



Australian Government

Independent National Security Legislation Monitor

CERTAIN QUESTIONING AND DETENTION POWERS IN RELATION TO TERRORISM

The Hon Roger Gyles AO QC

October 2016

Certain Questioning and Detention Powers in Relation to Terrorism

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Australian Government

Independent National Security Legislation Monitor

THE HON ROGER GYLES AO QC

ONE NATIONAL CIRCUIT
BARTON ACT 2600

31 October 2016

The Hon Malcolm Turnbull MP

Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Prime Minister,

Independent National Security Legislation Monitor Review of Certain Questioning and Detention Powers in Relation to Terrorism

In the circumstances discussed with the Attorney-General and your department, I am pleased to present my report on the abovementioned review in electronic form. Printed copies will be provided in due course.

This report is unclassified and is suitable to be presented to each House of Parliament in accordance with s 29 of the *Independent National Security Legislation Monitor Act 2010* (Cth).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Roger Gyles'.

Roger Gyles AO QC
Independent National Security Legislation Monitor

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1 Summary of Recommendations

Crimes Act 1914 (Cth) Pt IC

1. The initial investigation period available pursuant to subdiv B of pt IC of the *Crimes Act 1914* (Cth) be increased to eight hours (four hours if the person appears to be under 18 years of age, or an Aboriginal person or a Torres Strait Islander).
2. There should be a reasonable outer limit to the period for detention without charge, regardless of dead time pursuant to pt IC of the *Crimes Act 1914* (Cth) — a period for investigation should not be an indefinite de facto preventative detention power. In my view, 10 days is that outer limit.
3. The procedures in and pertaining to making applications under subdiv B of pt IC of the *Crimes Act 1914* (Cth) should be revised to ensure they are up-to-date with electronic capability.
4. In the absence of a compelling justification, s 23DB(9) of the *Crimes Act 1914* (Cth) and related provisions ought to be repealed. If justified, the section should be redrafted to clearly indicate the basis on which it should be exercised, and distinguished from s 23DF of the *Crimes Act 1914* (Cth) and related provisions.
5. The substance of the application of pt IC of the *Crimes Act 1914* (Cth) to terrorism cases should be reviewed together with control orders and preventative detention orders when those powers are reviewed pursuant to the *Independent National Security Legislation Monitor Act 2010* (Cth). A part of that review should be to see how many arrests with periods of extended detention do not lead to a charge of a terrorism offence or lead to a charge that is dropped before trial. This will assist in judging whether the power is being misused. Another part should be to review the natural justice issue referred to in para 7.32 of this report.
6. The adoption of an alternative approach to investigative detention based on the New South Wales model should be kept under active consideration.

Australian Security Intelligence Organisation Act 1979 (Cth) Pt III Div 3

7. Subdivision C of div 3 of pt III of the *Australian Security Intelligence Organisation Act 1979* (Cth) should be repealed or cease when the sunset date is reached. Successive extensions of the sunset date since 2006 should end.
8. The balance of div 3 of pt III of the *Australian Security Intelligence Organisation Act 1979* (Cth) should either be repealed, or not extended beyond the present sunset date, and should be replaced by a questioning power following the model of coercive questioning available under the *Australian Crime Commission Act 2002* (Cth) as closely as possible. A sunset clause should not be necessary for such a questioning power.

9. In the context of recommendation 8, the definition of a ‘terrorism offence’ in the *Australian Security Intelligence Organisation Act 1979* (Cth) should be amended to include the foreign incursion and recruitment offences in pt 5.5 of the Commonwealth *Criminal Code* and the terrorism financing offences in the *Charter of the United Nations Act 1945* (Cth), and the phrase ‘important in relation to a terrorism offence’ should be amended to read ‘important in relation to an actual or threatened terrorism offence’ wherever appearing.

Other

10. A protocol should be developed between the Australian Security Intelligence Organisation, the Australian Criminal Intelligence Commission, and any relevant state body which shares information obtained by compulsory questioning, to avoid oppression by successive examinations. This protocol should then be approved and given appropriate status by the Attorney–General. The Independent National Security Legislation Monitor and other supervisory bodies such as the Inspector–General of Intelligence and Security and the Commonwealth Ombudsman should be able to monitor how this protocol operates in practice.
- 1.1 The reasoning behind each recommendation is provided in the following sections of this report.

2 Introduction

- 2.1 This report is to review the operation, effectiveness, and implications, of the relevant legislation, including consideration as to whether it: contains appropriate safeguards for protecting the rights of individuals; remains proportionate to the threat of terrorism, or threat to national security, or both; and remains necessary. Assessment as to whether the legislation is being used for matters unrelated to terrorism and national security is required.
- 2.2 I must have regard to Australia's obligations under international agreements and to the arrangements agreed from time to time between the Commonwealth, the States, and the Territories, to ensure a national approach to countering terrorism.
- 2.3 A review of div 3 of pt III of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**) and any other provision of that Act as far as it relates to that division, pursuant to s 6(1)(b) of the *Independent National Security Legislation Monitor Act 2010* (Cth) (**INSLM Act**) is required to be completed by 7 September 2017.¹ That division provides the Australian Security Intelligence Organisation (**ASIO**) with special powers relating to terrorism offences, being questioning warrants (**QWs**), and questioning and detention warrants (**QDWs**), and related matters. That time limit requires that the review take place notwithstanding s 9 of the INSLM Act.
- 2.4 A review of pt IC of the *Crimes Act 1914* (Cth) (**Crimes Act**) is also one of the functions of the office.² That part provides for the detention (and questioning) of persons arrested for Commonwealth offences. Subdivision B of div 2 deals with terrorism offences.
- 2.5 The Australian Criminal Intelligence Commission (formerly the Australian Crime Commission) (**ACIC**) has compulsory questioning powers.³ The arrangements that are in place mean that those powers apply to certain terrorism offences, and to that extent, may be reviewed pursuant to s 6(1)(b) of the INSLM Act.
- 2.6 Combining those reviews provides a better perspective than separate reviews and is the best use of limited resources.
- 2.7 The existence and exercise of other powers relating to counter-terrorism and national security vested in federal and state bodies form part of the backdrop to this review and report.
- 2.8 The previous Independent National Security Legislation Monitor (**INSLM**), Mr Bret Walker SC, reviewed and made recommendations about ASIO QWs, and QDWs, in chs IV and V of his 2012 Annual Report. He dealt with police powers of questioning post-arrest and pre-charge in Appendix F of the same report, but made no recommendations as to them. He touched on pre-emptive detention for questioning by the then Australian Crime Commission, and the New South Wales Crime Commission, in ch V of that report.

