist the collection of intelligence that is important to a terrorism offence',[4] and where 'other methods of collecting that intelligence would be ineffective'.[5]

17. Significant changes to the framework introduced in 2020 decoupled adult questioning warrants from offences under the Criminal Code. These amendments instead based the availability of coercive questioning on a limited number of the section 4 heads of security under the ASIO Act. The 2020 amendments made questioning warrants available to collect intelligence relating to 'espionage', 'politically motivated violence' (including terrorism), and 'acts of foreign

[3] PJCIS, *ASIO questioning and detention powers* (March 2018) 26-27 and recommendation 1; INSLM, *Certain Questioning and Detention Powers in Relation to Terrorism* (February 2017), 43 and recommendation 8.
[4] *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) Schedule 1, Item 24, adding section 34C to the ASIO Act (this section has now been repealed).
[5] Ibid.

interference'.[6] The Law Council expressed concern at the time that the broad subject matter that might attract an adult questioning warrants now extends to 'threats to Australia's economic or political interests, not merely the protection of life or safety'.[7]

18. The Bill now proposes to further extend the subject matter of an adult questioning warrant to three additional heads of security, aligning this more closely with section 4 of the ASIO Act.[8] Should the Bill pass, the additional heads of security for which an adult questioning warrant can be sought are in relation to:

- sabotage;
- promotion of communal violence;
- attacks on Australia's defence system; and
- the protection of Australia's territorial and border integrity from serious threats.

19. While the Law Council does not have the same insight into evolving or emerging national security threats as agencies directly engaged in this work, from a rule of law perspective we consider it critical that any extension of ASIO's compulsory questioning powers is only to the extent necessary to effectively and proportionately respond to identifiable security threats. In the absence of this justification, the Law Council is concerned about the steady expansion of available grounds for an adult questioning warrant to effectively cover all of ASIO's security mandate. In doing so, these extraordinary powers continue to drift further from their initial focus, and increasingly become available in situations that may not demonstrate the same immediate and serious links to the life and safety of persons in the community.

20. In more recent submissions, the Law Council has expressed some support for expanding the subject matter of questioning warrants beyond 'terrorism offences' as originally proposed. For example, in 2017, we wrote in a supplementary submission to PJCIS:

> *An expansion to matters of security would appear to have potential utility in assisting ASIO to address areas of potential significant concern for Australia such as countering espionage and foreign interference*.[9]

21. We note here that our support only extended to countering espionage and foreign interference. These comments were made in the course of separating the intelligence collection function of ASIO from the requirement that questioning warrant powers be utilised in the course of investigating a terrorism offence.

[6] *Australian Security Intelligence Organisation Act 1979* (Cth) s.34A.
[7] Law Council of Australia, Submission No 31 to Parliamentary Joint Committee on Intelligence and Security, *Australian Security Intelligence Organisation Amendment Bill 2020* (3 July 2020), [44].
[8] *Australian Security Intelligence Organisation Act 1979* (Cth) s.34A.
[9] Law Council of Australia, 'Review of ASIO's Questioning and Detention Powers' (Submission to PJCIS No 4.1, 1 September 2017), [25].

Inconsistencies in statements regarding necessary and proportionate powers

22. Just prior to the 2020 amendments, Division 3 of Part III of the ASIO Act was reviewed by the PJCIS.[10] This review considered the recommendation of the INSLM that this Division be repealed and replaced with a compulsory questioning warrant power that more closely resembled that used by the Australian Criminal Intelligence Commission,[11] as well discussion of the appropriateness of the remit of ASIO's compulsory questioning powers.

