Law Council
OF AUSTRALIA

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

Parliamentary Joint Committee on Intelligence and Security

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About the Law Council of Australia

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 90,000 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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- Mr Greg McIntyre SC, President
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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

The Law Council is grateful for the contributions to this submission of the Law Society of New South Wales.

The Law Council also acknowledges the assistance and guidance of its advisory committees, particularly the National Criminal Law Committee and National Human Rights Committee, as well as the National Security Law Working Group.

Executive summary

1. The Law Council of Australia welcomes the opportunity to provide this submission to the Parliamentary Joint Committee on Intelligence and Security (**Committee**) review of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**).

2. The Law Council acknowledges the important role of the Australian Security Intelligence Organisation (**ASIO**) in keeping Australia and Australians safe from national security threats, and the need for its powers to be adequate to support this function. However, such powers should not exceed what is necessary and proportionate to respond to identified security threats. This extends to the questioning and detention powers set out in Division 3 of Part III of the ASIO Act.

3. There have been significant changes to ASIO's operating environment, including changes to the threat environment, rapid technological changes, and numerous expansions of ASIO's intelligence collection powers. The Law Council welcomes this review, which is the result of a Committee recommendation to amend the *Intelligence Services Act 2001* (Cth), to allow the Committee to commence a review of the provisions by 7 September 2023.[1] It is important to conduct these reviews regularly to ensure the legislation is fit-for-purpose in the contemporary environment, and that the public can be assured of this.

4. The Law Council acknowledges that the Committee and successive reports from the Independent National Security Legislation Monitors (**INSLM**) supported the conferral of a compulsory questioning power on ASIO, subject to appropriate limitations and safeguards.[2] The Law Council welcomed, in its previous submission, the retention of a number of important safeguards in the re-designed compulsory questioning regime, especially an ongoing role for the Inspector-General of Intelligence and Security (**IGIS**) to attend compulsory questioning to conduct 'real-time' oversight.[3]

5. The Law Council is concerned to ensure that the essential distinction is maintained between ASIO's intelligence collection powers and the investigatory powers of law enforcement agencies. This separation is consistent with the views of the Hope Royal Commission on ASIO, which emphasised the importance of ASIO's functions being demonstrably separate to those of law enforcement agencies.[4]

6. ASIO's powers have been expanded in significant ways in recent years. In July 2020, the Law Council expressed its concerns over the expansion of these powers in its submission on the Australian Security Intelligence Organisation Amendment Bill 2020 (**ASIO Amendment Bill**), and made a total of 78 recommendations for improvement.[5]

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[1] Parliamentary Joint Committee on Intelligence and Security (PJCIS), Advisory Report on the Australian Security Intelligence Organisation Amendment Bill 2020 (December 2020) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOAmendmentBill2020/Report> Recommendation 5.

[2] PJCIS, 2018 Report, 26-27 at [2.15]-[2.22] and recommendation 1; and Independent National Security Legislation Monitor (INSLM), 2016 Report, 43 at [9.13] and recommendation 8.

[3] Law Council of Australia, Australian Security Intelligence Organisation Amendment Bill 2020 (3 July 2020) <https://lawcouncil.au/resources/submissions/australian-security-intelligence-organisation-amendment-bill-2020> 8.

[4] The Hon Justice Robert Hope, Royal Commission into Intelligence and Security, *Fourth Report: Australian Security Intelligence Organisation*, 1976, 210-21. As referenced in ibid, 14-5 at [27]-[28].

[5] Law Council of Australia, Australian Security Intelligence Organisation Amendment Bill 2020 (3 July 2020) <https://lawcouncil.au/resources/submissions/australian-security-intelligence-organisation-amendment-bill-2020>.

7. In August 2020, the Law Council also made a submission on the revised Minister's Guidelines to ASIO,[6] which sets the standards and other procedural requirements that ASIO is required to adhere to in the performance of its functions under section 17 of the ASIO Act. In that submission, the Law Council acknowledged key improvements from the previous version of the 2007 ASIO Guidelines, but indicated several remaining concerns.

8. Australia's current National Terrorism Threat Level is described as 'possible' and the Australian Government provides that '[W]hile Australia remains a potential terrorist target, there are fewer violent extremists with the intention to conduct an attack onshore.'[7] The Law Council also acknowledges that security threats are changing in response to geopolitics, emerging technologies and broader social trends.[8]

9. The Law Council notes that ASIO's compulsory questioning powers are extraordinary, were not intended to be permanent, and there is no equivalent in any other jurisdiction within the 'Five Eyes alliance' that the Law Council is aware of.[9] These powers therefore require strong oversight and safeguards.

10. In this submission, the Law Council focuses on five main issues:

- compulsory questioning powers in relation to children and other vulnerable persons;
- presence and role of lawyers for questioning warrants subjects;
- accountability mechanisms;
- prescribed authorities; and
- the pending sunset date.

11. In the Law Council's view, a compulsory questioning regime, which provides for the exercise of intrusive powers, must contain strong safeguards to protect individuals, particularly children and vulnerable persons, preserve the right to legal representation and have appropriate accountability mechanisms. In this regard, the Law Council makes the following recommendations:

- In relation to compulsory questioning powers of persons with disabilities:
    - The ASIO Act should be amended to make specific provision for the protection of the rights of persons with disabilities under adult questioning warrants. This should include requirements in the issuing criteria, procedural arrangements for notification of warrants, the conduct of questioning and the permitted disclosure provisions.
- In relation to the presence and role of lawyers at the time of questioning warrants subjects:

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[6] Law Council of Australia, Comments on the Minister's Guidelines to the Australian Security Intelligence Organisation (Submission, 13 August 2020) <https://lawcouncil.au/resources/submissions/comments-on-the-ministers-guidelines-to-the-australian-security-intelligence-organisation>.
[7] Australian Government, National Threat Level (website, last updated 28 November 2022) <https://www.nationalsecurity.gov.au/national-threat-level/current-national-terrorism-threat-level>.
[8] 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 (1 February 2024) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOActCQP2023/Submissions> 7 [16].
[9] PJCIS, Review of ASIO's questioning and detention powers (March 2018) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIO/Report/section?id=committees%2freportjnt%2f024080%2f24741> [1.44]-[1.55].

A lawyer's prescribed role and the removal of a lawyer at the time of questioning

- Provisions for the prescribed role of lawyers at the time of questioning set out in section 34FF(3) of the ASIO Act and the discretionary power to remove lawyers in section 34FF(6) should be removed.

  Alternatively, 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.

The right of person being questioned to access lawyer of that person's choice and legal assistance funding

- Subsections 34F(4) and (5) of the ASIO Act should be omitted;
- Commonwealth legal assistance funding should be available for all reasonable legal expenses incurred if needed; and
- new funding should not be offset against existing legal assistance funding, or the funding of the federal courts or oversight bodies.

Duty to give sufficient information to subject's lawyer

- 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 client on the validity of the questioning warrant and acts done under the purported authority of the warrant.