¹ INSLM Act s 6(1B)(a).

² INSLM Act ss 4 (definition of 'counter-terrorism and national security legislation', para (c)(iii)), 6(1)(a)(i).

³ See, *Australian Crime Commission Act 2002* (Cth) pt II div 2 (**ACC Act**).

- 2.9 The principal recommendation was that QDWs be abolished by repeal of the relevant statutory provisions. That recommendation has not been acted on. Several changes to the QW procedures were recommended, some based on the assumption that QDWs would be abolished. Only some have been adopted.
- 2.10 These powers are revisited in this report in light of experience over recent years and the current security situation. This review has involved public and private written submissions, public and private hearings, private consultations, and the voluntary and compulsory provision of information. As much material as possible has been published on the INSLM website.⁴ The submissions published there give a comprehensive account of the considerations and arguments that have been advanced and taken into account. It is unnecessary to reproduce all of that information in this report. An account of the review process may be found at Appendix 1.
- 2.11 I should immediately say there is no evidence any of the powers under review, the use of which has been based on terrorism or national security, have been used for matters unrelated to terrorism or national security.

⁴ See, www.inslm.gov.au.

3 Security Landscape and Counter-Terrorism Powers

3.1 The threat of terrorism became a prominent legislative concern in Australia from 2001, in the aftermath of the 2001 attacks on the United States by Al Qaeda, the 2002 attack in Bali by Jemaah Islamiyah, and the 2005 attacks in London. Early attacks such as these were often conducted on a large scale, with many participants and extensive planning. These features provided authorities with a relatively significant amount of time during which they could investigate potential terrorist threats, and if necessary, intervene. Early Australian legislative measures to address terrorism were developed on the basis of this form of threat.

3.2 Amendments to the ASIO Act were among the first of these legislative measures. These amendments introduced a regime to permit ASIO, upon obtaining a warrant, to either require a person to appear before a prescribed authority for questioning, or have a person taken into custody to then appear before a prescribed authority for questioning.⁵ These warrants were the precursor to the current QW and QDW regime presently under review. Other legislative measures included the introduction of:

- the 2004 Anti-Terrorism Acts,⁶ which:
 - introduced pt IC into the Crimes Act;
 - made it an offence for individuals to be members of an organisation found to be a terrorist organisation, or to associate with persons who promote or direct the activities of a terrorist organisation; and
 - provided ASIO with powers to force the surrender of passports in connection with suspected terrorism; and
- the 2005 Anti-Terrorism Acts,⁷ which:
 - introduced the control order and preventative detention order regimes;
 - expanded offences relating to financing terrorism; and
 - provided the Australian Federal Police (**AFP**) with enhanced powers to stop, search, and question, people, and seize items.

3.3 It has been reported that between September 2001 and September 2011, the Australian Parliament passed 54 acts related to countering terrorism.⁸

⁵ See, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth).

⁶ *Anti-Terrorism Act 2004* (Cth); *Anti-Terrorism Act (No 2) 2004* (Cth); *Anti-Terrorism Act (No 3) 2004* (Cth).

⁷ *Anti-Terrorism Act 2005* (Cth); *Anti-Terrorism Act (No 2) 2005* (Cth).

⁸ George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136, 1144.

- 3.4 Since 2011, there has been a shift in the terrorism threat faced by both Australia and the Western world more generally. While the threat of larger-scale, co-ordinated attacks remains, it is now accompanied by the risk of smaller groups or lone operators carrying out small-scale, less co-ordinated attacks under the influence of organisations such as Islamic State of Iraq and the Levant. In Australia in particular, threats are now most commonly posed by single participants, supported by one or two associates, attempting to carry out ‘relatively unsophisticated attacks’ such as stabbings or shootings on ‘soft targets’ such as shopping centres, with the lack of sophistication enabling those attacks to be launched without much preparation or lead time.⁹ Additionally, would-be perpetrators now expend far more effort to avoiding detection, using a range of encryption methods. There is accordingly less time to disrupt these acts and a greater reliance on sensitive intelligence to do so.
- 3.5 The environment has been further complicated by concerns around the return of foreign fighters and a growing awareness of the link between terrorism and organised crime. These concerns led to the Australian Crime Commission (now the ACIC) being empowered to use its long-standing coercive questioning powers on matters relating the investigation of terrorism.¹⁰ The Australian Parliament has also begun considering and passing several ‘tranches’ of legislation. These tranches are conventionally recognised as:

- **Tranche One:** *National Security Legislation Amendment Bill/Act (No 1) 2014 (Cth)*

The National Security Legislation Amendment Bill (No 1) 2014 was introduced to the Senate and referred to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) on 16 July 2014. The PJCIS reported on the Bill on 17 September 2014,¹¹ and the Bill was passed by Parliament on 1 October 2014. Being a response to an earlier report of the PJCIS,¹² the Bill contained a ‘package of targeted reforms to modernise and improve the legislative framework governing the activities of the Australian Intelligence Community... [to ensure it] keeps pace with the contemporary, evolving security environment’.¹³

Key measures of the Bill included:

- introducing computer access warrants, which enable ASIO to use a third party’s computer to access data;
- aligning ASIO’s powers with those available under the *Surveillance Devices Act 2004* (Cth), to ensure a consistent framework that takes account of developments in surveillance technology;

⁹ See, Transcript of Proceedings, *Review into Terrorism Questioning and Detention Powers Public Hearing*, 19 August 2016, 26.

