
Questioning and detention powers

Independent National Security Legislation Monitor

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Executive Summary

1. The Law Council of Australia is grateful for the opportunity to provide the following submission to the Independent National Security Legislation Monitor's (INSLM) inquiry into certain questioning and detention powers (CQDPs) relating to:
 - Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act) (questioning warrants and questioning/detention warrants);
 - Part IC of the *Crimes Act 1914* (Cth) (Australian Federal Police (AFP) powers of detention, obligations of investigators); and
 - Coercive questioning powers of the Australian Crime Commission (ACC) under the *Australian Crime Commission Act 2002* (Cth) (ACC Act).
2. The Law Council understands that the INSLM's current review is not directed at powers contained in the *Criminal Code Act 1995* (Cth) (including preventative detention orders) or in Division 3A of Part 1AA of the *Crimes Act 1914* (Cth) (stop, search and seizure regime relating to Commonwealth places), although the existence of these powers will be taken into account. The review will examine the period since that examined by the previous INSLM (the period since the 2012 Annual Report¹).
3. The Law Council acknowledges the critical responsibility of the Australian Parliament to ensure the security of Australia and its people. In this regard, it is vital that our security and law enforcement agencies have appropriate powers to detect, prevent, and prosecute terrorist activities to protect the Australian community. The Law Council recognises that intelligence gathering is key to preventing terrorist actions and that gaining information from members of the community who may hold relevant information is vital.
4. Such powers must, however, be a necessary and proportionate response to potential threats and not unduly impinge on the values and freedoms on which our democracy is founded – and which Australians rightly expect Parliament to protect at the same time. The Law Council has therefore long argued that our ant-terrorism laws must strike the appropriate balance between community safety and protecting individual freedoms.
5. The Law Council holds concerns about the potential infringement of liberties and rights as a result of CQDPs, including the rights to freedom from arbitrary detention, freedom of movement and right to privacy.² It submits that, where there is the potential for CQDPs to significantly limit fundamental rights, the justification should be clearly articulated, and the powers only available in extraordinary circumstances. In the counter-terrorism context, detention of persons not suspected of terrorist activity cannot be justified. However, a regime which would allow the appropriate authority to question such persons, while undesirable in principle, might be justified by the extraordinary circumstances of a direct terrorist threat to the nation.³ As a minimum, detention, should only be exercised where an Australian court or issuing authority has examined the sufficiency of the evidence supporting the detention.
6. Amendment of ASIO, the AFP and the ACC's CQDPs, and in some cases repeal of the powers (for example in the case of ASIO's questioning and detention warrants), is

¹ Independent National Security Legislation Monitor, *Declassified Annual Report*, 20 December 2012.

² As set out in the *International Covenant on Civil and Political Rights* at articles 9, 12 and 17 respectively.

³ As noted in the Law Council's submission to the Senate Legal and Constitutional References Committee's Inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002, 3.

needed to ensure the proportionality of the regimes and a defendant's right to a fair trial. This is particularly important in light of recent High Court cases *X7 v Australian Crime Commission* (2013) 248 CLR 92, *Lee v New South Wales Crime Commission* [2013] HCA 39 and *Lee v New South Wales Crime Commission* [2014] HCA 20. Generally, these cases reinforce the privilege against self-incrimination, the right to silence and the right to a fair trial, particularly in situations where an agency uses its compulsory powers to question a person who is the subject of criminal charges.

7. Further, there appears to be a significant overlap in CQDPs, even if the use of the powers by ASIO, the AFP and the ACC can serve different purposes. There may be consequences to the overlap which should be considered and addressed. Some consequences of the overlap which may impact on the necessity and proportionality of the powers include the potential:
 - to create uncertainty about legal rights and obligations;
 - for unnecessary duplication; and
 - that the powers may be used in close succession, thus exacerbating concerns regarding limitations on individual rights.
8. Accordingly, there would be merit in having the greatest possible clarity around the boundaries between ASIO, the AFP and the ACC to avoid these outcomes.
9. Legislative amendment should be considered, to provide greater distinction between the types of conditions that may trigger each agency exercising their particular powers. Education of agency employees and the community to raise awareness in this area should also be considered.
10. In circumstances where there is an application of multiple CQDPs or other counter-terrorism powers (such as control orders or preventative detention orders) in relation to an individual, the Inspector-General of Intelligence and Security (IGIS) or Commonwealth Ombudsman should be empowered to make a proportionality determination.

Introduction

11. ASIO, the AFP and the ACC all have powers to compel persons to attend and answer questions in cases relating to terrorism,⁴ and in some circumstances, these powers extend to a power to detain.
12. A failure to attend, remain in detention or answer questions may be cause for criminal sanction. ASIO and the ACC may exercise their powers on persons who are not themselves suspected of terrorism, as well as those under suspicion.
13. The Law Council has previously raised concerns with ASIO's special powers, the AFP's pre-charge detention powers, and the coercive questioning powers of the ACC, on the basis that they do not accord with fundamental rule of law principles.⁵
14. Since the time of the former INSLM's 2012 Annual Report, there have been increasing reports of the ACC – primarily a criminal intelligence agency – using its extraordinary coercive powers of compulsory examination to investigate terrorism.⁶ This raises questions as to whether there are adequate boundaries between the ACC, the AFP and ASIO to avoid duplication and enable clear distinctions in responsibilities when organised crime targets become national security matters. The issue of appropriate boundaries also impacts on whether the powers are a necessary and proportionate response to the terrorism threat.
15. This submission is divided into 5 parts. Part 1 outlines the roles of ASIO, the AFP and the ACC insofar as they are involved in Australia's counter-terrorism response. Part 2 provides a description of the CQDPs of each agency. Part 3 provides examples or statistics based on publicly available information about how often these powers are being used. Part 4 argues that amendments for the specific regimes, and in some cases repeal of the CQDPs, are required. Part 5 identifies areas of overlap of CQDPs and potential consequences, including uncertainty about legal rights and obligations, unnecessary duplication, and the powers operating in close succession to significantly limit liberties.

Part 1: ASIO, the AFP and the ACC's respective roles in national security matters

16. The Law Council appreciates that a multi-agency approach is required to effectively combat terrorism. Collaboration and lawful information sharing is necessary to 'ensure

⁴ These powers arise under division 3 of part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO's questioning and questioning/detention warrants); part IC of the *Crimes Act* (the AFP's pre-charge powers of detention, obligations of investigators); and the *Australian Crime Commission Act 2002* (Cth) (the ACC's coercive questioning powers).

⁵ Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee, [Law Enforcement Legislation Amendment \(Powers\) Bill 2015](#); Law Council of Australia, Submission to the INSLM, [Inquiry into questioning and detention warrants, control orders and preventative detention orders](#), 10 September 2012; Law Council of Australia, Submission to the INSLM, [Supplementary submission – Inquiry into control orders and preventative detention orders](#), 10 December 2012; Law Council of Australia, Submission to the Attorney General of Australia, [Requirement for ASIO to disclose information prior to questioning](#), 23 April 2010; Law Council of Australia, [Submission to the Parliamentary Joint Committee on the Australian Crime Commission](#), 7 October 2005.

⁶ For example, during 2014-15, the ACC conducted 18 coercive examinations related to partner agency investigations into terrorist threats and funding: Australian Crime Commission, *Annual Report 2014-15*, 15.

that all of the capabilities of Australian agencies are leveraged to minimise the risk of intelligence failure'.⁷

17. ASIO, the AFP and the ACC are part of Australia's operational counter-terrorism response. Their differing responsibilities variously involve the investigation, prevention or disruption of national security targets.

ASIO

18. ASIO's main role is to gather information and produce intelligence that will enable it to warn the Government about activities or situations that might endanger Australia's national security.⁸ The ASIO Act defines security as the protection of Australia's territorial and border integrity from serious threats; the protection of Australia and its people from espionage, sabotage, politically motivated violence, the promotion of communal violence, attacks on Australia's defence system, or acts of foreign interference – whether directed from, or committed within, Australia or not; and the carrying out of Australia's responsibilities to any foreign country in relation to these matters.⁹

19. ASIO does not investigate lawful protest activity or purely criminal activities.¹⁰ ASIO is not a law enforcement body and has no powers of arrest.¹¹ However, ASIO cooperates closely with law enforcement agencies when there is a criminal link.¹² ASIO's investigations generally focus on detecting the intentions and activities of terrorists, people who seek to act violently for political reasons and people who seek to clandestinely obtain sensitive Australian information.¹³ Most of ASIO's resources are aimed at preventing a terrorist attack in Australia, countering terrorist-related activity, warning of security threats, and countering espionage and foreign interference against Australia.¹⁴

AFP

20. The AFP is a statutory authority established under the *Australian Federal Police Act 1979* (Cth) (the AFP Act) as the primary law enforcement agency responsible for enforcing Commonwealth criminal law.¹⁵ It also contributes to combating organised crime and to protect Commonwealth interests from criminal activity in Australia and overseas.¹⁶ As a key member of the national security community, the AFP leads and contributes to many whole-of-government national security initiatives.¹⁷ Some key strategic priorities for the AFP of relevance to the INSLM's inquiry include:¹⁸

- countering the threat of terrorism and violent extremism to the safety and security of Australians and Australian interests, inside and outside Australia;

⁷ Australian Government, '[Counter-Terrorism White Paper: Securing Australia, Protecting Our Community](#)', 2010, 28.

⁸ Australian Security Intelligence Organisation, website at <http://www.asio.gov.au/>.

⁹ *Australian Security Intelligence Organisation Act 1979* (Cth), s4.

¹⁰ Australian Security Intelligence Organisation, *What we do*, at <http://www.asio.gov.au/About-ASIO/What-we-do.html>.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Australian Federal Police, *Annual Report 2014-15*, 8.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ In accordance with section 8 of the *Australian Federal Police Act 1979* (Cth) and the Ministerial Direction issued on 12 May 2014 under section 37(2) of the *Australian Federal Police Act 1979* (Cth).