- In relation to accountability mechanisms:

  Judicial oversight of issuing compulsory questioning warrants: 'double lock' requirement

  - That the Committee gives further consideration 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 by a judicial officer (appointed *persona designata*) following the same principles as would be applied by a court on an application for statutory judicial review under the Administrative Decisions (Judicial Review) Act 1977 (Cth), and the judicial officer confirms the primary issuing decision;
    - 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.

- If the Committee does not support a 'double lock' approach, the Law Council recommends that alternative mechanisms for independent review should be considered.

Judicial authorisation of apprehension

- That subsection 34BE(2) of the ASIO Act (and related provisions) be amended so that only a judicial officer appointed *persona designata* may authorise the immediate apprehension of a warrant subject, on the basis of an unacceptable risk the person may abscond, tip off others or tamper with or destroy relevant information.

Explicit issuing criterion of necessity and proportionality

- A statutory requirement to assess necessity and proportionality in the issuing criteria for questioning warrants should be implemented.

Breach reporting on questioning warrants

- That section 34HA of the ASIO Act is amended to require the Director-General's reports to the Attorney-General on questioning warrants give details of compliance with the limits of authority under the warrant and the requirements of Part 3 of Division 3 of the ASIO Act.

- In relation to prescribed authorities[10]:

Grounds of disqualification and conflict of interest

- Section 34AD(2) of the ASIO Act should be expanded to provide that the mandatory grounds of disqualification of a person for appointment as a prescribed authority are:
  - persons who are employed or engaged by any Commonwealth, State or Territory government department or agency, or the parliamentary service of an Australian jurisdiction;
  - persons who are appointed as the head of any Commonwealth, State or Territory government department, agency or parliamentary department;
  - persons who are members of the Australian Defence Force, including volunteers within the Legal Corps persons who are currently employed or engaged by a member of any Australian legislature; and
- Consideration should be given to requiring appointees to not have held any of the above forms of employment, engagement, appointment or elected office in the previous 10 years.

[10] A prescribed authority means a person appointed under subsection 34AD(1) of the ASIO Act that oversees the questioning of a subject under a questioning warrant. A prescribed authority provides directions during the execution of the questioning warrant in accordance with Division 3 of Part III of the ASIO Act. In certain circumstances, the prescribed authority may make a direction to appoint a lawyer for the subject of a questioning warrant (see sections 34FB and 34FC of the ASIO Act).

Governor-General as the appointing authority

- Section 34AD of the ASIO Act should be amended to provide that the Governor-General is the appointing authority for prescribed authorities, who hold office for a five-year term, consistent with the appointment of ACIC examiners.

Governor-General's mandatory powers of termination

- Subsection 34AD(9) of the ASIO Act should be amended to provide that the Governor-General must, unless exceptional circumstances exist, terminate the appointment of a prescribed authority if any of the circumstances in paragraphs (a)-(e) are proved to exist.

- In relation to the pending sunset date:

  - That the Committee closely scrutinise any proposal to extend the existing sunset provision beyond 7 September 2025, noting alternative intelligence gathering powers and the evolving threats to national security beyond those that existed at the time of implementation.

  - If the Committee deems that Division 3 of Part III of the ASIO Act should not be affected by the sunset provision and continue beyond 7 September 2025, the Law Council emphasises the importance of the ongoing, independent review of the scheme to ensure its continuing necessity and proportionality.

Compulsory questioning powers in relation to children and other vulnerable persons

Questioning powers in relation to children

12. Reforms to the ASIO Act in 2020 lowered the minimum age of questioning to 14 years of age (from 16 years of age) and widened the scope of questioning in relation to a minor from terrorism offences to politically motivated violence.[11] These warrants enable a child who is aged at least 14 years to be questioned about a 'minor questioning matter' subject to certain thresholds being met.[12]

13. The Committee has previously described ASIO's compulsory questioning powers in relation to children as 'extraordinary' and 'the need for their use in regard to minors must be clearly evidenced.'[13] Nevertheless, in its 2020 Advisory Report, the Committee provided in-principle support for the lowering of the minimum age for questioning to 14 years, along with specific safeguards.[14]

14. The Law Council continues to hold concerns in relation to compulsory questioning powers of minors as set out in our earlier submissions on the ASIO Amendment

[11] See s 34A (definition of 'minor questioning warrant') and s 34BB(1) of the ASIO Act.
[12] ASIO Act, s 34BB.
[13] PJCIS, Review of ASIO's questioning and detention powers (March 2018) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIO/Report/section?id=committees%2freportjnt%2f024080%2f25026> [3.152].
[14] PJCIS, Advisory Report on the Australian Security Intelligence Organisation Amendment Bill 2020 (December 2020) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOAmendmentBill2020/Report> 14-5.

Bill.[15] It therefore welcomes the updated view of ASIO that it no longer sees a strong case to support the continuance of the power to question minors under warrant.[16] In its submission to this review, ASIO highlights that it has never used, nor requested, a minor questioning warrant, acknowledging that the threat environment has evolved and the alternative methods that ASIO has at its disposal to investigate minors are deemed sufficient.[17] The Department of Home Affairs appears supportive of this position.[18]

15. The Law Council strongly supports this sensible proposal to repeal the provisions in relation to the power to question minors under warrant.

Questioning of persons with disabilities

16. The Law Council remains concerned by the lack of statutory protections for vulnerable adults who may be subject to compulsory questioning, such as persons with intellectual, cognitive, developmental or physical disabilities.

17. The Law Council acknowledges that the *Australian Security Intelligence Organisation (Statement of Procedures) Instrument 2020* (**Statement of Procedures**) provides certain safeguards for people with known vulnerabilities. For example, a request for a questioning warrant must include a statement of the particulars of any known vulnerabilities (including a physical, sensory, intellectual or psychiatric disability, or medical condition) in relation to the subject, to the extent they are relevant to the questioning.[19] Further, the subject of a questioning warrant may only be apprehended, searched and questioned under conditions that take account of any known vulnerabilities in relation to the subject.[20]

18. We note, however, that the Statement of Procedures does not elaborate on the extent to which ASIO should take steps to inform itself of such vulnerabilities and sees benefit in the provision of greater detail as to when it should seek expert advice when assessing particular needs and special requirements for subjects.

19. The Law Council also acknowledges the Department of Home Affairs' response to our previous recommendation with regards to safeguards for persons with disabilities. In this regard, the Department highlighted:

- the obligation under section 34AG to treat subjects humanely will ensure that persons with disabilities are treated appropriately;
- the prescribed authority ensures the warrant is executed within the confines of the law and may make directions in relation to the conduct of all people involved; and

[15] Law Council of Australia, Australian Security Intelligence Organisation Amendment Bill 2020 (3 July 2020) <https://lawcouncil.au/resources/submissions/australian-security-intelligence-organisation-amendment-bill-2020>, 20.
[16] ASIO, ASIO submission to the Parliamentary Joint Committee on Intelligence and Security (February 2024) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOActCQP2023/Submissions> 3.
[17] Ibid, 3-4.
[18] Department of Home Affairs, Submission to Parliamentary Joint Committee on Intelligence and Security (1 February 2024).
[19] ASIO (Statement of Procedures) Instrument 2020, s 6(1)(c).
[20] Ibid, s 13(7).