¹⁰ In September 2013, an instrument was executed by the Board of the Australian Crime Commission establishing a particular special operation with interests in countering terrorism: see, [5.11].

¹¹ See, PJCIS, Parliament of Australia, *Inquiry into the National Security Legislation Amendment Bill (No 1) 2014* (2014).

¹² See, PJCIS, Parliament of Australia, *Report of the Inquiry into Potential Reforms of Australia’s National Security Legislation* (2013).

¹³ Commonwealth, *Parliamentary Debates*, Senate, 16 July 2014, 65 (George Brandis, Attorney-General).

- enhancing the ability of the Australian Security Intelligence Service to collect, and share with ASIO, intelligence about Australians of security interest overseas; and
- establishing a limited protection from legal liability for authorised participants in ASIO's covert intelligence operations, subject to rigorous safeguards and appropriate oversight.

A further feature of the Bill was amendments to ASIO's Special Intelligence Operations (SIOs) to deal with disclosure by journalists of information pertaining to SIOs. An aspect of these amendments was referred to me by the then Prime Minister on 11 December 2014. I subsequently provided my report on 21 October 2015, which was tabled in Parliament on 2 February 2016.¹⁴ The Government accepted my recommendations.

- **Tranche Two:** *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill/Act 2014 (Cth)*

The Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 was introduced into the Senate on 24 September 2014 and referred to the PJCIS. The PJCIS reported on the Bill on 17 October 2014.¹⁵ The Bill was also referred to the Senate Legal and Constitutional Affairs Committee, which reported on the Bill on 17 October 2014.¹⁶ The Bill was passed by Parliament on 30 October 2014, and represented the Government's legislative response to the domestic threat posed by Australians returning to Australia from foreign conflicts overseas.

Key measures of the Bill included:

- creating new offences for advocating terrorism and for being in a 'declared area' of a foreign country where a terrorism organisation is engaging in hostile acts;
- preserving counter-terrorism powers such as control orders, preventative detention orders, QWs and QDWs, and police stop, search and seizure powers;
- broadening the criteria for listing terrorist organisations and streamlining the process for listing terrorist organisations;
- providing law enforcement agencies with additional powers such as delayed notification search warrants, and introducing measures to make evidence collected in foreign jurisdictions more readily admissible; and
- facilitating termination of welfare payments for individuals assessed to pose a serious risk to national security.

¹⁴ See, Roger Gyles, *Report on the Impact on Journalists of Section 35P of the ASIO Act* (Commonwealth of Australia, 2015).

¹⁵ See, PJCIS, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014).

¹⁶ Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014).

The Bill and subsequent Act also implemented certain recommendations made by the former INSLM,¹⁷ and by the Council of Australian Governments.¹⁸

- **Tranche Three:** *Counter-Terrorism Legislation Amendment Bill/Act (No 1) 2014 (Cth)*

The Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth) was introduced to the Senate on 29 October 2014, and referred to the PJCIS for report on 30 October 2014. The Committee reported on the Bill on 20 November 2014,¹⁹ and the Bill was passed by Parliament on 2 December 2014.

Key measures of the Bill included amending the control order regime to expand the grounds upon which an order can be sought, made, and varied, and to expand the purposes of the control order regime.

- **Tranche Four:** *Telecommunications (Interception and Access) Amendment (Data Retention) Bill/Act 2015 (Cth)*

The Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015 was introduced to the House of Representatives on 30 October 2014 and referred to the PJCIS for report on 21 November 2014. The PJCIS reported on the Bill on 27 February 2015,²⁰ and the Bill was passed by Parliament on 26 March 2015.

Key measures of the Bill included creating new obligations on telecommunications and internet service providers to retain prescribed information or documents (ie, metadata) for two years to enable national security authorities, criminal law enforcement authorities, and other enforcement agencies, to access it for their use.

¹⁷ See, Bret Walker, *Declassified Annual Report: 20th December 2012* (Commonwealth of Australia, 2012); Bret Walker, *Annual Report: 28th March 2014* (Commonwealth of Australia, 2014).

¹⁸ See, Council of Australian Governments, *Council of Australian Governments Review of Counter-Terrorism Legislation* (Commonwealth of Australia, 2013).

¹⁹ See, PJCIS, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014* (2014).

²⁰ See, PJCIS, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (2014).

3.6 At the time of writing this report, a fifth and sixth tranche of legislation was under consideration by Parliament, being the Counter-Terrorism Legislation Amendment Bill (No 1) 2016 (Cth),²¹ and the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth). Key measures of the Counter-Terrorism Legislation Amendment Bill (No 1) 2016 (Cth) include:

- lowering the minimum age at which a control order may be imposed on an individual from 16 to 14 years;
- introducing new powers to allow police to use entry, search and seizure, telecommunications interception, and surveillance device powers, in relation to those subject to control orders; and
- allowing the court to consider information not disclosed to the subject of a control order during control order proceedings for security purposes.

3.7 The key measure of the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth) is to establish a scheme under which a Supreme Court of a state or territory can extend the custody of a convicted individual at the end of their sentence, if the Court is satisfied to a high degree of probability that the individual poses an unacceptable risk of committing a serious terrorism offence (as defined by pt 5.3 of the Commonwealth *Criminal Code*).

²¹ This Bill was previously known as the Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (Cth) prior to the dissolution of Parliament in April 2016.

4 Explanation of Statutory Provisions

- 4.1 It is useful to begin this section with a plain English explanation of the key statutory provisions that were the subject of this review.