- preventing, deterring, disrupting and investigating serious and organised criminal activities impacting on the interests of the Australian community, including through collaborating with state and territory law enforcement to ensure that they have access to Commonwealth intelligence and operational resources;
- maintaining focus on investigating Commonwealth offences;
- leading the Commonwealth's efforts to disrupt organised criminal groups by restraining and seizing their assets and unexplained wealth;
- contributing effectively to Australia's border management and security, particularly by protecting Australia from people smuggling through prevention, deterrence and disruption;
- where possible, identifying emerging criminal threats to the national interest and, for issues in which the AFP has operational expertise, advising on appropriate approaches to counter such threats; and
- contributing effectively to whole-of-government efforts to prevent Australia from being a safe haven for proceeds of crime, including from corruption, or used for money laundering purposes.¹⁹

ACC

21. The ACC is a federal statutory body established under the ACC Act to reduce the threat and impact of serious and organised crime on Australia and the Australian economy.²⁰ It commenced operation on 1 January 2003.
22. The ACC works in collaboration with other Commonwealth, State and Territory law enforcement agencies. As a Commonwealth statutory authority, the ACC also has responsibilities under *the Public Service Act 1999* (Cth) and the *Financial Management and Accountability Act 1997* (Cth).
23. The ACC collects and disseminates criminal intelligence and undertakes criminal investigations with its partner agencies.²¹ The ACC's work priorities are set by the ACC Board. It has been empowered to conduct special investigations and special operations where conventional law enforcement methods are unable or unlikely to be effective.²²
24. Through the 'National Security Impacts from Serious Organised Crime Special Operation', the ACC is supporting law enforcement and national security agencies as needed for investigations into matters relating to national security with impacts from serious and organised crime, such as people smuggling, terrorism and serious and organised crime penetration at the border.²³ The ACC is also able to examine and

¹⁹ Australian Federal Police, *Annual Report 2014-15*, 11.

²⁰ See section 4 of the *Australian Crime Commission Act 2002* (Cth) for a definition of 'serious and organised crime'.

²¹ This is reflected in section 7A of the *Australian Crime Commission Act 2002* (Cth) where it is noted that one of the ACC's functions is 'to collect, correlate, analyse and disseminate criminal information and intelligence and to maintain a national database of that information and intelligence'.

²² *Australian Crime Commission Act 2002* (Cth), s7C(3).

²³ Australian Crime Commission, *National Security Impacts from Serious Organised Crime No. 2 Special Operation*, <https://crimecommission.gov.au/organised-crime/determinations/national-security-impacts-serious-organised-crime-no-2-special>.

identify potential or actual convergences between serious and organised crime and national security impacts.²⁴

25. Through the use of coercive powers, unique intelligence collection and analytical capabilities, the ACC is able to provide its perspective of the evolving threats and risks posed by serious and organised crime groups within the national security environment.²⁵
26. In the inaugural National Security Statement in December 2008, the then Prime Minister situated organised crime as a national security priority.²⁶ Since this time, the ACC has 'focused on an all hazards approach to national security, encapsulating organised crime'.²⁷
27. On 23 January 2013, the Australian Government released Australia's first national security strategy, *Strong and Secure: A Strategy for Australia's National Security*, which aimed to provide an overarching framework to guide Australia's security efforts over five years. The strategy recognises that serious and organised crime poses a key national security risk.²⁸ Preventing, detecting and disrupting serious and organised crime is one of the strategy's eight key pillars to securing the nation and its citizens.²⁹ The strategy notes that:

*Serious and organised crime can undermine our border integrity and security. It can erode confidence in institutions and law enforcement agencies, and damage our economic prosperity and regional stability. It can involve the procurement, distribution and use of illegal weapons. This type of crime is highly adaptive and may link to, or exacerbate, other significant issues of national security, such as terrorism and malicious cyber activity.*³⁰

28. On 2 September 2014, the Government provided \$24.4 million to the ACC to support the national effort against terrorism by providing the ACC with 22 investigators and analysts to establish a Foreign Fighters Task Force.³¹ The Minister for Justice, the Hon. Michael Keenan MP, stated that the 'ACC is already focusing existing resources on the threat of foreign fighters and has in the last 12 months conducted 40 coercive hearings on 24 individuals'.³²
29. The Minister stated that the reason for the \$24.4 million funding to the ACC in 2014 to support the national effort against terrorism was because:

The ACC has always worked with national security agencies on the links between terrorism and organised crime, but this funding will allow them to dedicate personnel and resources specifically to the foreign fighter threat.

²⁴ Ibid.

²⁵ Ibid

²⁶ The Hon. Kevin Rudd MP, 'National Security Statement' (4 December 2008).

²⁷ Australian Crime Commission, *Organised Crime Groups*, July 2013.

<https://crimecommission.gov.au/publications/intelligence-products/crime-profile-fact-sheets/organised-crime-groups>.

²⁸ Australian Government, *Strong and Secure: A Strategy for Australia's National Security*, 2013, 11.

²⁹ Ibid, 15.

³⁰ Ibid, 11.

³¹ The Hon Michael Keenan MP, *Media Release: \$24 million to establish the Australian Crime Commission's Foreign Fighters Taskforce*, 2 September 2014.

[https://www.ministerjustice.gov.au/MediaReleases/Pages/2014/ThirdQuarter/2September2014-\\$24MillionToEstablishTheAustralianCrimeCommission'sForeignFightersTaskforce.aspx](https://www.ministerjustice.gov.au/MediaReleases/Pages/2014/ThirdQuarter/2September2014-$24MillionToEstablishTheAustralianCrimeCommission'sForeignFightersTaskforce.aspx)

³² Ibid.

The ACC possesses unique coercive powers and intelligence gathering abilities which will be harnessed in the fight against terrorism.

The ACC's coercive powers compel individuals and organisations to provide information when questioned, and if they don't they can be brought before the courts on contempt charges.

Compelling returned foreign fighters and extremists to provide information has the potential to save lives by identifying additional terrorist suspects or their facilitators, domestically and offshore.

The ACC will also expand its focus on analysing criminal intelligence to explore the very real links between terrorism and organised crime.

Utilising the ACC's Fusion intelligence capability will also bolster the analysis of intelligence in order to increase the chances of identifying the extent of new and emerging links between extremists and criminal networks.

The nexus between terrorism and organised crime remains a persistent threat, and the ACC as the nation's criminal intelligence agency is best placed to identify these links, fill the intelligence gaps and disrupt the serious and organised crime groups involved.³³

30. The ACC Annual Report from 2014-15 states:

We contribute to Australia's response to national security threats, in particular the threat posed by Australians going abroad to support terrorist activities in Syria and Iraq. The links between terrorism and organised crime, including Australians who finance terrorist activities and the issue of Australians going overseas to fight, are emerging and complex problems.

In September 2014, we were allocated \$24.4 million over four years to support the national effort against terrorism. Working under Project Ridgeline, we are increasing the national understanding of the evolving threat posed by foreign fighters, identifying previously unknown threats, and contributing to domestic monitoring and disruption activities.³⁴

31. Through Project Ridgeline the ACC aims to:

... identify Australian citizens involved in the Syria and Iraq conflict and whether they are engaged in serious and organised criminal activity or linked to serious and organised crime groups. We also aim to enhance understanding of the financial, communications, travel and other methodologies used to support people involved in the Syria and Iraq conflict. Sub Project Ridgeline- Pinecrest is focusing on identifying domestic terrorism threats.³⁵

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid, 99.

Part 2: Certain questioning and detention warrant framework

32. The CQDPs of ASIO, the AFP and the ACC impose different rights and obligations on subjects and the agencies. Nonetheless, there is a consistent impact: each allows the ability to coercively obtain information in national security matters.

ASIO questioning and questioning and detention warrants

33. A questioning warrant (QW) or a questioning and detention warrant (QDW) can be obtained under ASIO's special terrorism powers³⁶ from an 'issuing authority'³⁷ to compel persons to attend before a 'prescribed authority'³⁸ and answer questions by ASIO. The purpose is for ASIO to obtain intelligence.³⁹ A person who is not a suspect may be the subject of a QW or QDW.

34. It has been said that the detention and coercive powers given to ASIO in Division 3 of Part III of the ASIO Act are unique in the Western democratic world.⁴⁰

35. The issuing authority may issue a QW or a QDW only if the Director-General of ASIO has requested it and the issuing authority is satisfied that there are *reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence*.⁴¹

36. The person may be questioned for an initial period of 8 hours, extendable to 16 hours, and to a maximum of 24 hours.⁴² In cases where an interpreter has been present at any time during the questioning, the person may be questioned for an initial period of 34 hours, extendable to 32 hours, and 40 hours (with a maximum 48 hour limit).⁴³ For people aged between 16-18 years there is a special limit of 2 hours of continuous periods of questioning,⁴⁴ however, the criteria for issuing a warrant in respect of a

³⁶ *Australian Security Intelligence Organisation Act 1979* (Cth), pt 3, div III.

³⁷ 'Issuing authority' is defined under s34A of the *Australian Security Intelligence Organisation Act 1979* (Cth) to mean: (a) a person appointed under section 34AB; or (b) a member of a class of persons declared by regulations made for the purposes of that section to be issuing authorities. Section 34AB notes that the Minister may, by writing, appoint a Judge as an issuing authority, and the regulations may also declare that persons in a specified class are issuing authorities.

³⁸ 'Prescribed authority' is defined under s34A of the *Australian Security Intelligence Organisation Act 1979* (Cth) to mean a person appointed under section 34B, which includes the following appointments made by the minister: (1) a person who has served as a judge in one or more superior courts for a period of 5 years and no longer holds a commission as a judge of a superior court; (2) If there is an insufficient number of people to act as a prescribed authority under subsection (1), a person who is currently serving as a judge in a State or Territory Supreme Court or District Court (or an equivalent) and has done so for a period of at least 5 years; (3) If there are insufficient persons available under subsections (1) and (2), a person who holds an appointment to the Administrative Appeals Tribunal as President or Deputy President and who is enrolled as a legal practitioner of a federal court or of the Supreme Court of a State or Territory and has been enrolled for at least 5 years.

³⁹ Attorney-General's Department, Submission No 8 to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, October 2014, 3. *Australian Security Intelligence Organisation Act 1979* (Cth), s34ZE(1).

⁴⁰ Lisa Burton, Nicola McGarrity and George Williams, 'The Extraordinary Questioning and Detention Powers of the Australian Security Intelligence Organisation' (2012) 36 *Melbourne University Law Review* 415, 417.

⁴¹ *Australian Security Intelligence Organisation Act 1979* (Cth), s34E(1)(b) t; 34G(1)(b) for QDW.

⁴² Under section 34R(4) the prescribed authority may permit the questioning to continue if satisfied that: (a) there are reasonable grounds for believing that permitting the continuation will substantially assist the collection of intelligence that is important in relation to a terrorism offence; and (b) persons exercising authority under the warrant conducted the questioning of the person properly and without delay in the period mentioned in that subsection.

⁴³ *Australian Security Intelligence Organisation Act 1979* (Cth), 34R(9) and (11).

⁴⁴ *Ibid*, s34ZE(6)(b)(ii).

minor does not include the requirement that the best interest of the child be given primary consideration, in accordance with Australia's obligations under the *Convention on the Rights of the Child*.⁴⁵ Children under 16 cannot be questioned or detained.