- the IGIS may be present at any search or screening and subjects may make a complaint to the IGIS.[21]

20. The Department of Home Affairs has also pointed to additional safeguards in the Statement of Procedures, including transportation that prevents unnecessary physical hardship, interactions must be humane and courteous and questioning must not be in a manner that is unfair or oppressive.[22]

21. The Law Council continues to seek greater protections for persons with disabilities in primary legislation rather than a reliance on:

    - the Statement of Procedures and the discretion of the prescribed authority in supervising the conduct of questioning; or
    - the oversight role of the IGIS in relation to questioning (which appears to assume that IGIS officials would be present at every questioning session, despite the absence of a statutory requirement for this to occur).[23]

22. The Law Council is concerned that reliance on the beneficial exercise of executive discretion in a particular manner falls considerably short of providing a safeguard to a core human right.[24]

23. Further, the Law Council considers that certain statutory limitations in the legislation cannot be overcome via the exercise of discretion under the warrant framework.[25] For example:

    - there is no provision enabling an adult with a disability to have a non-lawyer representative present, such as a carer or a disability advocate;[26]
    - it is possible that an adult with a cognitive, intellectual or developmental disability could be questioned in the absence of a lawyer;[27]
    - a prescribed authority generally cannot give directions that are inconsistent with the questioning warrant,[28] which may limit the ability to give directions that provide adequate support tailored to the circumstances of individual warrant subjects in exercising their legal capacity;
    - there is no obligation on the prescribed authority to ensure that a person with a disability is given appropriate, independent assistance in exercising rights to waive having a lawyer present, or to ensure that the person understands the various matters that must be explained to the person;[29] and

[21] Department of Home Affairs, Australian Security Intelligence Organisation Amendment Bill 2020 Submission 4 – Supplementary Submission (July 2020) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOAmendmentBill2020/Submissions> 23.
[22] Ibid.
[23] Ibid.
[24] The PJCHR has also commented on the absence of specific safeguards for persons with disabilities: PJCHR, Scrutiny Report 7 of 2020, 44 at [2.44]. See further: 44-46 at [2.46]-[2.48] and 63 at [2.96].
[25] The PJCHR raised similar concerns, noting that the absence of specific protections 'may result in a person with a disability being subject to exploitation': Ibid, 45 at [2.47].
[26] See ASIO Act, ss 34AA and 34FD, which are limited to non-lawyer representatives in relation to minor questioning warrants.
[27] See ibid, s 34FA(2).
[28] See ibid, s 34DE(2). The exceptions are if the prescribed authority has been given notice of a concern raised by the IGIS under s 34DM and considers that the direction is necessary to address the concern satisfactorily, or if the direction has been approved in writing by the Attorney-General.
[29] See ASIO Act, s 34DC.

- the secrecy provisions under section 34GF may prevent a person with a disability from liaising with a disability advocate or support person, either before or after questioning, regarding concerns about the warrant.[30]

Recommendation 1 – safeguards for persons with disabilities

- **The ASIO Act should be amended to make specific provision for the protection of the rights of persons with disabilities under adult questioning warrants. This should include requirements in the issuing criteria, procedural arrangements for notification of warrants, the conduct of questioning and the permitted disclosure provisions.**

Role of lawyers for questioning warrants subjects

24. A key area of concern with Division 3 of Part III of the ASIO Act is the scope for disproportionate restrictions on the role of lawyers at the time of questioning. As set out below, these concerns relate primarily to the restrictions on raising objections during questioning and the ability to remove a lawyer in certain circumstances.

Prohibitions on raising objections and cautioning clients during questioning

25. Subsection 34FF(3) of the ASIO Act requires that a questioning subject's lawyer must not intervene in the questioning of the subject or address the prescribed authority before whom the subject is being questioned except to:

- request clarification of an ambiguous question, or
- request a break in questioning to provide advice to the subject.

26. In supporting these restrictions, the Department of Home Affairs notes its concern that if a lawyer were to have an active role in questioning, this would interrupt the flow of questioning and the elicitation of vital intelligence.[31] Despite this, the Law Council continues to hold concerns with the effect of subsection 34FF(3), which has the potential to be used to restrict a warrant subject's lawyer from raising objections to irrelevant or improper questioning, or cautioning the client during questioning. For example, a lawyer may wish to object to a question on the basis it is outside the scope of the warrant or is leading the subject. A lawyer may also wish to caution the 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 that question, noting that subsection 34GD(5) abrogates the privilege against self-incrimination.[32] The Law Council considers that these are entirely valid interventions that a lawyer should be permitted to make during questioning.

27. Further, 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.[33] It is also concerned that the

[30] See ibid, s 35GF. Especially s 34GF(5): definition of permitted disclosure.
[31] Department of Home Affairs, Australian Security Intelligence Organisation Amendment Bill 2020 Submission 4 – Supplementary Submission (July 2020) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOAmendmentBill2020/Submissions> 34.
[32] Law Council of Australia, Australian Security Intelligence Organisation Amendment Bill 2020 (3 July 2020) <https://lawcouncil.au/resources/submissions/australian-security-intelligence-organisation-amendment-bill-2020>.
[33] See further: Law Council of Australia, Submission to the Independent National Security Legislation Monitor Inquiry into questioning and detention warrants, control orders and preventative detention orders (September 2012), 33-35.

restrictions imposed by subsection 34FF(3) have the potential to impinge on a lawyer's professional obligation to act in the best interests of their client, 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.[34]

Removal of lawyers for 'unduly disrupting' questioning

28. Subsection 34FF(6) confers a power on the prescribed authority to direct the removal of a lawyer for 'unduly disrupting' questioning.[35] There is no guidance on what constitutes 'undue disruption' and no requirements for the prescribed authority to issue a prior warning to a person's lawyer, or to make such directions only as a last resort. A change in lawyer part-way through questioning could have a significant detrimental impact on the subject.[36]

29. Further, breadth of the power to direct the removal of lawyers is particularly problematic in view of the fact that the role of lawyers for questioning warrant subjects is explicitly limited by subsection 34FF(3) to seeking clarification of ambiguous questions and requesting breaks to give advice to their clients or address the prescribed authority (see above). This has the problematic result of making it possible for anything other than these interjections to be deemed to be a 'disruption' of questioning, and therefore potentially an 'undue' disruption that could warrant a direction for removal at the sole discretion of the prescribed authority.[37]

30. The Department of Home Affairs advises that the restrictions on a lawyer's role in questioning in subsection 34FF(3) reflect the fact that the questioning powers are designed to elicit information rather than bring criminal proceedings against the person. The Department notes that questioning is not intended to be an adversarial process and is instead an intelligence collection capability for ASIO. The Department states that if a lawyer were to have an active role in the questioning, this would interrupt the flow of questioning and the elicitation of vital intelligence, and take away from strictly limited questioning time under the legislation.[38]

31. The Law Council maintains that these restrictions go further than is reasonable and necessary to facilitate the efficient conduct of questioning and protect interests in