Crimes Act Pt IC

- 4.2 Part IC provides for the detention and questioning of individuals arrested on suspicion of having committed an offence against a law of the Commonwealth, and imposes obligations on officials regarding the treatment of those individuals in detention. It does not establish any independent arrest power.
- 4.3 While pt IC does not cover the field, allowing state and territory laws to remain in force, it does provide that any Commonwealth law in force before the enactment of the part, as well as any rule of common law or state or territory law that is inconsistent with the part, has no effect.²²
- 4.4 Part IC does not deal exclusively with terrorism offences, or counter-terrorism measures. Rather, div 2 of pt IC establishes two parallel regimes of powers and responsibilities for officials who are detaining individuals for the purpose of investigating suspected Commonwealth offences. Subdivision A of div 2 applies to non-terrorism offences, and subdiv B applies to terrorism offences.²³ Division 3 of pt IC then imposes obligations on officials that are common to investigations of suspected terrorism and non-terrorism offences.
- 4.5 Subdivisions A and B of pt IC largely mirror each other in their structure and content, with subdiv B containing several additional provisions and powers to assist investigators conduct investigations in the circumstances of counter-terrorism operations.
- 4.6 Under both subdivisions, investigating officials may detain an individual who is under arrest for the purposes of investigating whether that individual has committed a Commonwealth offence.²⁴ An individual arrested for either a terrorism or non-terrorism offence may generally be held for four hours without charge to enable the investigating officials to question the individual about the suspected offence.²⁵ This time of detention is referred to as the 'investigation period'.

²² Crimes Act s 23A.

²³ 'Terrorism offence' is defined in s 3 of the Crimes Act.

²⁴ Crimes Act ss 23C(2), 23DB(2).

²⁵ Crimes Act s 23C(4). Where the individual appears to be under the age of 18, or an Aboriginal person or a Torres Strait Islander, the time they may generally be detained is reduced to two hours.

- 4.7 Before or at the end of the investigation period, an investigating official may apply to a magistrate for an extension to the investigation period, therefore extending the time the individual may be detained.²⁶ For non-terrorism offences, where the offence is a serious Commonwealth offence,²⁷ a magistrate may extend the investigation period once by up to eight hours,²⁸ if satisfied of certain matters.²⁹ Through this mechanism, a total investigation period may therefore be up to 12 hours for non-terrorism offences. For terrorism offences, if satisfied of certain matters,³⁰ a magistrate may extend the investigation period any number of times, provided the combined total of those extensions does not exceed 20 hours.³¹ Through this mechanism, a total investigation period may therefore be up to 24 hours for terrorism offences.³²
- 4.8 Under pt IC, some periods of time when an individual is detained are disregarded when calculating the investigation period. These periods are colloquially referred to as 'dead time'.³³
- 4.9 Where an individual is under arrest for a terrorism offence (but not a non-terrorism offence), a magistrate may declare certain other periods of time to be disregarded as 'specified time' (in addition to those automatically declared by operation of pt IC). This may happen when an investigating official applies, the magistrate is satisfied of certain matters, and the detention of the person during that time is necessary to preserve or obtain evidence, or complete the investigation into a terrorism offence.³⁴ A magistrate may make any number of these declarations. However, the combined total of time declared to be specified time under this mechanism cannot exceed seven days.³⁵
- 4.10 When these various mechanisms are taken together, a person who is under arrest for a terrorism offence can be detained without charge for an indeterminate amount of time (ie, 24 hours of investigation period time, plus seven days of specified time,³⁶ plus the undefined amount of time permitted by the other dead time provisions³⁷). While there is no exact time limit for those arrested for serious non-terrorism offences, the absence of a power for a magistrate to declare additional periods of specified time necessarily implies that, under pt IC, an individual arrested for terrorism offences can generally be held for substantially longer periods of time without charge than individuals arrested for non-terrorism offences.

²⁶ Crimes Act ss 23D(1), 23DE(1).

²⁷ A 'serious Commonwealth offence' is a Commonwealth offence punishable by imprisonment for a period of more than 12 months: Crimes Act s 23B(1) (definition of 'serious Commonwealth offence').

²⁸ Crimes Act s 23DA(7).

²⁹ See, Crimes Act ss 23DA(2).

³⁰ See, Crimes Act s 23DF(2).

³¹ Crimes Act s 23DF(7).

³² Or 22 hours if the individual appears to be under the age of 18, or an Aboriginal person or a Torres Strait Islander.

³³ See, Crimes Act ss 23C(7), 23DB(9).

³⁴ Crimes Act s 23DD.

³⁵ Crimes Act s 23DB(11).

³⁶ Unless the person appears to be under the age of 18, is an Aboriginal person or a Torres Strait Islander, in which case the total time of their detention may encompass 22 hours of investigation period time, and seven days of specified time.

³⁷ See, Crimes Act s 23DB(9)(a)–(l).

- 4.11 Appendix 2 contains a diagram of the pt IC process for those arrested for non-terrorism offences, and a diagram of the pt IC process for those arrested for terrorism offences.

ACC Act Pt II Div 2

- 4.12 The ACIC is empowered under pt II div 2 of the ACC Act to undertake coercive questioning in the form of ‘examinations’. Examinations may take place in the context of an ACIC ‘special operation’, or ‘special investigation’, which are operations or investigations specifically identified and approved by the ACIC Board in a written instrument.³⁸ Examinations of individuals (examinees) in relation to a particular matter may take place either before the examinee has been charged with an offence relating to that matter (if they are to be charged at all), or after the examinee has been charged with an offence relating to that matter and awaiting trial.³⁹ An examinee does not have to be implicated in any wrongdoing.
- 4.13 For an examination to commence, an examiner⁴⁰ will summon the examinee to appear before the examiner to either give evidence, or produce any documents or other things referred to in the summons.⁴¹ In practice, this is usually instigated by a request from the ACIC to an examiner. The examiner then determines if the summons is reasonable in the circumstances. In the case of a prospective examination after the examinee has been charged with an offence, the examiner determines if it is reasonably necessary for the purposes of the special operation or special investigation.⁴² Appendix 3 contains a diagram summarising the process for the commencement of examinations.
- 4.14 If an examinee fails to attend an examination, or otherwise comply with the requirements of a summons, he or she commits an offence.⁴³ An examinee also commits an offence if he or she refuses or fails to answer a question the examiner requires them to answer.⁴⁴ Accordingly, even if answering a question would incriminate an examinee, or otherwise be contrary to their interests, the examinee must answer the question or otherwise commit an offence.