37. A QW may require a specified person to appear before a prescribed authority for questioning under the warrant immediately after the person is notified of the issue of the warrant, or at a time specified in the warrant.⁴⁶ In contrast, QDW authorises a person to be taken into custody immediately by a police officer, brought before a prescribed authority immediately for questioning, and to be detained until the statutory time limits for questioning under warrant expire (a maximum of 7 days).⁴⁷

38. Before applying for a QW or QDW, the Director-General must first obtain the consent of the relevant Minister, the Attorney-General.⁴⁸ For a QDW the Attorney-General must be satisfied that there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person:

- may alert a person involved in a terrorism offence that the offence is being investigated;
- may not appear before the prescribed authority; or
- may destroy, damage or alter a record or thing the person may be requested to produce in accordance with the warrant.⁴⁹

39. The issuing authority is not required to consider this question before issuing a QDW.⁵⁰ A prescribed authority also has the power to give a direction that a person, the subject of a QW, be detained.⁵¹

40. A person who is the subject of an ASIO QW or QDW must:

⁴⁵ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, art 3, 3.

⁴⁶ *Australian Security Intelligence Organisation Act 1979* (Cth), s34E(2).

⁴⁷ *Ibid*, s34G. Under section 30 of the *Australian Security Intelligence Organisation Act 1979* (Cth), if the Director-General becomes satisfied that the grounds on which a warrant was issued have ceased to exist, then they must, as soon as practicable, take such steps as are necessary to ensure that action under the warrant is discontinued.

⁴⁸ Under section 34D(4) of the *Australian Security Intelligence Organisation Act 1979* (Cth), the Minister can only consent to the making of a questioning warrant if satisfied that a) there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a terrorism offence; and b) 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; and c) that there is a written statement of procedures in force to be followed in the exercise of authority under warrants issued. Under s34F(4) of the *Australian Security Intelligence Organisation Act 1979* (Cth), the Minister can only consent to the making of a questioning and detention warrant if satisfied that a) there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence; and b) relying on other methods of collecting that intelligence would be ineffective; and c) there is a written statement of procedures to be followed in the exercise of authority under the warrants; and d) there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person: i) may alert a person involved in a terrorism offence that the offence is being investigated; or ii) may not appear before the prescribed authority; or iii) may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.

⁴⁹ *Australian Security Intelligence Organisation Act 1979* (Cth), s34F(4)(d).

⁵⁰ *Ibid*, s34G.

⁵¹ Under section 34K(4) of the *Australian Security Intelligence Organisation Act 1979* (Cth) a prescribed authority may give directions under subsection (1) to detain a person if they are satisfied that there are reasonable grounds for believing that, if the person is not detained, the person: a) may alert a person involved in a terrorism offence that the offence is being investigated; or (b) may not continue to appear, or may not appear again, before a prescribed authority; or c) may destroy, damage or alter a record or thing the person has been requested, or may be requested, in accordance with the warrant, to produce.

- answer all questions and provide records or things permitted by the QW;⁵²
- not destroy or tamper with ‘records or things’ requested to be produced under the QW;⁵³
- surrender their travel documents and passports;⁵⁴
- not leave Australia without permission;⁵⁵
- not tell others, while the warrant is in force, that they are being questioned by ASIO, unless they are permitted to do so;⁵⁶
- not tell others, for two years after the expiry of the warrant, about any operational information relating to the warrant, unless permitted to do so.⁵⁷

41. The penalty for not complying with these conditions is five years imprisonment.

42. A person who is questioned or detained by ASIO has the right to:

- be treated humanely and not be subjected to cruel, inhuman or degrading treatment;⁵⁸
- have limited access to a lawyer;⁵⁹
- make a complaint at any time about ASIO to the IGIS or about the AFP to the Commonwealth Ombudsman;⁶⁰ and
- contact a parent or guardian, if the person is 16 or 17 years old, and have their parent or guardian present during questioning.⁶¹

43. There are penalties if officials breach these safeguards.⁶²

44. The questioning of a person by ASIO under an ASIO QW or QDW must be video recorded.⁶³

⁵² *Australian Security Intelligence Organisation Act 1979* (Cth), s34L(2); s34L(6).

⁵³ *Ibid*, s34L(10).

⁵⁴ *Ibid*, s34W(1) and s34Y.

⁵⁵ *Ibid*, s34X.

⁵⁶ *Ibid*, s34ZS(1).

⁵⁷ *Ibid*, s34ZS(2).

⁵⁸ *Ibid*, s34T(2).

⁵⁹ Under section 34K(11)(a) of the *Australian Security Intelligence Organisation Act 1979* (Cth), a person who has been taken into custody, or detained, under a warrant may contact anyone whom the warrant permits the person to contact, which includes a single lawyer of the person’s choice (under s34F(5)), subject to the exceptions outlined in s34ZO.

⁶⁰ *Australian Security Intelligence Organisation Act 1979* (Cth), s34ZG.

⁶¹ *Ibid*, s34ZE.

⁶² The various offences of breaching these safeguards are set out under section 34ZF of the *Australian Security Intelligence Organisation Act 1979* (Cth). Each offence carries a maximum penalty of 2 years imprisonment.

⁶³ *Australian Security Intelligence Organisation Act 1979* (Cth), s34ZA.

AFP's powers of detention and obligations of investigators under Part IC of the Crimes Act⁶⁴

45. Part IC of the Crimes Act provides for the pre-charge detention of persons arrested under section 3W and 3WA⁶⁵ of the Act for the purpose of furthering police investigations.⁶⁶ It also imposes obligations on police officers in relation to arrested persons and 'protected suspects'.⁶⁷ Division 2 of Part IC is divided into two subdivisions. Subdivision A deals with non-terrorism offences and subdivision B deals with terrorism offences.

Non-terrorism offences

46. A person arrested for a non-terrorism offence may, while arrested for that offence, be detained for the purpose of investigating whether the person committed the offence and/or committed another Commonwealth offence an investigating official reasonably suspects the person has committed. The 'investigation period' during which the person may be detained must be reasonable having regard to all the circumstances, and cannot exceed **4 hours**.⁶⁸ A magistrate may extend the period to **8 hours** (this may be done once only).⁶⁹ Any reasonable periods of time when questioning is suspended or delayed for one of the listed reasons e.g. to allow an arrested person to communicate with their lawyer do not count towards the 'investigation period' and will extend the total period of remand.⁷⁰

Terrorism offences

47. A person arrested for a terrorism offence may, while arrested for that offence, be detained for the purpose of investigating whether the person committed the offence and/or committed another Commonwealth offence an investigating official reasonably suspects the person has committed. The 'investigation period' during which the person may be detained must be reasonable having regard to all the circumstances and cannot exceed **4 hours**.⁷¹ A magistrate may extend the period any number of times to

⁶⁴ The below summary of Part IC of the *Crimes Act 1914* (Cth) is a modified excerpt from Appendix F of the Independent National Security Legislation Monitor, *Declassified Annual Report*, 20 December 2012, 139-141. It seeks to take into account recent counter-terrorism measures as a result of, for example, the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.

⁶⁵ *Crimes Act 1914* (Cth), s23C, s23DB.

⁶⁶ Part IC was inserted into the *Crimes Act 1914* (Cth) in response to recommendations of the Review Committee of Commonwealth Criminal Law, chaired by Sir Harry Gibbs. Second Interim Report, *Detention before Charge*, 112/1989.

⁶⁷ A person is a 'protected suspect' for the purposes of Part IC if the person is in the company of an investigating official for the purpose of being questioned about a Commonwealth offence but the person has not been arrested for the offence where any one or more of the following applies: a) the official believes there is sufficient evidence to establish that the person committed the offence, b) the official would not allow the person to leave if the person wished to do so, c) the official has given the person reasonable grounds for believing the person would not be allowed to leave if he or she wished to do so: sub-s 23B(2).

⁶⁸ *Crimes Act 1914* (Cth), para 23C(4)(b). This period is reduced to 2 hours for an Aboriginal or Torres Strait Islander or a person under 18 years: para 23C(4)(a). The number and complexity of matters being investigated is the only factor that must be considered in determining whether the period is reasonable: sub-s 23C(5). No other factors are listed.

⁶⁹ *Crimes Act 1914* (Cth), s23DA. The magistrate must be satisfied of the factors in sub-s 23DA(2) before extending.

⁷⁰ *Ibid*, sub-s 23C(7).

⁷¹ *Ibid*, sub-s 23DB(5)(b). This period is reduced to 2 hours for an Aboriginal or Torres Strait Islander or a person under 18 years: para 23DB(5)(a). The number and complexity of matters being investigated is the only factor that must be considered in determining whether the period is reasonable: sub-s 23DB(6). No other factors are listed.

a total of **20 hours**, extending the period to a **total of 24 hours**.⁷² Any reasonable periods of time when questioning is suspended or delayed for one of the listed reasons do not count towards the 'investigation period' and will extend the total period of remand.⁷³ If a person is arrested for a terrorism offence and an investigation is being conducted into whether the person committed the offence or another terrorism offence, an investigating official may apply to a magistrate to disregard any reasonable time during which the questioning of the person is suspended or delayed.⁷⁴ When the investigation period of 24 hours is added to the maximum of **7 days** that may be specified, the period of permissible detention for a person arrested for a terrorism offence is up to **8 days**.⁷⁵

48. Part IC applies in the case of investigations into Commonwealth offences conducted by 'investigating officials',⁷⁶ which broadly includes all members of the AFP, and all members of a police force of a State, and Commonwealth officers who have been given a power of arrest.
49. Division 3 of Part IC sets out the obligations of investigating officials in relation to people under arrest and protected suspects. A person must be treated with humanity and with respect for human dignity and must not be subjected to cruel, inhuman or degrading treatment.⁷⁷ The investigating official must, before starting to question a person, caution them that they do not have to say or do anything, but that anything they do say or do may be used in evidence.⁷⁸ It is a precondition of the operation of the authorised period of pre-charge custody that a person has been lawfully arrested.⁷⁹
50. The official must inform the person that they are a) entitled to contact a relative or friend to notify them of their whereabouts and b) entitled to contact a lawyer and have the right to arrange for the lawyer to be present during questioning. The investigating official must make arrangements for these communications and in the case of any communication with a lawyer, must as far as practicable allow the person to communicate in circumstances where the communication will not be overhead. Any questioning must be deferred for a reasonable time to enable the communication and, where the person so elects, to enable the lawyer to attend the questioning.⁸⁰
51. If a person who is being questioned as a suspect (whether under arrest or not) makes a confession or admission to an investigating official, that confession/ admission is inadmissible as evidence against the person in proceedings for any Commonwealth

⁷² Ibid, s23DF(7). The magistrate must be satisfied of the factors in sub-s 23DF(2) before extending the period.