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[34] See further, professional conduct rules under the Legal Profession Uniform Law pertaining to the fundamental duties of lawyers to the court and the administration of justice, to act in the best interests of the client, and to avoid any compromise to their integrity and professional independence.
[35] ASIO Act, s 34FF(6).
[36] The Law Council also notes that the removal of a subject's lawyer in these circumstances could inappropriately influence an adult warrant subject's discretion to waive their right to contact another lawyer. That is, the warrant subject may form a view that having another lawyer would be futile, since they would be similarly liable to removal for doing no more than acting in the client's best interests. In the absence of guaranteed Commonwealth financial assistance, a warrant subject may be concerned that they are unable to afford a lawyer who would be legally restrained from actively protecting their client's interests during questioning.
[37] See further: PJCHR, Scrutiny Report 7 of 2020 (June 2020), 59 at [2.88].
[38] Department of Home Affairs, Australian Security Intelligence Organisation Amendment Bill 2020 Submission 4 – Supplementary Submission (July 2020) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOAmendmentBill2020/Submissions> 34.

national security. Further, these restrictions inappropriately undermine the substance of a person's rights to effective legal assistance to understand and exercise their rights to challenge a warrant or aspects of its purported execution.[39]

32. The Law Council is also concerned that what is intended for the questioning process may not always be reflected in practice, particularly if the right safeguards are not in place. For example, in 2005 the then-IGIS gave evidence to the former Parliamentary Joint Committee on ASIO, ASIS and ASD (**PJCAAD**, which was the predecessor to the Committee) that, 'in practice, the prescribed authorities have interpreted section 34U [which corresponds to s 34FF(3) in the ASIO Act] fairly strictly, by not permitting any questions put to them by lawyers other than to clarify ambiguity'.[40]

33. The (then) IGIS also gave evidence to the PJCAAD in 2005, that when warrant subjects sought to raise queries or concerns directly with the prescribed authority during questioning without the assistance of their lawyer, 'not surprisingly [they] can sometimes have difficulty in fully expressing their point of view'.[41]

34. The former PJCAAD also took classified evidence from lawyers representing questioning warrant subjects. The PJCAAD reported that 'the Committee has been told in evidence that lawyers and the subjects of the warrants have been excluded when a submission for an extension of time has been made and that a request for questioning to cease to allow for a complaint to be made to IGIS has been denied'.[42]

35. The former PJCAAD recommended that 'individuals be entitled to make representations through their lawyer to the prescribed authority'.[43] The Law Council notes that this recommendation was never implemented fully, but rather only partially through provisions enabling the subject's lawyer to request an opportunity to address the prescribed authority during a break in questioning (which may be allowed or denied at the discretion of the prescribed authority).[44] This provision in subsections 34FF(2)-(5) does not seek to implement the totality of the former PJCAAD's recommendation.

Additional safeguards

36. The Law Council's preferred approach is that the provisions for the prescribed role of lawyers at questioning – subsection 34FF(3) – and the discretionary power to remove lawyers – subsection 34FF(6) – are removed. If there is no appetite to completely remove these powers, the Law Council submits that the following safeguards are necessary to constrain the ability to limit or remove a lawyer from questioning:

- guidance on what constitutes 'undue disruption';[45]
- 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;

[39] Law Council of Australia, Australian Security Intelligence Organisation Amendment Bill 2020 (3 July 2020) <https://lawcouncil.au/resources/submissions/australian-security-intelligence-organisation-amendment-bill-2020> 69.
[40] Parliamentary Joint Committee on ASIO, ASIS and ASD, Report on the Review of Division 3, Part III of the ASIO Act 1979 – Questioning and Detention Powers, (November 2005), 50 at [3.22].
[41] Ibid, 50 at [3.21].
[42] Ibid, 50 at [3.22].
[43] Ibid, 51-52 at [3.28] and recommendation 5.
[44] ASIO Act, ss 35ZQ(7) and (8).
[45] ASIO Act, s 34FF(6).

- a requirement to issue a prior warning to a person's lawyer before taking steps to remove the lawyer;
- making such directions as a last resort, noting the detrimental impact that a change of lawyer part-way through questioning could have on the subject.

37. Further, subsection 34FA(3) provides that a prescribed authority may direct that the subject of an adult questioning warrant be prevented from contacting a lawyer if the prescribed authority is satisfied that the subject has had a reasonable opportunity to contact a lawyer. The Law Council considers that guidance should be provided on the important role played by a lawyer in these circumstances and require active steps to be taken to ensure that the person has access to full information about how to obtain a lawyer and the means to facilitate such access, before this conclusion is reached.

Recommendation 2 – a lawyer's prescribed role and the removal of a lawyer at the time of questioning

- **Provisions for the prescribed role of lawyers at the time of questioning set out in section 34FF(3) and the discretionary power to remove lawyers in section 34FF(6) should be removed.**
- **Alternatively, 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;**
  - **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.**

Restrictions on a person's lawyer of choice

38. The Law Council does not support the power of the prescribed authority to prohibit a questioning warrant subject being represented by their lawyer of choice during questioning, as per subsections 34F(4)-(5) of the ASIO Act.[46] The Law Council's primary position is that a person compelled to answer questions pursuant to a warrant must be entitled to access a lawyer of choice, without limitation, at all stages of the questioning process. Such access is integral to the ability of a warrant subject to effectively exercise their right to challenge the legality of the warrant and its execution.[47] The Law Council therefore submits that these sections of the ASIO Act should be omitted.

39. The Department of Home Affairs has noted that the provisions relating to legal representation are largely consistent with similar provisions in the *Australian Crime Commission Act 2002* (Cth) (**ACC Act**) in that they provide for access to a lawyer; provide for the ability of the subject to apply for the provision of assistance in respect

[46] ASIO Act, ss 34F(4)-(5).
[47] See further: Law Council of Australia, Submission to the Independent National Security Legislation Monitor Inquiry into questioning and detention warrants, control orders and preventative detention orders (September 2012), 33-35; and Law Council of Australia, Policy Statement: Rule of Law Principles (March 2011), 3 (principle 4 – Everyone should have access to competent and independent legal advice).

of the subject's appearance; and enable a person exercising authority under a warrant to monitor the subject's contact with a lawyer. The Department stated that variations in this area were necessary to reflect the context of ASIO's powers and ensuring they are effective in the context of ASIO's security intelligence function. The Department also noted that removing the ability to involve a particular lawyer in certain circumstances ensures the subject cannot use the lawyer to tip off others about a security investigation or cause the destruction of security relevant records or other things.[48]

40. The Law Council reiterates its view that the risks associated with tip-off and tampering should be managed, as is done in the ACC Act, via the enactment of disclosure offences and contempt provisions applicable to all persons, including an examinee's lawyer,[49] and the usual application of lawyers' professional conduct rules and their overarching professional duties and responsibilities as officers of the court.[50] This view was supported by the Committee in its advisory report, which agreed with the Law Council and the former INSLM that the provisions under the ACC Act offer a fair and workable framework for access to legal representation, and that the ASIO Act provisions should be consistent with those of the ACC Act in relation to legal representation.[51]

41. The Law Council also maintains that legal aid should be available to a subject to cover all reasonable expenses incurred arising from their legal representation. The ASIO Act has an existing provision that creates a discretionary financial assistance scheme administered by the Attorney-General (section 34JE), in which financial assistance is not guaranteed. In its response to the Law Council's view, the Department of Home Affairs outlined the current process for applying for financial assistance, and noted that a primary consideration in a potential grant of legal financial assistance is the 'applicant considerations' – an assessment of whether the applicant has the financial means to meet the cost of the legal representation.[52]

42. This may imply that legal assistance funding should be made available to all subjects if needed, noting the extraordinary nature of the powers, and the importance of independent legal representation in the administration of the scheme.