³⁸ See, ACC Act s 7C(1)(d).

³⁹ ACC Act s 24A(2).

⁴⁰ Examiners are statutory appointees appointed by the Governor–General pursuant to s 46B of the ACC Act, following the Attorney–General’s consultation with the Inter-Governmental Committee on the appointment. A person is eligible to be appointed as an examiner if they are enrolled as a legal practitioner, and have been so for at least five years. Examiners may be appointed on a full-time or part-time basis, and in the past have included barristers and judges of various jurisdictions.

⁴¹ ACC Act s 28(1).

⁴² ACC Act s 28(1).

⁴³ ACC Act s 30(1), (6).

⁴⁴ ACC Act s 30(2)(b), (6).

- 4.15 An examiner may generally regulate the conduct of an examination as the examiner thinks fit.⁴⁵ Past examinations have generally taken place with an examiner taking a passive, monitoring role, with legal counsel for the ACIC asking questions of the examinee, similar to the manner in which courts and royal commissions proceed. Examinations must, however, be held in private, and the examiner may give directions about who may be present at any part of the examination.⁴⁶
- 4.16 An examiner may direct that information obtained from the examination (eg, answers to questions provided by the examinee) not be used or disclosed, or may only be used by, or disclosed to, specified persons in specified ways or under specified conditions.⁴⁷ An examiner must give such a direction if a failure to do so would either prejudice a person's safety, or be reasonably expected to prejudice the examinee's fair trial, if the examinee has been charged with an offence related to the examination or if such a charge is imminent.⁴⁸
- 4.17 As previously noted, an examinee must answer questions or produce documents or things during the examination, even if this would tend to incriminate them. In such cases, a 'use immunity' is available to the examinee if, before answering the question, the examinee claims that answering the question or producing the document or thing might tend to incriminate them and make them liable to penalty. In such cases, the answer, document or thing will not be admissible in evidence against the examinee in a criminal proceeding, a proceeding for the imposition of a penalty, or a confiscation proceeding.⁴⁹
- 4.18 This use immunity does not strictly prohibit the use of either evidence directly obtained from an examination (examination material) or derivative material (ie, evidence obtained using knowledge gained from the examinee's answers given during the course of an examination). However, the ACC Act has a complex process for determining whether such material may be disclosed to prosecutors of the examinee.

⁴⁵ ACC Act s 25A(1).

⁴⁶ ACC Act s 25A(3).

⁴⁷ ACC Act s 25A(9). This direction can, however, in effect be overruled by a court where a person has been charged with an offence, and the court considers that it may be desirable in the interests of justice that particular material from the examination be made available to the person or a legal practitioner representing the person: see, ACC Act s 25A(12).

⁴⁸ ACC Act s 25(9A).

⁴⁹ ACC Act s 30(4), (5).

- 4.19 If a 'specified entity'⁵⁰ seeks to disclose to prosecutors examination material or derivative material before an examinee has been charged with an offence, it may do so subject to any restrictions imposed by the examiner.⁵¹ If a specified entity seeks to disclose to prosecutors examination material or derivative material after an examinee has been charged with an offence to which that material relates, it requires the authorisation of a court.⁵² In determining whether to grant such an authorisation, a court must be satisfied that the disclosure is required in the interests of justice.⁵³
- 4.20 The ACIC may also disclose material to prosecutors for the purposes of charges being brought in relation to the examination (eg, if the examinee fails to comply with the requirements of a summons).⁵⁴ It may also disclose material to a proceeds of crime authority either before or after the confiscation of items to which the material relates.⁵⁵ Neither of these disclosures requires a court authorisation.
- 4.21 Appendix 4 contains a diagram summarising the various uses of examination and derivative material.
- 4.22 During the course of an examination, an examinee may have a lawyer present.⁵⁶ However, the ability of the examinee's lawyer to examine or cross-examine any other witness participating in the examination (as is the case for counsel assisting the examiner, and any other person authorised by the examiner to appear at the examination) is subject to the examiner's discretion.⁵⁷
- 4.23 A summons issued by an examiner may contain a notation prohibiting disclosure of information about the summons or its existence.⁵⁸ If a person makes a disclosure contrary to that prohibition, they commit an offence.⁵⁹ However, an individual may make a disclosure within the scope of the prohibition in certain circumstances, including to obtain legal advice or representation in relation to the summons.⁶⁰ A person who is not the subject of a summons, but otherwise involved in an examination, may also obtain legal advice and representation,⁶¹ and therefore make some disclosures in relation to an examination.

⁵⁰ 'Specified entities' are: an examiner; the Chief Executive Officer or a member of staff of the ACIC; a person or body investigating whether the examinee committed an offence against a law of the Commonwealth, or of a state or territory; a prosecutor of the examinee; a prosecuting authority; a proceeds of crime authority; or any other person or body lawfully in possession of examination material: ACC Act s 25B(1), (3).

⁵¹ ACC Act ss 25C(1)(a), 25D(1)(a), (b).

⁵² ACC Act ss 25C(1)(b), 25D(1)(c).

⁵³ ACC Act s 25E(1).

⁵⁴ ACC Act ss 25F(2), 30(1)–(3), 33(1), 35(1).

⁵⁵ ACC Act s 25H(1).

⁵⁶ ACC Act s 25A(2)(a).

⁵⁷ ACC Act s 25A(6).

⁵⁸ ACC Act s 29A.

⁵⁹ ACC Act s 29B(1).

⁶⁰ ACC Act s 29B(2).

⁶¹ ACC Act s 25A(2)(a).