⁷³ Ibid, sub-s 23DB(9).

⁷⁴ An application may be made under sub-s 23DC(2) of the *Crimes Act 1914* (Cth). Para 23DB(9)(m) enables time specified by a magistrate under sec 23DD to be discounted from the "investigation period" so long as the suspension or delay in the questioning is reasonable. Sub-s 23DB(11) provides that no more than 7 days may be disregarded under para 23DB(9)(m).

⁷⁵ The 7 day cap on the amount of time that may be specified as not counting towards the 'investigation period' in sub-s 23DB(11) of the *Crimes Act 1914* (Cth) was introduced following the case of Dr Mohamed Haneef. Dr Haneef was arrested and held under the *Crimes Act 1914* (Cth) for twelve days as no cap on "dead time" existed at the time of his arrest and detention. The Clarke Inquiry was critical of the lack of a cap on dead time and recommended a cap of no more than 7 days be introduced. *Report of the Inquiry into the Case of Dr Mohamed Haneef*, The Hon, John Clarke QC, 2008, 249.

⁷⁶ *Crimes Act 1914* (Cth), s23B(1).

⁷⁷ Ibid, s23Q.

⁷⁸ Ibid, s23F. The giving of this caution and any response must, where practicable, be tape recorded: sec 23U. The right to remain silent is not affected by Part 1C: sec 23S.

⁷⁹ *Crimes Act 1914* (Cth), s23C.

⁸⁰ Ibid, s23G. The right to communicate with a friend/relative and/or lawyer can only be denied in very limited circumstances and in the case of a lawyer, there must be exceptional circumstances, senior officer approval and the offer and arrangement of alternative legal representation: s23L.

offence unless the questioning of the person and anything said by the person during questioning was tape recorded.⁸¹ The burden on the prosecution to prove a confession/admission was voluntary remains as does the discretion of the judiciary to exclude unfairly, illegally or improperly obtained evidence.⁸²

52. Section 23S of the Crimes Act notes that nothing in the Part affects the right of a person to refuse to answer questions or to participate in an investigation except where required to do so by or under an Act. The person has a right to an interpreter.⁸³ Part IC also applies to the accused and not witnesses.⁸⁴

ACC

53. The ACC reports to the ACC Board on the outcomes of special operations and investigations, as well as advising on national criminal intelligence priorities.⁸⁵ To undertake its work, the ACC:

*... employs combinations of coercive powers and traditional law enforcement techniques such as telephone interception, physical and technical surveillance, controlled operations and covert human intelligence sources (informants) as a composite approach to the gathering of criminal intelligence. It uses these capabilities to support partner agencies and to provide government with an independent assessment of the risk, threat and impact of serious and organised crime on the community and national interests.*⁸⁶

54. The ACC has a range of coercive powers, similar to a Royal Commission, which are used in special investigations and special operations to obtain information where traditional law enforcement methods are not successful.⁸⁷ The ACC Board determines the use of these powers.⁸⁸ The powers are exercisable by ACC examiners, who are independent statutory officers, appointed by the Governor-General, for the ACC's special intelligence operations and special investigations. A special investigation is designed to disrupt and deter criminal groups by collecting evidence and intelligence about criminal activity that may result in criminal proceedings and the seizure of illegally obtained assets, in cooperation with partner agencies.⁸⁹ Special operations focus on gathering intelligence around particular criminal activity so decisions are informed by the true extent, impact and threat of that criminal activity; these operations can help determine if a special investigation is warranted.⁹⁰
55. ACC examiners have the power to conduct an examination for the purposes of a special ACC operation/investigation⁹¹ and demand information from certain federal, state and territory agencies.⁹² The coercive powers include the ability to summon a

⁸¹ Ibid, s23V. Note that where it is not reasonably practicable to tape record, other measures must be taken as set out in para 23V(1)(b). A person must be provided with a copy of the tape recording (and if one is prepared, transcript) without charge within 7 days of the making of the recording: sub-s 23V(2). A court may still admit evidence where sec 23V was not complied with, but only in certain circumstances: sub-s 23V(5)-(7).

⁸² Ibid, s23Q and 23S.

⁸³ Ibid, s23N.

⁸⁴ *R v Lawrence (No 3)* [2003] NSWSC 655.

⁸⁵ *Australian Crime Commission Act 2002* (Cth), s7A.

⁸⁶ Australian Crime Commission, *Submission to Inquiry into the Comprehensive Revision of the Telecommunications (Interception and Access) Act 1979*, 4.

⁸⁷ Australian Crime Commission, *Annual Report 2012-2013*, 12.

⁸⁸ *Australian Crime Commission Act 2002* (Cth), s7C.

⁸⁹ Australian Crime Commission, *Annual Report 2012-2013*, 262.

⁹⁰ Ibid, 267.

⁹¹ Ibid, s24A.

⁹² Ibid, s19A, 20. The power to obtain information from a 'State agency' – which includes an agency of the Northern territory or ACT – was inserted by the *Families, Community Services and Indigenous Affairs and*

person to attend an examination to give evidence under oath or affirmation and the power to demand the production of documents or things specified in a notice.⁹³ Failure to comply is an indictable offence punishable with a maximum fine of 200 penalty units or 5 years' imprisonment.⁹⁴ The ACC can also use the prospect of contempt referrals to gain compliance with its coercive powers.⁹⁵ The ACC may apply for a search and seizure warrant,⁹⁶ including by telephone in circumstances of urgency,⁹⁷ and may apply for a court order requiring a person to deliver his or her passport to the ACC.⁹⁸

Part 3: Use of powers

56. The below information describes the extent of the use of the CQDPs based on publicly sourced documents. The Law Council encourages the INSLM to seek statistics relating to use of the powers from each of the agencies concerned.

ASIO

57. Based on ASIO's Annual Reports, below is a table of how often ASIO has used its QW and QDW powers. It indicates that ASIO has used its QW powers 16 times and that it has not used its QDW powers.

Year	Questioning Warrant	Questioning and Detention Warrant
2014-2015	0	0
2013-2014	0	0
2012-2013	0	0
2011-2012	0	0
2010-2011	0	0
2009-2010	1	0
2008-2009	0	0
2007-2008	0	0
2006-2007	0	0

Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth). This power only operates in relation to state and territory agencies where an arrangement between the federal minister and the appropriate state or territory minister is in force under section 20A of the *Australian Crime Commission Act 2002* (Cth).

⁹³ *Australian Crime Commission Act 2002* (Cth), s28-29.

⁹⁴ *Ibid*, sub-s 29(3A), 30(6).

⁹⁵ Australian Crime Commission, *Annual Report 2012-2013*, 87; *Australian Crime Commission Act 2002* (Cth), s34A.

⁹⁶ *Australian Crime Commission Act 2002* (Cth), s22.

⁹⁷ *Ibid*, section 23.

⁹⁸ *Ibid*, section 24.

2005-2006	1	0
2004-2005	11	0
2003-2004	3	0

AFP

58. From public records, the use of pre-charge detention powers by the AFP under Part IC of the Crimes Act is uncertain. Some recent cases where the powers may have been used since 2012 include:

- Five terror suspects who planned to join Islamic State after leaving Australia by boat in May 2016;⁹⁹ and
- An 18-year-old in October 2015.¹⁰⁰

ACC

59. The latest ACC Annual Report from 2014-15 noted that during the financial year the ACC conducted 18 coercive examinations over 24 sittings related to partner agency investigations into terrorist threats and funding, produced 102 intelligence products filling related intelligence gaps, and produced 79 information reports concerning foreign fighters and counter-terrorism (including disclosures that supported operational activity by regional Joint Counter Terrorism Teams and the National Disruption Group, including high profile arrests of people allegedly planning attacks in Australia).¹⁰¹

60. In October 2014 the ACC provided the following in response to Questions on Notice from the Parliamentary Joint Committee on Intelligence and Security regarding the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Foreign Fighters Bill):

How many times has ASIO requested the ACC to use coercive powers to interview a person of interest?

The ACC can only undertake examinations for an ACC purpose. However, the ACC works cooperatively with partners in a broader context as is required in accordance with the Board determinations. It is therefore common for partners to refer matters to the ACC where the matter fits within the scope of an ACC Board determination. The ACC has conducted a total of 216 examinations in the 2012-13 financial year and 42 examinations for 26 individuals have been conducted in the 2013-14 financial year on national security related matters. It is inappropriate to comment on the specific number of requests received for the use of the ACC's coercive powers as this can expose operational matters.

Have ASIO asked the ACC to use its coercive powers because they could not use their questioning powers?

⁹⁹ 'Tow-boat terror five appear in court', SBS (online) 12 May 2016.

<http://www.sbs.com.au/news/article/2016/05/12/tow-boat-terror-five-appear-court>

¹⁰⁰ Lucy Carter, 'Parramatta shooting: Keeping teenage terrorism suspect in custody without charge could amount to torture, lawyers say', ABC (online) 9 October 2015. <http://www.abc.net.au/news/2015-10-09/teenage-terror-suspect-in-custody-under-anti-terrorism-law/6839614>

¹⁰¹ Australian Crime Commission, 2014-15 Annual Report, 15.

This question is best referred to ASIO, however the ACC can only undertake examinations for ACC purposes.

Has the ACC ever provided any advice to ASIO in terms of how to lower the threshold so that they could use their coercive powers?

No.¹⁰²

Part 4: Amendments required for specific regimes

61. The Law Council has previously expressed a number of concerns about ASIO's, the AFP's and the ACC's CQDPs, their impact on the privilege against self-incrimination and the adequacy of the safeguards to protect individual rights.¹⁰³ This section reiterates some of those concerns and adds to them in light of recent reviews or developments.
62. The Law Council recognises that intelligence gathering is key to preventing terrorist actions and that gaining information from members of the community who may hold relevant information is vital. The issue is how such information might be obtained consistent with rule of law principles and human rights obligations, which require that counter-terrorism measures be necessary and proportionate to the terrorist threat.
63. The Law Council holds concerns about the potential infringement of liberties and rights as a result of CQDPs, including the rights to freedom from arbitrary detention, freedom of movement and right to privacy.¹⁰⁴ It submits that, where there is the potential for CQDPs to significantly limit fundamental rights, the justification should be clearly articulated, and the powers only available in extraordinary circumstances. In the counter-terrorism context, detention of persons not suspected of terrorist activity cannot be justified. However, a regime which would allow the appropriate authority to question such persons, while undesirable in principle, might be justified by the extraordinary circumstances of a direct terrorist threat to the nation.¹⁰⁵ As a minimum, detention, should only be exercised where an Australian court or issuing authority has examined the sufficiency of the evidence supporting the detention.