23. In 2017, both ASIO and AGD advocated that the 'circumstances in which it may have recourse to a compulsory questioning framework should be extended to encompass all elements of the definition of 'security' under the ASIO Act'.[12] At the public hearing for that review, representatives of both ASIO and AGD argued this point as relating more to the pre-emptive nature of ASIO's security function.[13]

24. Professor George Williams was also asked about this expansion of powers beyond terrorist offences to all of the heads of security, describing the general availability of the powers as 'some unfortunate mission creep'.[14] He commented that:

> *[w]e would certainly strongly oppose the idea that the power should be exercisable generally in respect of matters of security … That would be inconsistent with the approach taken by your predecessor committee in seeing this as an extraordinary power justified only in respect of the threat posed by terrorism.*[15]

25. The PJCIS asked ASIO about why extending questioning warrants to the full security remit was useful. In responding, ASIO provided examples about terrorism, espionage and foreign interference.[16] By September 2017, it appears that ASIO was more focused on expanding the remit only as far as espionage and foreign interference.[17] ASIO argued to the Committee that the expansion of these powers would 'provide a critical investigative capability to assist ASIO in discovering, understanding and mitigating espionage and foreign interference threats'.[18] As noted, the 2020 amendments made questioning warrants available to collect intelligence relating to 'espionage', 'politically motivated violence' (including terrorism), and 'acts of foreign interference'.

26. The proposal to now extend the application of adult questioning warrants to matters of sabotage, promotion of communal violence, attacks on Australia's defence system, and serious threats to Australia's territorial and border integrity represents an extraordinary further expansion of ASIO's compulsory questioning remit. We

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[10] Parliamentary Joint Committee on Intelligence and Security, *Reviewed of the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979* (March 2018).
[11] INSLM, *Certain Questioning and Detention Powers in Relation to Terrorism*, 2016.
[12] ASIO, Submission No 8 to Parliamentary Joint Committee on Intelligence and Security, *Review of ASIO's Questioning and Detention Powers* (9 May 2017) [36] 13.
[13] Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 16 June 2017, 31-2; Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 16 June 2017, 32.
[14] Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 16 June 2017, 13.
[15] Ibid.
[16] See ASIO, Submission No 8.2 to Parliamentary Joint Committee on Intelligence and Security, *Review of ASIO's Questioning and Detention Powers* (June 2017) 5-6.
[17] See ASIO, Submission No 8.6 to Parliamentary Joint Committee on Intelligence and Security, *Review of ASIO's Questioning and Detention Powers* (4 September 2017) 5. Note that ASIO continued to advocate for all of the heads of security to be included (see, e.g. [59]-[60], but elected to focus on foreign interference and espionage in alignment with the priorities of the government of the day.
[18] Ibid [16].

query this ever-growing normalisation of extraordinary powers, which were intended for anti-terrorism purposes.

27. The Law Council is particularly concerned with the proposed inclusion of the protection of Australia's territorial and border integrity from serious threats to trigger compulsory questioning powers. In March 2024, ASIO submitted to the PJCIS that it 'does not consider the use of questioning warrants in relation to our border security activities to be necessary or reasonable'.[19] The Department of Home Affairs also took the view that Part III Division 3 should be expanded to cover all heads of security, except border integrity.[20]

28. The Law Council is concerned that the broader expansion of the proposed scope of questioning warrants is inconsistent with the public comments of the responsible agencies over recent times. These would suggest that ASIO already has the powers (more than what) it needs. The Law Council recommends that questioning warrants should not be extended to border integrity matters.

29. We are further concerned that the additional heads of security are currently either undefined or vaguely defined in the ASIO Act and open to broad interpretation. If, contrary to our position, the proposal to extend ASIO's questioning powers to the additional heads of security is successful, we consider it critical that the heads of security are defined with an appropriate level of clarity and precision, either in primary legislation or supporting guidance material. Clearly defining the scope of each head of security is particularly important in circumstances where ASIO's use of questioning warrants is classified information and not subject to public scrutiny.

30. If, contrary to our position, this proposal is successful, we again raise concern with the repeal of the sunset clause in the absence of regular independent review of these provisions.