ASIO Act Pt III Div 3

- 4.24 ASIO also has the ability to coercively question individuals through the issue of either a QW, or a QDW. A person who is the subject of such a warrant must provide information sought by ASIO pursuant to the warrant, or otherwise they will commit an offence.⁶²
- 4.25 The main difference between a QW and a QDW is that a person issued with a QDW is taken into custody, while a person issued with a QW is not.
- 4.26 To obtain either a QW or a QDW, the Director-General of ASIO must seek the consent of the Attorney-General to make an application to an issuing authority for the issuance of such a warrant.⁶³ To grant this consent, the Attorney-General must be 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;⁶⁴
 - b. having regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in the circumstances for the warrant to be issued; and
 - c. that there is in force a written statement of procedures to be followed in the exercise of authority under QWs and QDWs.⁶⁵
- 4.27 Before consenting to a QDW, the Attorney-General must also be satisfied that there are reasonable grounds for believing that if the individual is not immediately taken into custody and detained, the individual may:
- a. alert a person involved in a terrorism offence that the offence is being investigated;
 - b. not appear before the prescribed authority; or
 - c. destroy, damage or alter a record or thing the individual may be requested to produce in accordance with the warrant.⁶⁶

⁶² ASIO Act s 34L(2).

⁶³ ASIO Act s 34D(6), 34F(7).

⁶⁴ 'Terrorism offence' for the purposes of the ASIO Act is defined in s 4 of the ASIO Act, and is distinct from the definition of 'terrorism offence' contained in the Crimes Act.

⁶⁵ ASIO Act s 34D(4).

⁶⁶ ASIO Act s 34F(4).

- 4.28 If the Attorney-General consents to the Director-General's request, the Director-General may then apply to an issuing authority for the issuance of a QW or QDW.⁶⁷ An issuing authority may issue the warrant if it is satisfied there are reasonable grounds for believing the warrant will substantially assist the collection of intelligence important in relation to a terrorism offence.⁶⁸ Additionally, if a QDW is being sought, the issuing authority must take account of any previous detention under a warrant experienced by the individual, and be satisfied that:
- a. the issuance of the warrant is justified by information which is additional to, or materially different from, that known to the Director-General at the time the Director-General sought the Attorney-General's consent for the previous warrant; and
 - b. the individual is not being detained in connection with one of the earlier warrants.⁶⁹
- 4.29 If a QW is issued by the issuing authority, then the individual must appear before the prescribed authority for questioning immediately after they are notified of the issue of the warrant, or at a time specified in the warrant.⁷⁰ A 'prescribed authority' is a person appointed by the Attorney-General who:
- a. has served as a judge in one or more superior courts for a period of five years and no longer holds a commission as a judge; or
 - b. if the Attorney-General is of the view that there is an insufficient number of persons referred to in para a, is currently serving as a judge in a state or territory Supreme Court; or
 - c. if the Attorney-General is of the view that there is an insufficient number of persons referred to in paras a and b, currently holds an appointment to the Administrative Appeals Tribunal as President or Deputy President, is enrolled as a legal practitioner of a federal court or the Supreme Court of a state or territory, and has been so enrolled for at least five years.⁷¹
- 4.30 If a QDW is issued, the individual is taken into custody by a police officer to be brought before the prescribed authority for questioning under the warrant.⁷² The person is detained until either the questioning ceases, or 168 hours passes from the time the person is brought before the prescribed authority, whichever is the earliest.

⁶⁷ ASIO Act ss 34E(1), 34G(1). An issuing authority is a judge who has been appointed to that role by the Attorney-General: ASIO Act s 34AB. When performing the functions of an issuing authority, the authority is acting in an executive, rather than a judicial, capacity.

⁶⁸ ASIO Act s 34E(1)(b).

⁶⁹ ASIO Act s 34G(2).

⁷⁰ ASIO Act s 34E(2).

⁷¹ ASIO Act s 34B.

⁷² ASIO Act ss 34E(2), 34G(4).

- 4.31 QWs must specify that the individual is permitted to contact a single lawyer of their choice before appearing for questioning under the warrant, and at any time once questioning starts.⁷³ QDWs may identify someone the individual is permitted to contact, and the times they may contact that person, by reason of that person being a lawyer of the individual's choice, or having a particular legal or familial relationship with the individual.⁷⁴ In the case of either a QW or a QDW, the prescribed authority may, however, prevent the individual from contacting a particular lawyer of their choice if satisfied, on the basis of circumstances relating to that lawyer, that to do so would mean:
- a. a person involved in a terrorism offence may be alerted that the offence is being investigated; or
 - b. a record or thing that the person may be requested to produce in accordance with the warrant may be destroyed, damaged or altered.

In such a case, the individual may be permitted to choose another lawyer to contact.⁷⁵

- 4.32 An individual's contact with their lawyer must be conducted in a way that can be monitored by a person exercising authority under the QW or QDW (eg, an ASIO officer), although legal professional privilege remains.⁷⁶ However, reasonable opportunities must be provided for the lawyer to provide advice to the individual. While the lawyer may advise the individual, the lawyer cannot intervene in questioning of the individual or address the prescribed authority, except to request clarification of an ambiguous question. If the lawyer fails to comply with these restrictions, and is considered by the prescribed authority to be unduly disruptive of the questioning, the lawyer may be removed from where the questioning is taking place. If a lawyer is removed, the prescribed authority must permit the individual to contact another lawyer (subject to the restrictions previously discussed).⁷⁷

⁷³ ASIO Act s 34E(3).

⁷⁴ ASIO Act s 34G(5).

⁷⁵ ASIO Act s 34ZO.

⁷⁶ ASIO Act s 34ZV.

⁷⁷ ASIO Act s 34ZQ.