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[48] Department of Home Affairs, Australian Security Intelligence Organisation Amendment Bill 2020 Submission 4 – Supplementary Submission (July 2020) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOAmendmentBill2020/Submissions> 35-6.

[49] ACC Act, s 25A(2)(a) (an examinee is permitted to be represented by a lawyer at an examination) and s 35(1)(b) (offence of disrupting an examination). See also: s 34A(e) (disruption is a contempt of the ACC).

[50] The PJCHR also made this point, as part of its observation that 'it is not clear that there is a pressing and substantial need for this proposed limitation on a person's choice of lawyer': PJCHR, Scrutiny Report 7 of 2020 (June 2020), 58 at [2.85].

[51] PJCIS, Advisory Report on the Australian Security Intelligence Organisation Amendment Bill 2020 (December 2020) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOAmendmentBill2020/Report> [3.161]-[3.162].

[52] Department of Home Affairs, Australian Security Intelligence Organisation Amendment Bill 2020 Submission 4 – Supplementary Submission (July 2020) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOAmendmentBill2020/Submissions> 36.

Recommendation 3 – the right of person being questioned to access lawyer of that person's choice and legal assistance funding

- **Subsections 34F(4) and (5) of the ASIO Act should be omitted;**
- **Commonwealth legal assistance funding should be available for all reasonable legal expenses incurred if needed; and**
- **new funding should not be offset against existing legal assistance funding, or the funding of the federal courts or oversight bodies.**

Prohibitions and limitations on the ability of lawyers to access critical information

43. There are limitations on the ability of a warrant subject's lawyer to see the entirety of the questioning warrant and underlying documentation (such as the statement of facts and grounds supporting the request). In particular, section 34FE enables the Director-General of Security to delete material from a questioning warrant as the Director-General considers necessary to avoid prejudice to security, the defence of the Commonwealth, the conduct of the Commonwealth's international affairs or the privacy of individuals.[53]

44. This provision also states that there is no entitlement for the subject's lawyer to access documents other than the warrant or variations (or written records of warrants issued or variations made orally).[54] This may limit the ability of a lawyer to ascertain the scope of authority under the warrant (including any specific conditions or limitations), and therefore the capacity to advise the subject about whether a particular question or other action purportedly done under the warrant (such as the seizure of records or things) is lawfully authorised.[55]

45. Further, where a questioning warrant is issued in respect of a security matter that comprises 'politically motivated violence' in the form of 'acts that threaten or endanger any person or class of persons specified by the Minister… by notice in writing given to the Director-General',[56] proposed section 34FE may operate to prevent a lawyer from viewing the relevant Ministerial notice, in order to independently consider whether the purported questioning matter specified in the warrant was legally capable of being authorised under the warrant.

46. The Law Council considers that any restrictions on the ability of a warrant subject's lawyer to access information should be subject to an overriding duty to ensure that the lawyer is given access to sufficient information so that the lawyer can perform the lawyer's professional responsibilities to act in the best interests of the client, including in providing advice to the client on the client's legal position in relation to the issuing and execution of the warrant.

Recommendation 4 – Duty to give sufficient information to subject's lawyer

- **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.**

[53] ASIO Act, s 34FE(4).
[54] Ibid, s 34FE(6)(b).
[55] See also: PJCHR, Scrutiny Report 7 of 2020 (June 2020), 60 at [2.89].
[56] ASIO Act, s 4 (subparagraph (d)(ii) of the definition of 'politically motivated violence').

Accountability mechanisms

Issuing authorities for questioning warrants

Authorisation of compulsory questioning and production

47. Reforms to the ASIO Act in 2020 removed the role of the independent issuing authority, meaning that under Division 3, the Attorney-General can directly issue questioning warrants.

48. 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 may impede timely and effective operations. In support of the current approach, the Committee has previously noted that the issuing of warrants by the Attorney-General would be a higher level of authorisation than that required for some other domestic compulsory questioning regimes, some of which provide for internal authorisations.[57]

49. Despite this, the Law Council continues to support judicial issuing of all warrants. Although the Law Council did not oppose the appointment of the Attorney-General as the issuing authority for compulsory questioning warrants under the ASIO Act, it expressed concern with the proposal to entirely remove statutory judicial supervision from the issuing process. 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.[58]

50. This proposed statutory 'double lock' requirement is analogous to the role of judges under the *Investigatory Powers Act 2016* (UK) in relation to technical intelligence and law enforcement collection warrants (for example, telecommunications interception and data access, and computer access).[59] The Attorney-General would be responsible for applying the issuing criteria to the facts and grounds as provided in ASIO's warrant request, and making a decision about whether the warrant should be issued. The warrant would not enter into force until a judicial officer has reviewed the issuing decision and confirmed that the issuing decision was open on the facts and grounds placed before the Attorney-General. If the judicial officer concluded that the issuing decision was not open to the Attorney-General on the facts and grounds provided by ASIO with the warrant request, then the warrant would be cancelled. Further details of the Law Council's proposals are set out in the previous submission as well as the Committee's previous report, where it sought the Department of Home Affair's comment on the Law Council's recommendation for a 'double lock' requirement.[60]

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[57] PJCIS, Review of ASIO's Questioning and Detention Powers (March 2018) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIO/Report/section?id=committees%2freportjnt%2f024080%2f25026> [3.120]-[3.124].

[58] Law Council of Australia, Australian Security Intelligence Organisation Amendment Bill 2020 (3 July 2020) <https://lawcouncil.au/resources/submissions/australian-security-intelligence-organisation-amendment-bill-2020> 41-42.

[59] See, for example, *Investigatory Powers Act 2016* (UK), ss 23-25 (approval by Judicial Commissioners of issuing decisions by the Secretary of State to issue telecommunications interception warrants).

[60] Law Council of Australia, Australian Security Intelligence Organisation Amendment Bill 2020 (3 July 2020) <https://lawcouncil.au/resources/submissions/australian-security-intelligence-organisation-amendment-bill-2020> 41-4. Also see PJCIS, Advisory Report on the Australian Security Intelligence Organisation Amendment Bill 2020 (December 2020) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOAmendmentBill2020/Report> [3.25]-[3.26].