Recommendations:

- **The proposed additional heads of security for which an adult questioning warrant may be sought should be further justified, noting that these would extend extraordinary compulsory questioning warrant powers across most of ASIO's functions, well beyond what was originally intended. If they remain, they should be defined to provide greater certainty as to scope and application.**
- **Adult questioning warrants should not be extended to border integrity matters. The current proposals are a reversal of earlier ASIO and Departmental positions.**

Minor questioning warrants

31. The Law Council is highly concerned that the Bill does not seek to repeal the minor questioning warrant framework from Division 3 of Part III of the ASIO Act. If retained, these powers have the potential to significantly trespass on the human rights of children in circumstances where both ASIO and the Department of Home

[19] ASIO, Submission No 1 to the Parliamentary Joint Committee on Intelligence and Security, *Review of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979* (March 2024) [19], 5.
[20] Department of Home Affairs, 'Department of Home Affairs submission to the review of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979: Parliamentary Joint Committee on Intelligence and Security' (Submission, 1 February 2024), [32] 9.

Affairs have recently conceded that there are less intrusive mechanisms for obtaining intelligence from minors, and also that the use of these powers risks counterproductive outcomes.

32. In its 2024 submission to the PJCIS, ASIO conceded that it had never used, nor requested, a minor questioning warrant, and that it no longer saw a strong case to support the continuance of the power to question minors under warrant.[21] This conclusion was reached by considering both the lack of use of the powers, and the threshold for issuing a warrant being such that 'by the time a minor engages in activities that reach this threshold, it is a matter for law enforcement to lead'.[22] ASIO acknowledged that it has 'a range of alternative methods available to investigate minors should they be engaging in activities that are prejudicial to security'.[23]

33. In a submission to the same inquiry, the Department of Home Affairs suggested that 'to the extent compulsory questioning of minors is necessary, it is better serviced by law enforcement agencies or other partner agencies'.[24]

34. The Law Council did not support the extension of compulsory questioning powers to children when these powers were first proposed and has maintained this objection since.[25] There are significant concerns on the public record that such warrants are viewed by ASIO as counter-productive and better administered by law enforcement agencies. The Law Council therefore cannot support the extension of minor questioning warrants in perpetuity.

Recommendation:

- **The minor questioning warrant framework should be repealed, or at the very least, allowed to sunset. We draw attention to the fact that the current proposals are a reversal of earlier ASIO and Departmental positions.**

Safeguards proposed by the bill

35. The Law Council welcomes the Bill's proposals to improve the safeguards under Division 3 of Part III of the ASIO Act. Broadly, the Bill adds additional safeguards that:

- extend disqualifying matters for appointment as a prescribed authority;[26]
- clarify when a person might be terminated from their appointment as a prescribed authority;[27]

[21] ASIO, '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* (March 2024), 3.
[22] Ibid [15].
[23] Ibid [14].
[24] Department of Home Affairs, 'Department of Home Affairs submission to the review of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979: Parliamentary Joint Committee on Intelligence and Security' (Submission, 1 February 2024), 12.
[25] Law Council of Australia, Submission to the Senate Legal and Constitutional References Committee Inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (20 November 2002), [63].
[26] Australian Security Intelligence Organisation Amendment Bill (No. 2) 2025, Schedule 1 Item 4.
[27] Ibid, Schedule 1 Item 5.

- proscribe additional subject matter about which the Director-General of security must report to the Attorney-General;[28] and
- restrict the eligibility for prescribed authorities presiding over questioning warrants issued post-charge to a current superior court judge with more 5 or more years' experience, or, a retired superior court judge.[29]

36. The Law Council supports the position of the Senate Standing Committee for the Scrutiny of Bills, which has commented—in our view accurately—that 'these safeguards, although welcome, are considered relatively minor'.[30]

Disqualifying matters for appointment as prescribed authority

37. Currently, subsection 34AD(2) of the ASIO Act outlines the roles which disqualify a person from appointment as a prescribed authority. These currently include:

> *(a) an ASIO employee or an ASIO affiliate; or*
>
> *(b) the Director-General; or*
>
> *(c) an AGS lawyer…; or*
>
> *(d) an IGIS official; or*
>
> *(e) a person referred to in subsection 6(1) of the Australian Federal Police Act 1979; or*
>
> *(f) a staff member of a law enforcement agency (other than the Australian Federal Police); or*
>
> *(g) a staff member of an intelligence or security agency.*

38. The Bill proposes expanding this list to include the following roles as disqualifying a person from appointment as a prescribed authority:

> *(h) a member of the Defence Force; or*
>
> *(i) an APS employee; or*
>
> *(j) an Agency Head (within the meaning of the Public Service Act 1999); or*
>
> *(k) a member of the Parliament of the Commonwealth or a State or the Legislative Assembly of a Territory; or*
>
> *(l) a person employed under the Members of Parliament (Staff) Act 1984 ; or*
>
> *(m) a Parliamentary Service employee (within the meaning of the Parliamentary Service Act 1999); or*
>
> *(n) the Director of Public Prosecutions or a person performing a similar function appointed under a law of a State or Territory; or*
>
> *(o) the Solicitor-General of the Commonwealth or State or Territory; or*
>
> *(p) an examiner (within the meaning of the Australian Crime Commission Act 2002).*

[28] Ibid, Schedule 1 Item 6.
[29] Ibid, Schedule 1 Item 8.
[30] Senate Scrutiny of Bills, *Scrutiny Digest 4 of 2025* (27 August 2025), 30.

39. While we support the proposed expansion of this ineligibility list, the Law Council notes that it continues to be restricted to current holders of one of the roles on the day of appointment. The Law Council is of the view that consideration should be given to also including recent holders of any of the above positions as being ineligible for appointment as a prescribed authority. This approach may assist in addressing perceived (and possibly actual) conflicts of interest.

40. The Law Council has raised concerns on a number of occasions about the discretionary approach to the termination of a prescribed authority under the provisions of the ASIO Act.[31] The existing termination of appointment provision (subsection 34AD(9) of the ASIO Act) provides the Attorney-General with a discretion to terminate a prescribed authority should they be found to engage in misbehaviour, incapacity, fail to comply with their obligations regarding conflicts of interest, or where the Attorney-General forms the opinion that there is an actual or potential conflict of interest.[32]

41. The Law Council has argued that all of the matters listed in subsection 34AD(9) should be mandatory grounds for termination.[33] We have advanced this position because the functions of a prescribed authority are performed on a secretive basis that is not susceptible to judicial review.[34] Trust and public confidence in the questioning warrant system requires that the integrity of a prescribed authority is unimpeachable.

42. The Bill seeks to makes mandatory the termination of a prescribed authority in situations of bankruptcy, where the Attorney-General forms the opinion they have an actual or possible conflict of interest, where the person has ceased to meet the eligibility criteria, or where the person, without reasonable excuse, fails to comply with disclosure obligations where there is a conflict of interest.[35] However the Bill proposes to preserve the discretion to terminate the appointment of a prescribed authority for misbehaviour or incapacity.

43. While the proposed amendments constitute improvements to the grounds for termination of a prescribed authority, the Bill has not fully addressed our concerns about the integrity or capability of a prescribed authority in situations of misbehaviour or incapacity. We particularly remain concerned about the potential ongoing appointment of a prescribed authority in situations where they have engaged in misbehaviour.[36] Given the secret and controversial status of questioning warrant powers, persons acting in the capacity of a prescribed authority require unimpeachable public trust as well as personal probity and competence.