- 4.33 At the start of questioning under a QW or QDW, the prescribed authority must explain the warrant, including what is authorised by the warrant, and the rights of complaint available to the individual.⁷⁸ During the course of questioning under a QW or QDW, the prescribed authority can make a number of directions,⁷⁹ including directions to detain the individual, or to defer questioning under the warrant.⁸⁰ Also during questioning under a QW or QDW, the individual is not permitted to contact, and may be prevented from contacting, anyone at any time other than those persons specified in the warrant, and other parties specified in the ASIO Act.⁸¹ The Director-General must ensure questioning under a QW or QDW is video recorded.⁸²
- 4.34 The Inspector-General of Intelligence and Security (**IGIS**) must be provided with a copy of any requests made for a QW or QDW, any warrant if issued, as well as any recordings made of questioning, and details of actions undertaken pursuant to a warrant.⁸³ The IGIS may also be present when an individual is taken into custody under a QDW, and during the course of questioning under either a QW or QDW.⁸⁴ Questioning and processes under a QW or QDW must be suspended if the IGIS raises a concern about impropriety or illegality in connection with the exercise, or purported exercise, of powers under a QW or QDW.⁸⁵
- 4.35 It is an offence punishable by up to five years imprisonment for a person (including the individual questioned) to disclose information (where disclosure is not permitted by the warrant) during the time the warrant is in force which indicates:
- a. that a QW or QDW has been issued;
 - b. a fact relating to the content of a QW or QDW; or
 - c. the detention of a person in connection with a QW or QDW,
- where that information is either operational information, or information obtained as a direct or indirect result of the issuance of the warrant, or of doing anything authorised by the warrant.⁸⁶
- 4.36 It is also an offence for a person to release operational information that they have as a direct or indirect result of the issuance of a warrant, or as a result of doing anything authorised by the warrant, within two years of the expiry of the warrant, if that disclosure is not permitted.⁸⁷
- 4.37 Appendix 5 contains a diagram summarising the process for ASIO to obtain QWs and QDWs.

⁷⁸ ASIO Act s 34J.

⁷⁹ Directions made by the prescribed authority must, however, be consistent with the QW or QDW, unless the direction has been approved by the Attorney-General, or the direction is necessary to address a concern raised by the Inspector-General of Intelligence and Security: ASIO Act s 34K(2).

⁸⁰ ASIO Act s 34K.

⁸¹ ASIO Act s 34K(10), (11).

⁸² ASIO Act s 34ZA.

⁸³ ASIO Act s 34ZI.

⁸⁴ ASIO Act s 34P.

⁸⁵ ASIO Act s 34Q.

⁸⁶ ASIO Act s 34ZS(1).

⁸⁷ ASIO Act s 34ZS(2).

5 History of Legislation Under Review

Crimes Act Pt IC

- 5.1 Part IC was introduced into the Crimes Act in 1991 by the *Crimes (Investigation of Commonwealth Offences) Amendment Act 1991* (Cth), to address uncertainty introduced by the High Court's decision in *Williams v the Queen* (1986) 161 CLR 278. In that case, the Court held that despite any negative impact on an investigation process, law enforcement agencies lacked the power under the common law to detain and question suspects, or continue other investigations into a suspect's alleged involvement in criminal activity, prior to bringing an arrested person before a judicial officer. Part IC was introduced to address this lack of power, enabling police to detain and question suspects prior to bringing them before a judicial officer, to facilitate the investigation process.⁸⁸ Detention for terrorism offences was dealt with in the same way as detention for all Commonwealth offences, under div 2 of the Crimes Act (as it then was, namely under the then s 23C). While the investigation period (and thus detention) could be extended at this time, extensions were limited to eight hours for all offences.
- 5.2 In 2004, the *Anti-Terrorism Act 2004* (Cth) was introduced. Among other things, this Act inserted ss 23CA, 23CB and 23DA into the Crimes Act. These sections introduced the treatment of terrorism offences as distinct from ordinary Commonwealth offences, enabling investigation periods to be extended for up to 20 hours for terrorism offences, as opposed to the eight hours possible for non-terrorism offences. They also broadened the circumstances for time in detention that could be disregarded as dead or specified time, and therefore not count towards the investigation period (at this point, without any judicial oversight).
- 5.3 Part of the rationale for enabling longer detention for terrorism offences than other offences was a view that if an attack occurred in Australia similar to those overseas, law enforcement agencies would not have enough time to interrogate suspects before having to charge them. However, there was a significant chance authorities would not have enough evidence to charge the suspect without time to interrogate, and would have to release them.⁸⁹ The extended detention periods for terrorism offences were therefore introduced to 'adjust Australia's investigatory procedures to meet the new terrorist environment', acknowledging that the investigation of terrorism offences is often more complex than the investigation of ordinary Commonwealth offences, necessitating greater periods of pre-charge detention.⁹⁰

⁸⁸ Explanatory Memorandum, *Anti-Terrorism Bill 2004*, 1–2.

⁸⁹ Morag Donaldson, *Anti-Terrorism Bill 2004*, No 120 of 2003–04, 19 April 2004.

⁹⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 31 March 2004, 27658 (Philip Ruddock, Attorney-General).