¹⁰² Australian Crime Commission, Responses to Questions on Notice before the Parliamentary Joint Committee on Intelligence and Security regarding the Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, 8 October 2014.

¹⁰³ The Law Council has made previous submissions, which may be of use to the INSLM in its review of the CQDPs of ASIO, the AFP and the ACC (web links are provided to the submissions where appropriate): Submission to the Senate Legal and Constitutional Affairs Committee, [Law Enforcement Legislation Amendment \(Powers\) Bill 2015; Anti-terrorism Reform Project: A consolidation of the Law Council of Australia's advocacy in relation to Australia's anti-terrorism measures](#) (October 2013); Submission to the INSLM, [Inquiry into questioning and detention warrants, control orders and preventative detention orders](#) (10 September 2012); Submission to the INSLM, [Supplementary submission – Inquiry into control orders and preventative detention orders](#) (10 December 2012); Submission to the Attorney General of Australia, [Requirement for ASIO to disclose information prior to questioning](#) (23 April 2010); and Law Council of Australia, [Submission to the Parliamentary Joint Committee on the Australian Crime Commission](#) (7 October 2005).

¹⁰⁴ As set out in the *International Covenant on Civil and Political Rights* at articles 9, 12 and 17 respectively.

¹⁰⁵ As noted in the Law Council's submission to the Senate Legal and Constitutional References Committee's Inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002, 3.

ASIO Questioning and questioning and detention warrants

Questioning warrants

64. In 2012, the previous INSLM concluded, after examining all 16 reports to the Attorney-General about the extent to which action under a QW assisted ASIO¹⁰⁶ that QWs were a useful source of intelligence.¹⁰⁷ He also concluded that QWs are sufficiently effective to be appropriate, and necessary.¹⁰⁸ Further, he rejected the criticism that QWs are an unjustified infringement on liberty.¹⁰⁹

65. As indicated in the above table, the Law Council understands that, to date, no QWs have been issued since 2009-10 or the time of the former INSLM's 2012 Annual Report. Accordingly, the Law Council is not aware of any cases since 2012, which would indicate different reasoning to the former INSLM's regarding whether QWs should be adopted. It also notes that several recommendations of the former INSLM do not appear to have been implemented, or have only been partly implemented, including:

- Recommendation IV/1 – The issuing authority as well as the Attorney-General should be required to consider all the prerequisites for the issue of QWs, rather than the issuing authority taking the consent of the Attorney-General as conclusive of some of them. The last resort requirement for QWs should be repealed and replaced with a prerequisite that QWs can only be sought and issued where the Attorney-General and issuing authority are “satisfied that it is reasonable in all the circumstances, including consideration whether other methods of collecting that intelligence would likely be as effective”.¹¹⁰
- Recommendation IV/2 – The QW provisions should be amended to include a requirement that the prescribed authority must be satisfied on reasonable grounds that any extension of time granted on account of the use of an interpreter is no more than could reasonably be attributable to the use of the interpreter during questioning given the circumstances of the individual case.¹¹¹
- Recommendation IV/4 – The length of imprisonment for offences of deliberate contravention of safeguards in relation to QWs should be amended to be at parity with the length of imprisonment for offences against secrecy obligations in relation to QWs.¹¹²
- Recommendation IV/5 – The length of imprisonment for offences against secrecy obligations in relation to QWs should be reduced to 2 years.¹¹³

¹⁰⁶ *Australian Security Intelligence Organisation Act 1979* (Cth), s34ZH.

¹⁰⁷ Independent National Security Legislation Monitor, *Declassified Annual Report*, 20 December 2012, 96.

¹⁰⁸ *Ibid*, 4.

¹⁰⁹ *Ibid*, 5.

¹¹⁰ *Ibid*, 74. This recommendation has been partly implemented. There is still no requirement for the issuing authority to consider all the prerequisites for the issue of QWs, but, the 'last resort' requirement has been repealed and replaced with a prerequisite that QWs can only be sought and issued where the Minister is satisfied that it is reasonable in all the circumstances.

¹¹¹ *Ibid*, 77.

¹¹² *Ibid*, 81. Under section 34 ZF of the *Australian Security Intelligence Organisation Act 1979* (Cth), contravention of safeguards carries a maximum penalty of 2 years imprisonment. Under section 34ZS of the *Australian Security Intelligence Organisation Act 1979* (Cth), offences against secrecy obligations carry a maximum of 5 years imprisonment.

¹¹³ *Ibid*, 83. Under section 34ZS of the *Australian Security Intelligence Organisation Act 1979* (Cth), offences against secrecy obligations carry a maximum of 5 years imprisonment.

- Recommendation IV/6 – The offence of failing to produce a record or thing should be amended to include the wilful destruction of a record or thing as well as tampering with a record or thing with the intent to prevent it from being produced, or from being produced in a legible form.¹¹⁴
- Recommendation IV/7 – The QW provisions should be amended to make clear that a person who has been charged with a criminal offence cannot be subject to questioning until the end of their criminal trial.¹¹⁵

66. The last of these recommendations – Recommendation IV/7 above – should be viewed in the light of the High Court’s decisions in *X7 v Australian Crime Commission* (2013) 248 CLR 92, *Lee v New South Wales Crime Commission* [2013] HCA 39 and *Lee v New South Wales Crime Commission* [2014] HCA 20. Generally, these cases reinforce the privilege against self-incrimination, the right to silence and the right to a fair trial, particularly in cases where an agency uses its compulsory powers to question a person who is the subject of criminal charges. This interpretation is consistent with the former INSLM’s view in Recommendation IV/7.

67. In relation to the ACC’s coercive examination powers, the ACC Act has recently been amended by the *Law Enforcement Legislation Amendment (Powers) Act 2015* (Cth). The amendments broadly seek to establish the ACC’s view of the position prior to these High Court cases, namely, that it is constitutionally permissible to conduct a compulsory examination of a person who has been charged with an offence provided certain safeguards are in place.¹¹⁶

68. Nonetheless, the Law Council is concerned about the possibility of constitutional invalidity of the ACC Act provisions (discussed further below) and the impact on a defendant’s right to a fair trial. For this reason, it agrees with the former INSLM’s Recommendation IV/7.

69. The Law Council suggests that the former INSLM’s recommendations in relation to QWs be adopted.

Questioning and detention warrants

70. Recommendation V/1 of the former INSLM’s *Second Annual Report* (2012) recommended the QDW regime be repealed and replaced by additional provisions in the questioning warrant regime.¹¹⁷ Since the former INSLM published his second Annual Report, the terrorism threat has increased, as indicated by the raising of the terrorism threat level in September 2014.¹¹⁸ In 2014 in the context of the Foreign Fighters Bill, ASIO stated that:

Notwithstanding that ASIO has not previously applied for a questioning and detention warrant, ASIO strongly believes the current security environment, including the risk of onshore terrorist attacks, supports the proposed extension of the sunset date for the questioning and questioning and detention warrant

¹¹⁴ Ibid. This recommendation has been partly implemented. Section 34L(10) of the *Australian Security Intelligence Organisation Act 1979* (Cth) stipulates that a person commits an offence if the person has, in accordance with a warrant been requested to produce a record or thing; and the person engages in conduct; and as a result of the conduct, the record or thing is unable to be produced, or to be produced in wholly legible or usable form. However, there is no requirement that the person did the damage with the *intention* of preventing it from being produced, or produced in a legible form, as was recommended.

¹¹⁵ Independent National Security Legislation Monitor, *Declassified Annual Report*, 20 December 2012, 96.

¹¹⁶ *Australian Crime Commission Act 2002* (Cth), s24AA, 24A and 25A-25H.

¹¹⁷ Independent National Security Legislation Monitor, *Declassified Annual Report*, 20 December 2012, 106.

¹¹⁸ Australian Security Intelligence Organisation, *Annual Report 2014-2015*, 2.

regime in Division 3 of Part III of the ASIO Act. In addition, current statutory thresholds ensure these special powers are not used arbitrarily or unnecessarily at any time.

A questioning and detention warrant is important in circumstances where, if a person is not immediately taken into custody and detained, the person may alert a person involved in a terrorism offence that the offence is being investigated, may not appear before a prescribed authority to be questioned or may destroy, damage or alter a record or thing that they may be requested to produce under warrant.¹¹⁹

71. The Law Council queries whether ASIO's QDW powers are a necessary and proportionate response to the current terrorism environment and considers that the former INSLM's reasoning remains valid for several reasons.

72. First, the service of a QW can already require immediate attendance for questioning¹²⁰ and enable the use of reasonable force if the person served with the QW demonstrates resistance.¹²¹ This would appear 'appropriate to address apprehensions about tipping off, destroying or tampering with evidence or failing to appear'.¹²² In addition, section 34L(10) of the ASIO Act makes it an offence for a person who has been requested to produce a record or thing in accordance with a warrant (including a QW) to engage in conduct which renders the record or thing unable to be produced, or unable to be produced in wholly legible or usable form.

73. Secondly, immediate detention under a QDW arises on the basis of an assessment by the Attorney-General rather than an Australian court or issuing authority which has examined the sufficiency of the evidence supporting the detention. This raises serious questions about the separation of powers and the appropriateness of administrative detention. In contrast, detention may more appropriately arise under a QW where the prescribed authority – who can be expected to act judicially – makes the determination.¹²³

74. Thirdly, the former INSLM, after questioning government agencies as to why the QDW powers were necessary, was presented with:

[n]o scenario, hypothetical or real... that would require the use of a QDW where no other alternatives existed to achieve the same purpose. The power to arrest and question without charge for a broad range of preparatory and inchoate offences, the power to order the surrender of passports and prohibit a person from leaving Australia and the existing powers of detention or forcibly compelled immediate attendance under QWs all provide less restrictive alternatives to QDWs.¹²⁴

75. Similarly, the Law Council is not aware of evidence to date of a scenario which would appear to justify the QDW powers in light of the suite of alternative powers referred to by the former INSLM. The Law Council encourages the INSLM to inquire as to whether such a scenario now exists since the former INSLM's 2012 Annual Report.

¹¹⁹ Australian Security Intelligence Organisation, Submission to Parliamentary Joint Committee on Intelligence and Security, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, 6.

¹²⁰ *Australian Security Intelligence Organisation Act 1979* (Cth), 34E(2).

¹²¹ *Ibid*, 34V(1).

¹²² Independent National Security Legislation Monitor, *Declassified Annual Report*, 20 December 2012, 103.