51. The Department of Home Affairs considers that the Attorney-General is the most suitable person to determine the appropriateness of questioning warrants, and that a double lock process is not required for compulsory questioning warrants.[61] Further, the Department noted that significant changes in Australia's security environment have seen a rise in low complexity attacks by lone actors or small groups involving the use of weapons that are easy to acquire, such as knives or vehicles. This has significantly changed the pace of ASIO's investigations, as opportunities to identify and intervene are limited. The Department considers that the removal of a multi-step authorisation process ensures that ASIO's compulsory questioning powers are operationally effective in a fast-paced, high-threat environment.[62]

52. The Law Council acknowledges that the threat environment has evolved, but does not accept that potential delays are reason enough to outweigh the merits of a 'double lock' authorisation process. To address concerns of delay, the Law Council suggests 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 officer may order the destruction of the intelligence or may impose conditions on its retention.

53. 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 extension of these compulsory questioning powers to ASIO and the significant broadening of the questioning matters to espionage and foreign interference (and additional heads of power under Section 4 of the ASIO Act may be proposed by the Department of Home Affairs).[63]

54. It is noted that statutory judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) Act is not available for decisions to issue questioning warrants.[64] Further, judicial review under original jurisdiction of the High Court, or the mirroring jurisdiction of the Federal Court under section 39B of the *Judiciary Act 1903* (Cth), may be of extremely limited utility to a warrant subject. Such review is limited to the grounds of jurisdictional error (which has a high threshold). Further, it may be impossible for a warrant subject to obtain access to the necessary evidence to substantiate their application, given the likelihood of that information being highly classified and subject to a claim for public interest immunity.[65]

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[61] 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 (1 February 2024) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOActCQP2023/Submissions> 13 [63]-[66].

[62] Department of Home Affairs, Australian Security Intelligence Organisation Amendment Bill 2020 Submission 4 – Supplementary Submission (July 2020) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOAmendmentBill2020/Submissions>.

[63] 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 (1 February 2024) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOActCQP2023/Submissions> 9 [32]-[34].

[64] ADJR Act, section 3 and Schedule 1, paragraph (d) (decisions made under the ASIO Act are not decisions to which the ADJR Act applies).

[65] As the High Court remarked in *Church of Scientology v Woodward* (1982) 154 CLR 25 at 61 (per Mason J), the test of establishing that ASIO acted outside the limits of its authority to exercise a collection power or perform a collection function 'presents a formidable hurdle to a plaintiff' including 'because a successful claim

55. In addition, a lawyer for a warrant subject has extremely limited statutory rights to access information for the purpose of commencing review proceedings. This includes the power of the Director-General of Security to redact content from the warrant instrument;[66] the absence of a right of access to documentation other than the warrant instrument (such as the statement of facts and grounds accompanying ASIO's warrant request).[67] The ASIO Act also confers an extremely broad regulation-making power that enables the Secretary of the Department of Home Affairs to impose prohibitions on the lawyer accessing information after the execution of the warrant, without limitation on the grounds of prohibition.[68]

56. The Law Council considers that a 'double lock' requirement in the issuing process for questioning warrants would go a significant way towards addressing the above-mentioned concerns, while also strengthening independence and rigour in the issuing process. If the Committee does not support a 'double lock' approach, the Law Council recommends that alternative mechanisms for independent review should be considered.

Recommendation 5 – Judicial oversight of issuing compulsory questioning warrants: 'double lock' requirement

- **That the Committee gives further consideration 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 by a judicial officer (appointed *persona designata*) following the same principles as would be applied by a court on an application for statutory judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), and the judicial officer confirms the primary issuing decision;**
  - **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.**

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of Crown privilege may exclude from consideration the very material on which the plaintiff hopes to base his argument' (in addition to the breadth of the concept of intelligence that 'relates to' security in the context of the anticipatory nature of ASIO's functions). See also: Ibid, 72 and 75-77 (per Brennan J) at which it was noted that 'discovery would not be given against the Director-General [of Security] save in a most exceptional case'.

[66] See ASIO Act, s 34FE(4).

[67] Ibid, s 34FE(6)(b).

[68] Ibid, s 34FH. See also ASIO Regulation 2016, s 8.

- **If the Committee does not support a 'double lock' approach, the Law Council recommends that alternative mechanisms for independent review should be considered.**

Authorisation of apprehension

57. The Law Council continues to remain concerned about the absence of judicial involvement in decisions to authorise the immediate apprehension of a person for the purpose of bringing them into questioning in accordance with a warrant.[69]

58. The Law Council remains of the view expressed in its submission to the Committee in 2017[70], and also in 2020[71], that if such a power is to be available, it should be conferred solely upon a judicial officer, as is the case under section 31 of the ACC Act.[72]

59. The Law Council acknowledges the Department of Home Affairs' consideration of this recommendation in which it noted that its implementation could restrict ASIO's ability to efficiently execute warrants in time-sensitive circumstances, particularly where there is an imminent threat to public safety. The Department emphasises that this risk is particularly acute in relation to warrants authorising apprehension. The Department also expresses concern that it would result in two separate authorisation processes for questioning warrants.[73]

60. The Law Council considers that there is no viable justification for subjecting ASIO to a lesser standard of independence in the authorisation process, by conferring this power exclusively on a Minister. Given that decision-making about apprehension at the time of issuing a warrant necessarily involves the imposition of a significant restraint on a person's liberty based on a prediction about future conduct, it is important that such a complex and high-risk decision is subject to independent determination by a person who is not central to the executive government, as is a Minister of the Crown. As mentioned above, for urgent cases with imminent threats processes can be put in place.

61. If the Law Council's recommendation for the separate judicial authorisation of apprehension is not adopted, the Law Council considers this as a bare minimum, its recommendation 6 above (enactment of a double lock issuing process) must be implemented. This would mean that the Attorney-General's decision to authorise a power of apprehension is subject to an inbuilt review by a judicial officer as a precondition to the warrant entering into force.

Recommendation 6 – Judicial authorisation of apprehension

- **That subsection 34BE(2) of the ASIO Act (and related provisions) be amended so that only a judicial officer appointed *persona designata***

[69] See ASIO Act, s 34BE(2). See also PJCHR, Scrutiny Report 7 of 2020 (June 2020), 40 at [2.29].
[70] Law Council of Australia, Submission to the PJCIS Review of ASIO's questioning and detention powers, (April 2017), 10.
[71] Law Council of Australia, Australian Security Intelligence Organisation Amendment Bill 2020 (3 July 2020) <https://lawcouncil.au/resources/submissions/australian-security-intelligence-organisation-amendment-bill-2020> 44 [162]-[164].
[72] Cf *Australian Crime Commission Act 2002* (Cth) (ACC Act), s 31 (warrants for arrest of examinees are issued by judicial officers).
[73] Department of Home Affairs, Australian Security Intelligence Organisation Amendment Bill 2020 Submission 4 – Supplementary Submission (July 2020) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOAmendmentBill2020/Submissions> 24.

may authorise the immediate apprehension of a warrant subject, on the basis of an unacceptable risk the person may abscond, tip off others or tamper with or destroy relevant information.