44. The Law Council is of the view that the Attorney-General should only be able to exercise the power to continue a prescribed authority's appointment subject to a finding of misbehaviour where exceptional circumstances prevail. In light of the requirement for public trust, the reasons for the decision to apply the discretion to maintain an appointment under such exceptional circumstances should be

[31] Law Council of Australia, Submission to PJCIS, Review of Part III Division 3 of the ASIO Act (1 March 2024), [76]–[79]; Law Council of Australia, Submission to PJCIS, Review of Australian Security Intelligence Organisation Amendment Bill 2020 (3 July 2020), 62.
[32] See *Australian Security Intelligence Organisation Act 1979* (Cth) s 34(9).
[33] Law Council of Australia, Submission to PJCIS, Review of Part III Division 3 of the ASIO Act (1 March 2024), [78].
[34] Ibid.
[35] Australian Security Intelligence Organisation Amendment Bill (No. 2) 2025 Schedule 1 Part 4 Item 5 proposed subsection 34AD(9A).
[36] Ibid, Schedule 1 Part 4 Item 5 proposed subsection 34AD(9A)(a).

communicated to the public as soon as reasonably practicable after such a decision is reached.

Recommendation:

- **Proposed paragraph 34AD(9)(a) should require that the Attorney-General is satisfied that exceptional circumstance exist to permit a prescribed authority to continue in the role where they have been found to have misbehaved.**

Providing reports to the Attorney-General

45. The Law Council supports the proposed new paragraph 34HA(1)(aa), which would require ASIO's Director-General to report additional information to the Attorney-General about the conduct of questioning warrants. In our view, this provision would assist the Attorney-General to have better oversight of relevant conduct issues that arise in the exercise of ASIO's compulsory questioning powers.

Prescribed authority for post-charge questioning

46. Part 6 of Schedule 1 to the Bill proposes to introduce additional requirements to a questioning warrant in situations where a warrant is sought post-charge.[37] A questioning warrant is considered 'post-charge' under the ASIO Act if 'the subject of the warrant has been charged with a related offence and that charge is still to be resolved, or such a charge is imminent'.[38]

47. Proposed section 34BD(3A) requires that, where such conditions apply, the subject of a warrant can only be questioned by ASIO 'before a prescribed authority' who was appointed on the basis of paragraph 34AD(1)(a), meaning a judge who has served for 5 years or more on a superior court or has retired from a supreme court.[39]

48. The Law Council supports this amendment. We recognise that the involvement of experienced judicial officers represents an important additional safeguard that better ensures that the right of the subject of a post-charge questioning warrant to a fair trial is not unduly undermined by ASIO's compulsory questioning regime.

Outstanding improvements to safeguards

49. While we welcome the improvements to safeguards included in the Bill, subject to the above comments, these protections fall short of addressing the Law Council's longstanding concerns about the intrusions into fundamental rights and liberties presented by the compulsory questioning warrant regime. We maintain that, in light of the extraordinary powers involved in coercive questioning for intelligence collection purposes, the Parliament ought to consider introducing a more comprehensive suite of safeguards than those currently proposed by the Bill.

50. The Law Council is strongly of the view that more robust protections that directly address concerns about fundamental freedoms and human rights are required to mitigate both potential and perceived ill-effects of these powers and their intrusions

[37] Ibid Schedule 1 Part 6.
[38] *Australian Security Intelligence Organisation Act 1979* (Cth) s 34A.
[39] Ibid, s 34AD(1)(a).

into a raft of fundamental rights and liberties. Key areas for improvement are set out below.

Authorisation of compulsory questioning and production

51. The Law Council remains unsatisfied that compulsory questioning warrants are currently issued solely by a member of the Executive on the advice of the Director-General of Security.[40]

52. The Law Council accepts that ASIO requires an agile framework to respond to the current threat environment and acknowledges that ASIO considers the multi-step authorisation process to be inefficient and likely to impede timely and effective operations. However, we continue to advocate for the role of judicial officers in the authorisation process to promote actual and perceived independence, and we are concerned with the steps taken to entirely remove statutory judicial supervision from the warrant-issuing process.

53. The Law Council maintains its recommendation to retain judicial involvement by giving the Attorney-General the primary decision-making role on warrant applications and conferring a statutory role of review on judicial officers.[41]

54. The Law Council developed its recommendations for a 'double lock' mechanism based on the role judges perform in the warrant-issuing process under the *Investigatory Powers Act 2016* (UK), which outlines procedures for the issuing of electronic surveillance and technical intelligence collection warrants.