¹²³ *Australian Security Intelligence Organisation Act 1979* (Cth), s34K(4). See also Independent National Security Legislation Monitor, *Declassified Annual Report*, 20 December 2012, 102.

¹²⁴ Independent National Security Legislation Monitor, *Declassified Annual Report*, 20 December 2012, 105.

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76. Fourthly, QDWs have not, to the Law Council's knowledge, been used since they were introduced.¹²⁵ It is unclear whether the non-use of the powers indicates ASIO's judicious 'usage', difficulties in the legislative framework, or that they are not necessary, particularly in light of the overlap with the AFP's and ACC's CQDPs and the availability of other counter-terrorism measures. Nonetheless, the efficacy and worth of the QDW provisions as an intelligence tool does not appear to have been clearly demonstrated.
77. Fifthly, the privilege against self-incrimination is removed, providing for a use only immunity rather than a derivative use immunity. This means that information obtained by ASIO under a QDW is not admissible in evidence against the person in other criminal proceedings ('use immunity').¹²⁶ However, there is no such bar on the use of further information or evidence subsequently revealed as a result of the information obtained ('derivative use immunity'). Hence, any evidence obtained as a result of information or items provided by the person under a QW or QDW is capable of being used to prove that person has committed a criminal offence. This is a major departure from fundamental criminal law principle.¹²⁷
78. Sixthly, there is no statutory right to judicial review of an administrative decision or conduct for the purpose of making an administrative decision under the ASIO Act, which is in need of review. Such decisions are excluded from the operation of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). Administrative review is only available through the original jurisdiction of the Federal Court and High Court under subsection 19(2) and 23 of the *Federal Court of Australia Act 1976* (Cth) and paragraph 75(v) of the Commonwealth Constitution and section 39(B) of the *Judiciary Act 1903* (Cth). There may be a legitimate need to protect sensitive information to justify exemption from the ADJR Act. It should also be noted that the IGIS, Ombudsman and Parliamentary Joint Committee on Intelligence and Security can perform important review functions. However, the Law Council observes that in 2012 the Administrative Review Council recommended that the exemption from the ADJR Act of all decisions under the ASIO Act in paragraph (d) of Schedule 1 of the ADJR Act should be reviewed.¹²⁸ In 2005, the then Parliamentary Joint Committee on ASIO, ASIS and DSD recommended that, in the absence of a separate statutory right of judicial review, that a note to section 34E of the ASIO Act be adopted as a signpost to existing legal bases for judicial review.¹²⁹ While the then Government agreed to this recommendation,¹³⁰ no explanatory note has been inserted into section 34E describing in summary form existing legal bases for seeking a remedy.
79. Seventhly, subsection 34ZQ(2) of the ASIO Act requires that all contact between a person subject to one of these warrants and their lawyer is able to be monitored by an ASIO official. This raises questions as to the possible impact on client legal privilege. While the law does not require the disclosure of information despite a claim for privilege, information may be disclosed which could legitimately be the subject of a claim for privilege. Such restrictions could create unfairness to the person (who may

¹²⁵ ASIO Legislation Amendment (Terrorism) Bill 2002.

¹²⁶ *Australian Security Intelligence Organisation Act 1979* (Cth), s34L.

¹²⁷ Commonwealth Guide to Framing Commonwealth Offences, September 2011, 8.

¹²⁸ Administrative Review Council, *Federal Judicial Review in Australia Report*, 204.

¹²⁹ Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the operation, effectiveness and implications of Division 3 of Part III in the Australian Security and Intelligence Organisation Act 1979*, November 2005, 57 Recommendation 8.

¹³⁰ Government response to Parliamentary Joint Committee on Intelligence and Security Report on the operation, effectiveness and implications of Division 3 of Part III in the *Australian Security and Intelligence Organisation Act 1979* (Cth), March 2006, 3.

not even be under suspicion) by preventing a full and frank discussion between a client and his or her lawyer and the ability to receive relevant legal advice.

80. Eighthly, the Parliamentary Joint Committee on Human Rights has examined these powers and has concluded that, in the absence of further information, they are likely to be incompatible with human rights, including the right to freedom of movement.¹³¹ The power to detain individuals for questioning unjustifiably infringes upon the right to freedom of movement and the notion that individuals should not be held in custody without at least a reasonable suspicion of involvement in terrorism.

81. The former INSLM recommended that:

- ASIO's QDWs should be repealed;¹³² and
- the QW provisions should be amended to permit arrest if the police officer serving the warrant believes on reasonable grounds from anything said or done by the person served that there is a serious possibility that he or she intends not to comply with the warrant, and also to permit the prescribed authority to direct detention after service of a questioning warrant but before the time specified in it for attendance if it appears on reasonable grounds that there is an unacceptable risk of the person tipping off another involved in terrorism, failing to attend or destroying or tampering with evidence.¹³³

82. The INSLM observed that such amendments would provide a detention power narrower in scope than the power under QDWs, recognising the legitimate need of ASIO to ensure the attendance of a person for questioning while balancing individuals' rights not to be unnecessarily detained on a pre-emptive basis.

Recommendations:

- **The former INSLM's recommendations in relation to QWs and QDWs should be implemented.**
- **The exemption from the ADJR Act of decisions relating to QWs and QDWs should be reviewed. In the absence of a separate statutory right of judicial review, that a note to section 34E of the ASIO Act be adopted as a signpost to existing legal bases for judicial review.**

The AFP: Part IC of the Crimes Act

83. The former INSLM did not appear to raise objection with the pre-charge detention powers of the AFP in Part IC of the Crimes Act. Indeed he took the view that the pre-charge arrest and questioning powers for terrorism offences available under the Crimes Act should be preferred over the preventative detention order regime, as it allows the collection of evidence while safeguarding individual rights (e.g. to be

¹³¹ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourteenth Report of the 44th Parliament* (October 2014) [1.49].

¹³² Independent National Security Legislation Monitor, *Declassified Annual Report*, 20 December 2012, 88, recommendation V/1.

¹³³ *Ibid*, Recommendation IV/7, 128.

cautioned).¹³⁴ He noted that the safeguards in the Part IC pre-charge detention capabilities 'are maintained in accordance with normal rule of law principles'.¹³⁵

84. He appeared to accept that the longer time limit (20 hours rather than 8 hours) for questioning in relation to terrorism offences was justified due to the 'operational difficulties and added complexities involved in terrorism investigations'.¹³⁶

Need for greater clarity

85. Notwithstanding, these statements, the provisions governing the investigation of terrorism offences in Part IC of the Crimes Act are drafted in complex ways that may make them inaccessible to those trying to work with them, whether this be police officers seeking to enforce them, members of the community seeking to observe them, or even journalists or other parties seeking to understand their operation. The complexity undermines rule of law principles that 'the law must be both readily known and available, and certain and clear'.¹³⁷

86. The Clarke Inquiry revealed a number of shortcomings in the handling of the Dr Haneef case by government agencies, including that many of the officers involved did not fully understand or have sufficient experience in exercising their statutory obligations in relation to Part IC of the Crimes Act (the provisions that permitted the detention of Dr Haneef without charge).¹³⁸

87. The former INSLM previously queried whether redrafting Part IC would reduce its complexity.¹³⁹ In the view of the Law Council, a redraft of Part IC may aid clarity. Alternatively, a plain language guide should be developed for the national security community and the wider Australian population, making the laws more accessible.

88. A more detailed, plain English guide on investigation periods that includes, for instance, information required to be included and that which may be removed in an application for dead time and the rights of the person being investigated, would aid in further rendering the provisions intelligible for use by police officers and others trying to observe them.

Pre-charge detention period

89. The Council of Australian Governments (COAG) resolved at its meeting on 15 December 2015 to prioritise work to implement nationally consistent legislation on pre-charge detention, consistent with the recommendations of the Australia-New Zealand Counter-Terrorism Committee (ANZCTC).¹⁴⁰ While the INSLM's role is to examine existing national security laws (unless a referral from the Prime Minister is made),¹⁴¹ the Law Council submits that the COAG resolution should inform the INSLM's consideration of whether the pre-charge detention powers in Part IC of the Crimes Act are currently effective and appropriate.

¹³⁴ Ibid, 61.

¹³⁵ Ibid.

¹³⁶ Ibid, 60.

¹³⁷ Law Council of Australia, *Policy Statement on Rule of Law Principles.*, March 2011, Principle 1, 2.

¹³⁸ The Hon. John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef*, Australian Government.

<https://web.archive.org/web/20110601004355/http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/Report>.

¹³⁹ Independent National Security Legislation Monitor, *Annual Report*, 16 December 2011, 45.

¹⁴⁰ COAG Communique, 15 December 2015, 3.

¹⁴¹ *Independent National Security Legislation Monitor Act 2010* (Cth), s6-7.

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90. Further, the Commonwealth Part IC powers should be understood in the context of the Terrorism (Police Powers) Amendment (Investigative Detention) Bill 2016 (NSW) (TPPA Bill) which received Royal Assent on 16 May 2016. The TPPA Bill amended the *Terrorism (Police Powers) Act 2002* (NSW) (TPPA) to enable a terrorism suspect to be detained without a detention warrant for a maximum period of 4 days, but the maximum period may be extended by a detention warrant issued by a Judge of the Supreme Court so long as the maximum period does not exceed 14 days after the terrorism suspect was arrested.¹⁴² The TPPA may apply to a child as young as 14 years of age.¹⁴³
91. A police officer may, without a warrant, arrest a terrorism suspect for the purpose of investigative detention if:
- a) the terrorist act concerned occurred in the last 28 days; or
 - b) the police officer has reasonable grounds to suspect that the terrorist act concerned could occur at some time in the next 14 days; and
 - c) the police officer is satisfied that the investigative detention will substantially assist in responding to or preventing the terrorist act.¹⁴⁴
92. Given the COAG resolution, other states may implement similar laws.¹⁴⁵
93. The Law Council is concerned about extending periods of executive detention without trial, particularly in the absence of evidence offered to the public to support the claim that it is necessary and proportionate. AFP CQDPs appear to have been used on a number of occasions in recent years (see above) and there does not appear to be evidence substantiating a claim of their ineffectiveness.
94. The Law Council recognises that there are inherent difficulties in investigating terrorism offences, which are often international in scope, and that there is a particular urgency attached to investigating such offences. Nonetheless, there is no *prima facie* reason to believe that the investigation of terrorism offences as they are broadly defined under the Crimes Act, warrant more complex investigation than, for instance, narcotics importation, serious organised crime, serious fraud or cyber-crime.
95. A lack of evidence to warrant an extended period of detention for terrorism offences runs counter to rule of law principles that no one should be arbitrarily deprived of his or her liberty. Australia is bound by this principle under articles 9 of the Universal Declaration of Human Rights and the *International Covenant on Civil and Political Rights* which both state that no one shall be subjected to arbitrary arrest or detention. It would seem highly arbitrary to detain a person suspected of a terrorism offence where there is no evidence to suggest distinct treatment is justified when compared to other serious offences which also involve international investigation and urgent investigation.
96. There are also likely to be constitutional issues involved at the Commonwealth level if the maximum detention period under the pre-charge detention powers in Part IC of the Crimes Act is extended, or if police are able to detain individuals without warrant for substantial periods of time. The High Court in *Lim v Minister for Immigration, Local*

¹⁴² Terrorism (Police Powers) Amendment (Investigative Detention) Bill 2016 (NSW), s25H.