Issuing criteria for questioning warrants

62. In order to issue a questioning warrant under the ASIO Act, the Attorney-General must be satisfied that:

- there are reasonable grounds for believing that the questioning warrant will substantially assist in the collection of intelligence that is important in relation to an adult or a minor questioning warrant (as applicable); and
- 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.[74]

63. The Law Council considers that these thresholds are too low. For context, it notes that the questioning matters have been significantly expanded beyond terrorism, especially to cover espionage and foreign interference. The expansion of ASIO's extraordinary compulsory questioning powers to broader heads of security mean that questioning warrants can be issued in relation to security matters that do not necessarily involve the same degree of imminence or urgency as the potential commission of a terrorism offence. The Law Council considers that an increase to the issuing threshold for questioning warrants is a necessary corollary of the proposed expansion of the powers. This is even more important if a further expansion of powers is being considered by the government as has been proposed.[75]

64. In increasing the issuing criteria to an acceptable level, the Law Council supports explicit statutory criteria addressing matters of necessity (not merely reasonableness) and proportionality (not merely a limited sub-set of factors relevant to proportionality).

65. The Law Council acknowledges that the ASIO Guidelines (which are in and of themselves outside the scope of this inquiry) apply broadly to all ASIO operations and contain a general requirement for ASIO to assess matters of proportionality in its investigative decision-making. However, the Law Council considers that the existence of a requirement in the Guidelines overlooks the fundamental difference between an administrative obligation about the manner of exercise of a power (or requests for authorisation to exercise the power) and a legal limitation on the power itself. That is, the ASIO Guidelines are administratively binding on ASIO,[76] meaning that the consequences of their contravention are purely administrative in nature, such as Ministerial reprimand, internal discipline, or adverse findings by the IGIS and any ensuing public or Parliamentary criticism.

[74] ASIO Act, ss 34BA(1)(b)-(c) and 34BB(1)(c)-(d).
[75] See 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 (1 February 2024) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOActCQP2023/Submissions> 3. Also see ASIO, ASIO submission to the Parliamentary Joint Committee on Intelligence and Security (February 2024) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOActCQP2023/Submissions> 4-7.
[76] ASIO Act, s 8A.

66. A further benefit of a comprehensive statutory necessity and proportionality requirement in the issuing criteria for questioning warrants is that this would import international human rights law standards with respect to permissible limitations on rights (such as liberty and security of the person and freedom of movement) directly into the issuing criteria. As such, it would provide a stronger safeguard to the exercise of discretionary power only in a manner that is compatible with Australia's human rights obligations.

Recommendation 7 – Explicit issuing criterion of necessity and proportionality

- **A statutory requirement to assess necessity and proportionality in the issuing criteria for questioning warrants should be implemented.**

Reporting on questioning warrants

The need for breach reporting on questioning warrants

67. The Law Council remains concerned that there is no requirement for ASIO's individual warrant reports to inform the Attorney-General of any breaches of applicable legal requirements. This might include, for example, any instances in which ASIO exceeded the limits of its authority under a warrant; contravened a safeguard in relation to the humane treatment of warrant subjects; contravened a direction of the prescribed authority; or contravened a requirement in the Statement of Procedures for Questioning or the ASIO Guidelines.[77]

68. The Law Council acknowledges the Department of Home Affairs' response on this matter, noting that the inclusion of an additional breach reporting requirement may not provide an additional safeguard or assurance, compared to existing safeguards.[78] The Law Council maintains that mandatory reporting to the Attorney-General on these compliance issues is necessary, in addition to existing safeguards, to ensure appropriate Ministerial accountability in relation to the execution of individual warrants. Such reporting is also necessary to inform the future decision-making of the Attorney-General about the issuing of questioning warrants – including decisions about imposing particular conditions or limitations to help prevent the repetition of any previous compliance issues. In this way, it can certainly provide an additional safeguard.

69. The inclusion of a breach reporting requirement in individual warrant reports may also assist the IGIS in focusing their oversight of questioning warrants – including in identifying and addressing the causes of reported breaches and assessing whether individual breaches across multiple warrants are symptomatic of systemic issues. The Law Council considers that the benefits of an additional breach reporting requirement are clear.

[77] Ibid, s 34HA(1) (matters that must be included in questioning warrant reports).
[78] Department of Home Affairs, Australian Security Intelligence Organisation Amendment Bill 2020 Submission 4 – Supplementary Submission (July 2020) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOAmendmentBill2020/Submissions> 43.

Recommendation 8 – Breach reporting on questioning warrants

- **That section 34HA of the ASIO Act is amended to require the Director-General's reports to the Attorney-General on questioning warrants give details of compliance with the limits of authority under the warrant and the requirements of Part 3 of Division 3 of the ASIO Act.**

Prescribed authorities

Disqualifying matters

70. Subsection 34AD(2) of the ASIO Act prescribes a narrow range of matters disqualifying a person from appointment as a prescribed authority. They focus on the current employment or engagement of a person by specific agencies (namely, ASIO and other intelligence agencies,[79] the AFP and State and Territory police, the Australian Government Solicitor and the Office of the IGIS).

71. While such exclusions are appropriate, the Law Council is concerned that these matters do not adequately cover the circumstances in which an actual, potential or perceived conflict of interest is likely to arise. In particular:

- they are limited to the current employment or engagement of a person by one of the above agencies, and do not consider a person's recent employment or future employment, where known;
- they are limited to a very small number of Commonwealth agencies and State and Territory police. For example, the ASIO Act, does not prohibit appointment of the following lawyers, with 10 or more years' post-admission experience and a current practising certificate:
  - current or recent Ministerial or other political advisers; and
  - current or recent employees of the Department of Home Affairs, ACIC, the Attorney-General's Department (other than the part of that Department known as the Australian Government Solicitor), or the Commonwealth Director of Public Prosecutions; and
- they do not recognise that it is possible for at least a potential conflict of interest to arise by reason of a person's current or recent employment or engagement by any government department or agency (particularly noting the diffusion of responsibilities for national security across numerous areas of government).

72. The Law Council notes that it may be extremely difficult to craft an eligibility criterion that effectively excludes all circumstances in which there would be an unacceptable risk of a substantive or perceived conflict of interest by reason of a person's current or recent employment. The Law Council is also concerned that leaving the assessment of a potential conflict of interest to the discretion of the Executive Government would be unsatisfactory. It may invite similar criticisms to those made about appointments to administrative review bodies, including the AAT. Given that prescribed authorities will necessarily perform their functions confidentially, with very

[79] Defined in section 19A of the ASIO Act as being the Australian Secret Intelligence Service, the Australian Signals Directorate, the Australian Geospatial-Intelligence agency, the Office of National Intelligence, a law enforcement agency, and an authority of the Commonwealth or of a State that is prescribed by the regulations for the purposes of the paragraph.

limited opportunities for judicial review, the Law Council would prefer to remove the risk of even the perception of such conflicts of interest.

73. The Law Council is also concerned that subsection 34AD(5) of the ASIO Act merely requires the Attorney-General to 'have regard to' the potential for a prospective appointee to have a conflict of interest as a result of their work and other interests. It does not prohibit the Attorney-General from appointing a person despite the existence of an actual, potential or perceived conflict of interest. The Law Council is opposed to the legal possibility for a power of appointment to be available in such circumstances. It is incompatible with the important role performed by a prescribed authority in supervising ASIO's extraordinary powers.