55. Under the Law Council's proposed mechanism, the Attorney-General would be responsible for applying the existing issuing criteria, as currently drafted, to the factors and grounds provided by the Director-General of Security, and then making a decision about whether the warrant should be issued. To this stage, the 'double lock' mechanism makes no change to existing procedure.

56. Under a 'double lock' proposal, after the Attorney-General has decided that a questioning warrant should be issued, the warrant will not enter into force until the initial decision of the Attorney-General has been affirmed by a judicial officer or retired judge that the decision of the Attorney-General was open on the facts and grounds placed before the Attorney-General.[42] If the judicial officer or retired judge agrees with the Attorney-General's decision then the warrant is valid. If the judicial officer or retired judge does not agree with the Attorney-General, then the warrant would be cancelled.

57. The Law Council remains of the view that such a 'double lock' mechanism represents a substantial improvement over the current warrant-issuing process. To address concerns about delay, we have previously suggested:

> *… an approach where for matters with demonstrated urgency, provision could be made for the Attorney-General's issuing decision to take immediate effect, with provision for a judicial officer to conduct a subsequent review within three days. If the judicial officer does not confirm the issuing decision, the warrant is cancelled, and the judicial*

[40] Law Council of Australia, *Australian Security Intelligence Organisation Amendment Bill 2020* (3 July 2020) [151]–[152].
[41] Ibid, 41-42.
[42] See Law Council of Australia, *Submission to PJCIS, Review of Part III Division 3 of the ASIO Act* (1 March 2024), [50].

officer may order the destruction of the intelligence or may impose conditions on its retention.[43]

58. This suggestion would, in our view, preserve the agility to request a questioning warrant under demonstrable conditions of urgency. At the same time, the 'double lock' approach still subjects the grounds of the warrant to independent oversight.

59. The Law Council continues to maintain that judicial involvement in a 'double lock' authorisation process is an important counterbalance to the limitations in judicial review rights in relation to issuing decisions, especially in view of the proposed extension of these compulsory questioning powers by the Bill.

Recommendation:

- **Further consideration should be given to the merits of a 'double lock' approach to the issuing of compulsory questioning warrants, analogous to that in the *Investigatory Powers Act 2016* (UK) in which:**
  - **the Attorney-General makes the primary issuing decision on the questioning warrant;**
  - **if the Attorney-General decides to issue the warrant, it does not take effect until it has been reviewed and confirmed by a judicial officer;**
  - **if the judicial officer does not confirm the issuing decision, the warrant is cancelled, and the judicial officer must give written reasons to the Attorney-General and ASIO (copied to the IGIS); and**
  - **in urgent cases, provision should be made for the Attorney-General's issuing decision to take immediate effect, with provision for a judicial officer to conduct a subsequent review within three days. If the judicial officer does not confirm the issuing decision, the warrant is cancelled, and the judicial officer may order the destruction of the intelligence or may impose conditions on its retention.**

Improving legal representation

60. The Law Council remains concerned that Division 3 of Part III of the ASIO Act imposes disproportionate limitations on legal representation in the questioning warrant process. Our strong view remains that independent legal representation capable of acting fully in the best interest of one's client constitutes a vital safeguard against illegality and impropriety in the use of what remain extraordinary coercive powers.

61. In light of the proposed breadth of additional subject matter for questioning warrants, as well as possible downstream criminal offences flowing from the questioning warrant process, the serious derogation from the right to silence and the derived risk to a fair trial through coercive questioning, the Law Council is concerned that the Bill does not provide additional safeguards in relation to legal representation.

[43] Ibid [52].