¹⁴³ *Ibid*, s25F.

¹⁴⁴ *Ibid*,s25E.

¹⁴⁵ For example, see: Queensland Government, [Media Release: Expanded police powers to keep Queenslanders safe](#), 5 April 2016.

*Government and Ethnic Affairs*¹⁴⁶ in 1992 determined that Executive detention may be valid if it is for a legitimate non-punitive and essentially administrative purpose.¹⁴⁷ Punitive detention is a matter for the judiciary given Ch III of the Australian Constitution. Extending the pre-charge detention regime under the Crimes Act may be regarded as punitive and beyond power.

97. The states have fewer constitutional limitations. The High Court in *Fardon v Attorney-General (Queensland)*, for example, upheld a law which provided for renewed periods of detention in jail for serious sex offenders whose term of imprisonment had ended, because they were considered by a court to be an 'unacceptable risk to society' if released.

98. The Prime Minister, Malcolm Turnbull, has also noted that there are some 'constitutional impediments to the Commonwealth Government legislating for pre-charge detention of the period that our security services believe is necessary or is appropriate'.¹⁴⁸

Recommendations:

- **Part IC be redrafted to aid clarity. Alternatively, the Attorney-General's Department, the INSLM or the Ombudsman develop a plain English Guide to the Investigation of Terrorism offences in consultation with the AFP, State and Territory police services and other relevant stakeholders; and**
- **The INSLM inquire and report, to the extent possible, on any evidence justifying why the current pre-charge detention powers in Part IC of the Crimes Act are considered to be ineffective or inappropriate.**

Reporting Obligations

99. If the pre-charge detention powers of the AFP are to be maintained, the Law Council suggests an amendment to the reporting obligations, to enhance accountability. It is important that the AFP regime does not set a lower standard for reporting obligations than that imposed on ASIO in relation to QWs and QDWs. If such a scheme is maintained, the Law Council recommends that the AFP pre-charge detention regime include similar reporting obligations as those contained in the ASIO QW and QDW schemes. This would mean amending the AFP Act to, for example, require AFP annual reports to include a statement on:

- a) The total number of persons detained for questioning subsequent to arrest for a terrorism offence;
- b) the total number of requests made under Part IC for an extension of detention;
- c) the total number of extensions of detention granted by a magistrate; and
- d) the following numbers:
 - ii. the number of hours each person spent in detention; and

¹⁴⁶ (1992) 176 CLR 1.

¹⁴⁷ (2004) 223 CLR 575.

¹⁴⁸ Stephanie Anderson, 'COAG: State and territory leaders agree to develop laws for indefinite detention of terrorists, divided on tax reform', *ABC* (online) 11 December 2015. <http://www.abc.net.au/news/2015-12-11/coag-leaders-agree-on-indefinite-detention-laws-for-terrorists/7021652>

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- iii. the total of all those hours for all those persons.¹⁴⁹

Recommendation:

- **The AFP pre-charge detention regime should include similar reporting obligations as those contained in the ASIO QW and QDW schemes.**

The ACC

100. The ACC Act significantly limits the right to a fair trial, particularly by affecting the equality of arms principle and the protection against self-incrimination. Specifically, the ACC Act authorises an ACC examiner to conduct an examination pre-charge, post-charge, pre-confiscation application or post-confiscation application and compel answers to questions relating to an ACC special operation or special investigation into serious and organised criminal activity.
101. In such an examination or a hearing, a person cannot refuse to answer a question, or produce a document or thing on the basis that it might incriminate them, or expose them to a penalty.
102. Notwithstanding a number of safeguards contained in the ACC Act to protect the right to a fair trial, there is a real risk that the administration of justice will be interfered with by requiring a person to answer questions, on pain of punishment, designed to establish that he or she is guilty of the offence with which he or she is charged or has unlawfully acquired funds or assets.¹⁵⁰ The fact that a person may be examined, in detail, as to the circumstances of the alleged offence or confiscation proceedings, is very likely to prejudice a person in his or her defence.¹⁵¹
103. This risk also means that there is the potential for certain provisions in the ACC Act to be beyond the legislative power of the Commonwealth to enact. Regardless of the question of Constitutional validity, the Act, as currently drafted, is a disproportionate response to preventing and prosecuting serious and organised crime and corruption.

Validity and proportionality

104. Justice Hayne and Justice Bell in *X7 v Australian Crime Commission* (2013) (X7) noted:

There may then be a question of legislative power: can the legislature provide for the secret and compulsory examination of an accused person about the subject matter of the pending charge? That question would call for consideration not only of Ch III of the Constitution, but also, and more particularly, of s 80 of the Constitution and what is meant by 'trial on indictment' and the requirement that the trial on indictment of any offence against any law of the Commonwealth shall be 'by jury'.¹⁵²

¹⁴⁹ *Australian Security Intelligence Organisation Act 1979* (Cth), s94(1).

¹⁵⁰ *Hammond v The Commonwealth* (1982) 152 CLR 188 at 198 per Gibbs CJ (with whom Mason and Murphy JJ agreed).

¹⁵¹ *Ibid.*

¹⁵² *X7 v Australian Crime Commission* (2013) 248 CLR 92, [92] (Hayne and Bell JJ).

105. As the ACC Act was not considered to permit an examination of an accused person about the subject matter of a pending charge, the question of power was not reached for the majority of the High Court in *X7*.

106. However, the ACC Act's provisions which would permit an examination of an accused person about the subject matter of a pending charge do give rise to the question of whether it is within legislative power on the basis that it would be inimical to the exclusivity of the exercise of Commonwealth judicial power and contrary to an inviolable feature of the institution of trial by jury in s80 of the Constitution.¹⁵³ For example, the plaintiff in *X7* submitted that:

*... the judicial power of the Commonwealth vested by s71 of the Constitution in the closed category of courts described in Ch III is vested on the axiom of obedience to the judicial process. Following a person being charged with an offence against a law of the Commonwealth a curial investigative process commences and continues until the federal controversy joined between the Commonwealth and the person so charged is finally quelled by either a verdict of a jury, a plea of guilty or discontinuance of the charge(s). To repeat and borrow the words of Barton J in *Melbourne Steamship supra* at 346 "The subject matter has passed into the hands of the courts alone."¹⁵⁴*

107. A relevant question that may be required to be answered is whether the abrogation of the privilege against self-incrimination in the context of permitting an examination of an accused person about the subject matter of a pending charge is accompanied by adequate safeguards in the Act to ensure that the fair trial of an accused will not be prejudiced.¹⁵⁵ A similar assessment is required to be undertaken in terms of considering whether the measures contained in the Act are reasonable and proportionate.

108. While the majority of the High Court in *X7* did not consider the extent to which Division 2 of Part II of the ACC Act was Constitutionally invalid on the grounds of being contrary to Ch III of the Constitution, French CJ and Crennan J (in dissent) did so, and found that there were safeguards in the scheme to ensure the fair trial protection in the Constitution is maintained. These safeguards included:

- express provisions abrogating the privilege against self-incrimination by requiring a witness to answer questions after charges had been laid;
- provision of use immunity;
- provisions which enabled the court to restrain, as an abuse of process, the use of derivative material;
- provisions which enabled the court to make orders, other than orders restoring the privilege, to safeguard an examinee's fair trial; and
- a mechanism for limiting the questions asked or the documents or things sought in an examination.

¹⁵³ Written submissions of the Plaintiff at [14] in *X7 v Australian Crime Commission* (2013) 248 CLR 92.

¹⁵⁴ *Ibid.*

¹⁵⁵ *X7 v Australian Crime Commission* (2013) 248 CLR 92 (French CJ and Crennan J).

Purported Safeguards

109. The ACC and the rules of evidence and procedure purports to provide the following safeguards to ensure that the right to a fair trial is maintained in post-charge examinations and hearings:

- express provisions abrogating the privilege against self-incrimination;¹⁵⁶
- limitations on the purposes for which such an examination or hearing may be conducted;¹⁵⁷
- requirements that an ACC examiner, before issuing a post-charge summons, is to be satisfied that issuing the summons is reasonably necessary for the purposes of the relevant special operation or special investigation even though the examinee has been charged with an offence;¹⁵⁸
- requirements that examination and hearing material must not be disclosed in a way that would prejudice the fair trial of the examinee or witness;¹⁵⁹
- requirements that examination or hearing material cannot be disclosed to a prosecutor without an order from the court where it would be in the interests of justice;¹⁶⁰
- provision of a limited use immunity whereby information provided by a person under examination or a hearing cannot be admitted in evidence against that person in a criminal proceeding, a proceeding for the imposition or recovery of a penalty, or a confiscation proceeding;¹⁶¹
- limitations on the use of derivative material whereby information indirectly obtained from the person during a compulsory examination or hearing cannot be disclosed to a prosecutor without an order from the court that it would be in the interests of justice.¹⁶² A court may also make any orders necessary to ensure that an examinee or witness's fair trial is not prejudiced by the prosecutor's possession or use of derivative material.¹⁶³ The operation of the rules of evidence and procedure in relation to the use of derivative material in a trial are also preserved.¹⁶⁴

¹⁵⁶ *Australian Crime Commission Act 2002* (Cth), s30(4)(c).

¹⁵⁷ Under section 24A of the *Australian Crime Commission Act 2002* (Cth) an examiner may conduct an examination for the purposes of a special ACC operation/investigation. The examiner may only ask questions about matters relevant to the special operation or special investigation (subsection 25A(6)).

¹⁵⁸ *Australian Crime Commission Act 2002* (Cth), s28(1)(d).

¹⁵⁹ *Ibid*, sub-s 25A(9A) and 25A(14A).

¹⁶⁰ *Ibid*, s25C and sub-s 25E(1).