Recommendation 9 – Grounds of disqualification and conflict of interest

- **Section 34AD(2) of the ASIO Act should be expanded to provide that the mandatory grounds of disqualification of a person for appointment as a prescribed authority are:**
  - **persons who are employed or engaged by any Commonwealth, State or Territory government department or agency, or the parliamentary service of an Australian jurisdiction;**
  - **persons who are appointed as the head of any Commonwealth, State or Territory government department, agency or parliamentary department;**
  - **persons who are members of the Australian Defence Force, including volunteers within the Legal Corps;**
  - **persons who are currently employed or engaged by a member of any Australian legislature; and**
- **Consideration should be given to requiring appointees to not have held any of the above forms of employment, engagement, appointment or elected office in the previous 10 years.**

Appointing authority

74. The Department of Home Affairs deems the Attorney-General, as first law officer of the Commonwealth and with responsibility for oversight of the courts, as the appropriate person to appoint prescribed authorities.[80] The Law Council maintains there is a need to ensure the substantive and perceived independence of all prescribed authorities. That is, they should be appointed to a statutory office for a fixed term by the Governor-General. This would be akin to the appointment of examiners under the ACC Act.[81]

75. The Law Council continues to regard the appointment provisions of the ACC Act as a preferable model to those in the ASIO Act. That is, section 34AD of the ASIO Act confers the power of appointment on the Attorney-General, who is the issuing authority for questioning warrants, and for appointees to hold office at the Attorney-

[80] Department of Home Affairs, Australian Security Intelligence Organisation Amendment Bill 2020 Submission 4 – Supplementary Submission (July 2020) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOAmendmentBill2020/Submissions> 30.
[81] ACC Act, s 46B (appointment of examiners by the Governor-General for a term of five years).

General's pleasure. Adopting the ACC Act model would provide a much stronger guarantee of the independence of prescribed authorities.

Recommendation 10 – Governor-General as the appointing authority

- **Section 34AD of the ASIO Act should be amended to provide that the Governor-General is the appointing authority for prescribed authorities, who hold office for a five-year term, consistent with the appointment of ACIC examiners.**

Grounds for termination

Discretionary approach

76. The Law Council is concerned that the ASIO Act does not require the termination of the appointment of a prescribed authority on the basis of their proven misbehaviour, incapacity, failure to comply with obligations in relation to conflict-of-interest declarations without a reasonable excuse, or the existence of an actual or potential conflict of interest. Rather, the ASIO Act confers a discretionary power of termination in these circumstances.[82]

77. The Department of Home Affairs notes that conflicts may arise, for example, during a prescribed authority's tenure without their knowledge (and not necessarily affect their performance), or a bankruptcy might not otherwise affect their ability to perform their role. It further notes that in extreme circumstances, it could mean that a prescribed authority is removed during questioning and could affect ASIO's ability to collect intelligence in time-sensitive circumstances.[83] Therefore, the Department argues to maintain the Attorney-General's discretion as to whether a prescribed authority should be terminated in all the circumstances.

78. The Law Council previously considered that all of the matters listed in section 34AD(9) of the ASIO Act should be mandatory grounds for termination.[84] That is, there should be no possibility for an appointing authority to exercise a discretion to enable a prescribed authority to remain in office, despite being satisfied that the prescribed authority has engaged in misbehaviour, lacks physical or mental capacity, is bankrupt (and therefore vulnerable to financial influence) or has a conflict of interest, or fails to comply with their important obligations to declare potential conflicts of interest without a reasonable excuse. The Law Council has emphasised that the role of prescribed authorities should be subject to mandatory termination in these circumstances, in view of the fact that their functions are performance on a secretive basis that is not susceptible to statutory judicial review. The Law Council maintains this as its preferred position.

79. As an alternative, the Law Council notes that the provisions could be drafted in a way that provides for discretion in exceptional circumstances to allow for circumstances such as those raised by the Department of Home Affairs.

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[82] ASIO Act, s 34AD(9) (discretionary termination of appointment of prescribed authorities).
[83] Department of Home Affairs, Australian Security Intelligence Organisation Amendment Bill 2020 Submission 4 – Supplementary Submission (July 2020) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOAmendmentBill2020/Submissions> 31.
[84] Law Council of Australia, Australian Security Intelligence Organisation Amendment Bill 2020 (3 July 2020) <https://lawcouncil.au/resources/submissions/australian-security-intelligence-organisation-amendment-bill-2020> 62.

Recommendation 11 – Governor-General's mandatory powers of termination

- **Subsection 34AD(9) of the ASIO Act should be amended to provide that the Governor-General must, unless exceptional circumstances exist, terminate the appointment of a prescribed authority if any of the circumstances in paragraphs (a)-(e) are proved to exist.**

Sunset date

80. In its 2020 Advisory Report on the Bill, the Committee recognised the extraordinary nature of the questioning powers given to ASIO and recommended that the sunsetting timeframe be reduced to 5 years, being 7 September 2025.[85] This recommendation is reflected at section 34JF of the ASIO Act.

81. ASIO has submitted that the compulsory questioning framework should be retained for a further five years to September 2030.[86] The Department of Home Affairs suggests that it may be appropriate to 'normalise' Division 3 of Part III of the ASIO Act, rather than the laws being subject to a sunsetting clause and recommends legislating five yearly reviews of the laws.[87]

82. The Law Council considers that ASIO has other existing human and technical intelligence collection powers, and police powers of criminal investigation at its disposal. We therefore recommend that the Committee seeks evidence and considers carefully whether ASIO's compulsory questioning powers remain necessary in light of these existing powers.

83. If the Committee takes the view that the evidence presented to the inquiry provides that relevant security threats are enduring, and compulsory questioning warrants are required to manage these threats, then the Law Council emphasises the importance of the ongoing, independent review of the scheme to ensure its continuing necessity and proportionality. The role of the INSLM will be particularly important in monitoring the continuing necessity (or otherwise) of this aspect of the questioning regime.

[85] PJCIS, Advisory Report on the Australian Security Intelligence Organisation Amendment Bill 2020 (December 2020) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOAmendmentBill2020/Report> [4.33]-[4.34].
[86] ASIO, ASIO submission to the Parliamentary Joint Committee on Intelligence and Security (February 2024) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOActCQP2023/Submissions> 8 [25].
[87] 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 (1 February 2024) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOActCQP2023/Submissions> 3.

Recommendation 12 – sunset date

- **That the Committee closely scrutinise any proposal to extend the existing sunset provision beyond 7 September 2025, noting alternative intelligence gathering powers and the evolving threats to national security beyond those that existed at the time of implementation.**
- **If the Committee deems that Division 3 of Part III of the ASIO Act should not be affected by the sunset provision and continue beyond 7 September 2025, the Law Council emphasises the importance of the ongoing, independent review of the scheme to ensure its continuing necessity and proportionality.**