Restrictions on the intervention of legal representatives

62. Currently, subsection 34FF(3) of the ASIO Act requires that a lawyer present on behalf of a questioning warrant subject must not intervene in questioning or address the prescribed authority before whom their client is being questioned except to:

- request a clarification of an ambiguous question; or
- to request a break in questioning to provide advice to the subject,[44] noting that the prescribed authority has discretion to refuse a request for a break in questioning for the purposes of providing advice.[45]

63. A legal representative may ask a question of a prescribed authority during a break, but asking a question of a prescribed authority is not allowed during questions, nor under subsection 34FF(3) is it permissible to seek a break for the purposes of asking a question.[46]

64. These two grounds for intervention by a questioning warrant subject's legal representative remain unduly and unfairly narrow and onerous for the subject. We remain concerned that there are additional and highly legitimate grounds for intervention that are prohibited under this provision, as it is currently drafted. For example, a lawyer may wish to object to a question on the basis that it is outside the scope of the warrant. A lawyer may also wish to caution their client that a particular question goes to the subject matter of a current or an imminent criminal charge before the client is compelled to answer the question, noting that subsection 34GD(4) abrogates the privilege against self-incrimination. The Law Council contends that these examples represent entirely valid interventions that a lawyer should be permitted to make during questioning.

65. The former IGIS has noted that restrictions on legal representatives' participation being limited to breaks prevents them from intervening where procedural irregularities or concerns regarding approaches to questioning arise:

> *The practical effect of this section is that a subject's legal representative may only provide legal advice during breaks in the questioning …*
>
> *Section 34U is constructed this way to ensure that questioning is not unduly disrupted. While this limitation exists for good reason, it has the potential to be the cause of some frustration when lawyers wish to raise procedural queries with the Prescribed Authority, but are unable to do so due to the limitations described above.*
>
> *The subjects of section 34D warrants, as opposed to their legal representatives, are able to raise queries directly with the Prescribed Authority, but not surprisingly can sometimes have difficulty in fully expressing their point.*[47]

66. These are worrying observations. The Law Council considers that effective legal representation requires a subject's lawyer to have a meaningful opportunity to participate in the process to ensure that questions are both lawful and fair. We remain concerned that the operation of subsection 34FF(3) has the potential to impinge on a lawyer's professional obligation to act in the best interest of their client,

[44] *Australian Security Intelligence Organisation Act 1979* (Cth), s 34FF(3).
[45] Ibid, s 34FF(5).
[46] Ibid, s 34FF(4).
[47] IGIS supplementary submission to the PJCIS Review of ASIO questioning and detention powers in relation to terrorism (8 June 2017) [31]–[33].

especially when coupled with the power in subsection 34FF(6) to remove a lawyer from questioning if the prescribed authority considers that the lawyer is causing an undue disruption. This may result in the lawyer being faced with the choice between:

- upholding the lawyer's professional responsibilities and contravening subsection 34FF(3), and risking removal; or
- complying with the limitations in subsection 34FF(3) by participating less fully in the questioning process, but being unable to discharge the lawyer's professional obligation to act in the best interests of the client.

67. The Law Council is unconvinced that concerns about the flow of questioning are best addressed by a significant compromise to a legal representative's ability to represent their client. Effective restrictions on legal representation, particularly in circumstances where a questioning warrant has been issued with an immediate appearance provision, or, where the warrant is post-charge or a criminal charge is imminent, are both situations where the subject of questioning warrant is particularly vulnerable. The Law Council remains concerned that restricting the ability of legal representatives to fully advocate for their clients, particularly in circumstances where there are questions of procedural compliance or where questions potentially fall outside the scope of the warrant, ultimately risk undermining the integrity of the questioning process.

Removing 'unduly disrupting the questioning' provisions

68. Subsection 34FF(6) provides that a legal representative can be removed from where questioning is taking place if 'the prescribed authority considers the lawyer's conduct is unduly disrupting the questioning of the subject'.[48] 'Unduly disrupting' is not defined in the statute, and there is no requirement in the legislation or the guidelines that a warning be provided. Instead, section 9(19) of the *Australian Security Intelligence Organisation Statement of Procedures Instrument 2025* (Cth) states that a prescribed authority 'may warn a lawyer that they may be removed for unduly disrupting the questioning of the subject'. The power to direct removal is exercisable on the basis of the prescribed authority's discretion.