¹⁶¹ Sub-s 30(5) of the *Australian Crime Commission Act 2002* (Cth) would set out the general position that answers, documents or things over which an examinee has claimed the privilege against self-incrimination are not admissible in criminal proceedings, proceedings for the imposition of a penalty, or confiscation proceedings. Subsection 30(5A) of the *Australian Crime Commission Act 2002* (Cth) would set out the exceptions to that general position, when such answers, documents or things are admissible in those proceedings. The exceptions include permitting the evidence to be used against the person in a confiscation proceeding, if the answer was given, or the document or thing was produced, at the examination at a time when the proceeding had not commenced and is not imminent; or a proceeding about the falsity of an answer or any statement contained in the document.

¹⁶² *Australian Crime Commission Act 2002* (Cth), s25D and subsec 25E(1).

¹⁶³ *Ibid*, sub-s 25E(3).

¹⁶⁴ *Ibid*, sub-s 25G(2).

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110. However, there are a number of difficulties with these purported safeguards,¹⁶⁵ which may well mean that a person's right to a fair trial, in the manner intimated by Justices Hayne and Bell, and as specifically referred to in the dissenting judgment of Chief Justice French and Justice Crennan, in *X7* may well be unduly undermined, potentially making the legislation beyond power and/or a disproportionate response.
111. Notwithstanding the purported protections, the Law Council is concerned that there remains a real risk that a person who is examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice his or her defence. An accused person should not be forced to divulge his or her position prior to trial or to assist law enforcement officers in gathering supplementary information to aid in his or her prosecution.
112. For these reasons, the Law Council's primary recommendation is that the examination of a person charged or imminently to be charged by the ACC or Integrity Commissioner should be deferred until after the disposition of any charges.
113. However, if the INSLM is minded not to accept the Law Council's primary recommendation, the Law Council has made a number of alternative recommendations as set out in its submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the Law Enforcement Legislation Amendment (Powers) Bill 2015 (copy provided to the INSLM's office on 19 May 2016).
114. If an examination is permitted to occur prior to the resolution of the witness's pending charges, there should be strict regulation of who is present at the examination, what use can be made of the information obtained, and the subject matter able to be covered.
115. The Law Council suggests that it would be appropriate to require authorisation from a Federal Court judge before an ACC summons is issued to a person who is subject to criminal proceedings, and for that Judge to prescribe limitations on the matters which may be covered by the examination.
116. The Law Council notes that the Senate Legal and Constitutional Affairs Committee's Report on the Law Enforcement Legislation Amendment (Powers) Bill 2015 stated that the provisions do:

*... not include any safeguards to limit the proposed power to conduct post-charge examinations and hearings. It follows that an affected person would have limited recourse to the courts in circumstances where a post-charge investigation unduly interferes with that person's right to a fair trial. Therefore, the committee suggests the government to consider adding a provision to the Bill as recommended by the LCA [Law Council] to require an ACC examiner... to seek the authorisation of the Federal Court prior to commencing a post-charge examination or hearing. Such a provision could help to ensure that a court would retain a level of discretion over post-charge investigations and, as such, would provide a further safeguard to the right to a fair trial.*¹⁶⁶

117. Justice Weinberg, Court of Appeal, Supreme Court of Victoria, speaking extra-judicially has also stated:

¹⁶⁵ As set out in the Law Council's submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the Law Enforcement Legislation Amendment (Powers) Bill 2015 (copy provided to the INSLM's office on 19 May 2016).

¹⁶⁶ Parliament of Australia, Senate Legal and Constitutional Affairs Committee, *Report on the Law Enforcement Legislation Amendment (Powers) Bill 2015*, 18.

In my opinion, it is unfair, and quite wrong, to allow the Executive, using statutory coercive powers, to force an accused facing pending trial to answer questions about the very subject matter of the charges brought against him or her. To do so sharply tilts the balance between the interests of the state in bringing to justice those who have committed serious criminal offences, and the right of the accused to a fair trial.¹⁶⁷

Recommendation:

- **The examination of an accused person by the ACC should be deferred until after the disposition of any charges. In the alternative the ACC Act should require authorisation from a Federal Court judge before an ACC summons is issued to a person who is subject to criminal proceedings, and for that Judge to prescribe limitations on the matters which may be covered by the examination.**

Part 5: Overlap of questioning and detention powers

Overlap

118. The work of ASIO, the AFP and the ACC through their CQDPs, while not identical, appears to overlap in some significant respects:

- all three agencies can use their CQDPs to investigate when organised crime targets raise national security concerns;
- ASIO and the ACC have the ability to compel answers to questions from persons who are not under suspicion in national security matters;
- ASIO, the AFP and the ACC also have the ability to use their CQDPs on terrorism suspects; and
- use of the CQDPs by ASIO and the ACC abrogate the privilege against self-incrimination, provide for a use immunity but not a derivative use immunity.

119. However, use of the powers by ASIO, the AFP and the ACC can serve different purposes, even if they overlap in some ways. As discussed above, each of the three agencies have different powers and purposes for which they may be used. For example, ASIO's questioning warrant powers may assist in obtaining intelligence relating to terrorism networks or broader national security risks. The AFP's pre-charge detention powers may enable investigation of individuals with an aim of prosecution rather than only intelligence gathering. The ACC, through its compulsory powers, may be well placed to gather intelligence relating to the links between terrorism and serious and organised crime.

120. Confining certain powers to a single agency may arguably be inefficient and not allow the multiple aspects of terrorism to be addressed and investigated. A degree of overlap may also be beneficial for appropriate and lawful intelligence sharing, which is integral to addressing national security risks. There is a balance to be struck between

¹⁶⁷ Justice Mark Weinberg, *The impact of special commissions of inquiry/crime commissions on criminal trials*, 1 August 2014, 48. <<http://assets.justice.vic.gov.au/supreme/resources/66d960d7-4dae-4b13-853c-71a94e97a424/the+impact+of+special+commissions+of+inquiry+weinberg+j++1+aug+2014.pdf>>

sufficient separation to enable specialist agencies to perform their unique roles and ensuring that information is obtained in a consistent manner with rule of law principles and human rights obligations.

121. From publicly available documents, it is difficult to determine the extent and impact of any overlap on individuals subjected to the CQDPs. Media reports indicate that individuals may have been subjected to both ACC and ASIO questioning, although the questioning may have been three years apart.¹⁶⁸ The Law Council encourages the INSLM to make inquiries with ASIO, the AFP and the ACC as to the number of cases where individuals have been subjected to questioning by more than one of the agencies.

122. Nonetheless, there may be consequences to the overlap which should be considered and addressed. Any proposed law reform should be considered in the context of the whole range of existing laws.

Consequences of overlap

123. Some consequences of the overlap which may impact on the necessity and proportionality of the powers include the potential:

- to create uncertainty about legal rights and obligations;
- for unnecessary duplication; and
- that the powers may be used in close succession exacerbating concerns regarding limitations on individual rights.

124. Accordingly, there would be merit in having the greatest possible clarity in distinguishing between the boundaries between ASIO, the AFP and ACC to avoid unnecessary duplication and possible concurrent operation, and provide greater certainty to the operation of the three different regimes.

Uncertainty about legal rights and obligations

125. The rule of law requires that the law must be both readily known and available, and certain and clear.¹⁶⁹ This means that the legal framework should enable individuals to regulate their conduct with certainty.

126. The need for coherence and certainty in the law is important for accessibility of the law and the capacity of individuals to exercise their legal rights and duties. If a lawyer for a person who is to be subject to CQDPs is to advise his or her client properly, the regimes and the distinctions between them need to be as clear as possible.

127. The CQDPs create a complex legal regime with the potential for uncertainty as to the types of questions a person may legitimately be asked, their rights and the obligations of each agency. The differences in approach of the three schemes may create confusion as to legal rights and obligations, particularly where a person is subject to multiple CQDPs.

¹⁶⁸ Paul Farrell, 'Crime commission secretly interrogated Australian who was allegedly tortured by foreign agency', *The Guardian* (online) 4 March 2016. <<http://www.theguardian.com/australia-news/2016/mar/04/commission-secretly-interrogated-australian-who-was-allegedly-torture-by-foreign-agency>>

¹⁶⁹ Law Council of Australia, *Policy Statement on Rule of Law Principles.*, March 2011, Principle 1 .

Unnecessary duplication

128. The need for certainty in the operation of the three CQDP regimes also underlies the desirability of avoiding unnecessary overlap between them. The INSLM may wish to assess whether there is any unnecessary duplication of intelligence functions between ASIO, the ACC and the AFP.
129. The ability of each agency to compel answers to questions in terrorism cases albeit from a different standpoint, and there potentially being a number of intelligence repositories may also become problematic.
130. The Law Council notes, in this context, that duplication already exists in Australia's counter-terrorism framework, which is largely replicated at the state/territory and federal levels. Overlap increases the need for agencies to have effective communication channels to ensure that individuals are not unnecessarily subjected to multiple CQDPs.

Powers operating in close succession

131. The overlap may also give cause to a concern that the powers may be used to operate in close succession exacerbating concerns regarding significant limitations on individual liberties. The possibility of the powers operating in close succession does not appear to be excluded by any of the regimes. This means that there is the possibility for an individual to be the subject of multiple CQDPs where s/he is asked similar questions, albeit from a different agency. Nor does there appear to be a requirement for an assessment about the impact of a succession of measures on an individual before the powers are exercised.
132. This issue may be exacerbated when a range of other counter-terrorism measures may also be employed, including for example:
- preventative detention orders or control orders;¹⁷⁰ and
 - stop, search and seizure regime relating to Commonwealth places.¹⁷¹
133. The possible overlap of these extraordinary powers raises serious questions as to the proportionality of the response.
134. The Law Council recognises that the Commonwealth Ombudsman or the IGIS may oversee the appropriateness of particular investigations. It also recognises the important role of the INSLM in reviewing the effectiveness of national security laws. However, it is concerned that there does not appear to be independent oversight of the proportionality of a range of measures in relation to a person *before* those measures are exercised.
135. The IGIS or Commonwealth Ombudsman should be empowered to make a proportionality determination where multiple powers are employed against an individual.
136. Legislative amendment should also be considered to provide greater distinction between the types of conditions that may trigger each agency exercising their particular powers. Education of agency employees and the community to raise awareness in this area should also be considered.

¹⁷⁰ Divisions 105 and 104 of the *Criminal Code Act 1995* (Cth) respectively.

¹⁷¹ *Crimes Act 1914* (Cth), Division 3A of Part 1AA.

Recommendations:

- **Legislative amendment should also be considered to provide greater distinction between the types of conditions that may trigger each agency exercising their particular powers. Education of agency employees and the community to raise awareness in this area should also be considered.**
- **The IGIS or Commonwealth Ombudsman should be empowered to make a proportionality determination where multiple powers are employed against an individual.**

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote 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 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

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

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

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 the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.