69. Because the role of legal representatives is limited, by subsection 34FF(3), to seeking clarification of ambiguous questions or requesting breaks to give advice to their clients, our concern remains that, in the absence of guidance regarding the definition of 'unduly disrupting' questioning, it remains possible for legitimate interjections or advice provided by a legal representative to be interpreted as an undue interruption of questioning that warrant removal.

70. The Law Council is not convinced that such a discretion is required in order to achieve the outcomes of the questioning warrant. Additionally, we are concerned that a process that enables the actual and perceived unfairness of removing one's nominated legal representative on entirely discretionary grounds without warning risks compromising the questioning warrant process. This may have deleterious effects on the questioning warrant subject's cooperation or honesty, notwithstanding any threatened consequences under the existing provisions.

71. Additionally, the Law Council does not accept that any such removal provision should be exercisable, particularly without: clear guidance as to what constitutes impermissible disruption; provisions that provide certainty that requesting compliance with the law or the conditions with a warrant cannot constitute a

[48] *Australian Security Intelligence Organisation Act 1979* (Cth) s 34FF(6).

disruption; and a requirement to issue a warning before exercising any future power. We contend that, at the very least, these factors are required in light of the consequences of both limiting access to the questioning warrant subject's legal representation of choice, as well as the impact that finding new legal representation may have on the duration of questioning and consequent imposition of the freedom of movement of the subject.

Recommendations:

- **Provisions for the prescribed role of lawyers at the time of questioning set out in sub section 34FF(3) and the discretionary power to remove lawyers in sub section 34FF(6) should be removed. Alternatively, and at the very least, the following additional safeguards should be provided for:**
    - **guidance on what constitutes 'undue disruption';**
    - **guidance on when this power may be exercised, including having regard to the fundamental importance of the lawyer's presence as a safeguard to uphold access to justice and the rule of law;**
    - **a requirement to issue a prior warning to a person's lawyer before taking steps to remove the lawyer; and**
    - **making such directions as a last resort, noting the detrimental impact that a change of lawyer part-way through questioning could have on the person being questioned.**

Access to critical information by legal representatives

72. There are significant limitations on the right of access to critical information by a questioning warrant subject's legal representative. This includes limitations on a legal representative accessing the entirety of the warrant, as well as any statement of facts and grounds supporting the request.

73. For example, section 34FE enables the Director-General of Security to withhold any elements of the warrant they 'consider … necessary in order to avoid prejudice to security, the defence of the Commonwealth, the conduct of the Commonwealth's international affairs, or the privacy of individuals'.[49] Such withheld information may seriously limit the ability of the warrant subject's legal representative to ascertain the scope of the warrant, and therefore constrain their ability to provide advice about whether a particular action is consistent with the warrant (such as answering a question, or the seizure of records of things) and therefore lawfully authorised.

74. Any decision to withhold information by the Director-General of Security may generate additional difficulties where the provision of legal advice is rendered functionally impossible, particularly where the conduct in question relates to a head of security concerned with a foreign power such as espionage, foreign interference, politically motivated violence, or border integrity.

75. There is no requirement to actively provide the legal representative of a person subject to a questioning warrant with a copy of either the principal warrant, or (in instances where the terms of the warrant are varied) with a copy of the

[49] Ibid, s 34FE(4).

variation.[50] Instead, persons exercising authority under the questioning warrant must wait until a request is made by a lawyer.[51]

76. In our view, section 34FE should be amended so that the appointed legal representative of a questioning warrant subject is provided with a copy of the questioning warrant as a matter of course when entering the questioning warrant place.

Recommendation:

- **Section 34FE of the ASIO Act should be amended to provide that a lawyer for a questioning warrant subject is entitled to be given sufficient information to advise the lawyer's client on the validity of the questioning warrant and acts done under the purported authority of the warrant.**

[50] Ibid, 34FE(2)
[51] Ibid.