- 5.4 The Senate Legal and Constitutional Legislation Committee conducted an inquiry into the provisions of the Anti-Terrorism Bill 2004, where it heard a range of submissions regarding whether the additional measures proposed by the Bill were justified. In providing its comments, the Committee notably raised concerns about the capacity for the dead time provisions to be used to substantially increase the time a person was held in pre-charge detention prior to being brought before a judicial officer. The Committee therefore recommended that the expansions to the specified time provisions be subject to judicial oversight.⁹¹
- 5.5 When passed, the *Anti-Terrorism Act (No 1) 2004* (Cth) introduced a requirement that extended periods of specified time be judicially authorised. However, it did not impose any limits on the amounts of specified time that could be authorised (at the time, by a magistrate, bail justice, or justice of the peace). In addition, the Act did not contain any significant procedural requirements for obtaining such authorisations. These omissions substantially contributed to the controversial 12 day detention of Dr Mohamed Haneef without charge in 2007, and the subsequent review of Dr Haneef's arrest and detention (and in the process, pt IC) by the Hon M J Clarke QC.
- 5.6 In 2008, Mr Clarke delivered a report to the then Attorney-General which, among other things, considered shortcomings in pt IC of the Crimes Act and made recommendations for its improvement.⁹² Mr Clarke gave significant weight to the lack of procedural structure and guidance (and thus safeguards) within pt IC to facilitate the making and adjudication of applications for extensions to investigation periods, and the provision of specified time.
- 5.7 In response to these findings, in 2010 div 2 of pt IC was amended by the *National Security Legislation Amendment Act 2010* (Cth). This amendment restructured the division to introduce subdvs A and B. This separated provisions for investigations into terrorism offences from investigations into other Commonwealth offences, and introduced more structural and procedural guidance, including in relation to extensions to investigation periods and the provision of specified time pursuant to s 23DB(9)(m). Part IC obtained the form it takes today from this Act.
- 5.8 On 15 December 2015, the Council of Australian Governments (**COAG**) resolved to prioritise work to implement nationally consistent legislation on pre-charge detention following the recommendations of the Australia–New Zealand Counter-Terrorism Committee. On 1 April 2016, a communiqué issued by COAG stated:

COAG agreed, in principle, to the [New South Wales] model as the basis for a strengthened nationally consistent pre-charge detention scheme for terrorism suspects, with [the Australian Capital Territory] reserving its position. [New South Wales] will introduce the legislation and consult with other jurisdictions.⁹³

⁹¹ Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill 2004* (2004), ix, 21.

⁹² See, M J Clarke, *Report of the Inquiry into the Case of Dr Mohamed Haneef* (Commonwealth of Australia, 2008).

⁹³ See, Attorney-General, Sen the Hon George Brandis QC 'COAG to strengthen national security legislation' (Media Release, 1 April 2016)

- 5.9 The New South Wales *Terrorism (Police Powers) Act 2002* (NSW) was then amended by the *Terrorism (Police Powers) Amendment (Investigation Detention) Bill 2016* (NSW). The scheme differs from pt IC. Other states are expected to follow.⁹⁴ The Commonwealth has not announced an intention to follow suit.

ACC Act Pt II Div 2

- 5.10 The ACIC (through its various predecessor forms) has had the statutory power to compulsorily question individuals since 1984.⁹⁵ This power has never been linked by legislation to the investigation of, or response to, terrorism. Rather, it has always been for the purposes of the organisation's operations specifically authorised by the organisation's governing Board, currently referred to as 'special operations' and 'special investigations'.
- 5.11 In September 2013, a special operation was authorised by the Board of the Australian Crime Commission (as it then was). The special operation enabled the agency to use its powers in relation to a number of terrorism offences and threats, including terrorism offences under the Commonwealth *Criminal Code*, and the financing of terrorism.
- 5.12 In 2015, the ACC Act was amended to explicitly empower examiners to coercively question individuals in relation to matters that either are or may be relevant to a current or imminent charge against the individual.⁹⁶
- 5.13 These amendments followed two High Court cases exploring the limits of the coercive questioning powers. In the first case, the Court found that the ACC Act (as it was then drafted) did not permit the examination of an individual who was subject to pending criminal charges on matters related to those charges.⁹⁷ To enable such an activity, which altered the conventional criminal justice process, there needed to be clear and express legislative drafting.⁹⁸ Members of the Court expressed a similar view in the second case (albeit in relation to the New South Wales Crime Commission).⁹⁹ The amendments to the ACC Act were introduced to insert that clear and express drafting.¹⁰⁰ The extent to which they will withstand other grounds of scrutiny, such as constitutionality, remains to be seen.

⁹⁴ See eg, *Counter-Terrorism and Other Legislation Amendment Bill 2016* (Qld).

⁹⁵ See, *National Crime Authority Act 1984* (Cth) ss 28, 29, 30.

⁹⁶ See, *Law Enforcement Legislation Amendment (Powers) Act 2015* (Cth) ss 12, 13, 16.

⁹⁷ *X7 v Australian Crime Commission* (2013) 248 CLR 92.

⁹⁸ *Ibid.*

⁹⁹ See, *Lee v NSW Crime Commission* (2013) 251 CLR 196.

¹⁰⁰ Explanatory Memorandum, *Law Enforcement Legislation Amendment (Powers) Bill 2015*, 2.

ASIO Act Pt III Div 3

- 5.14 ASIO's coercive questioning powers constituted one of the first legislative measures that forms part of the Australian counter-terrorism landscape today. In particular, it predates all other major counter-terrorism regimes presently in force, including pt IC of the Crimes Act, and the preventative detention and control order regimes.
- 5.15 The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth) was introduced in March 2002 to respond to the new threat of terrorism raised by the 2001 attacks in the United States, on the basis that to ensure any perpetrators of serious terrorism offences 'are discovered and prosecuted, preferably before they perpetrate their crimes, it is necessary to enhance the powers of ASIO to investigate terrorism offences'.¹⁰¹ The compulsory questioning element of the regime was included to safeguard against the risk that ASIO's efforts could be thwarted by an unco-operative suspect or sympathiser.¹⁰² However, the measures were said to be intended as a last resort.¹⁰³
- 5.16 The Bill initially proposed that ASIO could question individuals without legal representation, and without a right to silence. It also permitted *incommunicado* detention of the individual without charge for up to 48 hours and, by allowing for the repeated issuance of such warrants, the possibility of indefinite detention.
- 5.17 These elements led significant controversy about the Bill when it went to the Parliamentary Joint Committee on ASIO, ASIS and DSD (PJCAAD) for review. In June 2002, the Committee made 15 recommendations, including that: the issuance of warrants be by judicial officer; detention not exceed seven days; provision be made for legal representation for individuals who are the subject of questioning; and information relating to the issuance of warrants be provided to the IGIS.¹⁰⁴ The Government accepted 10 of the 15 recommendations, while the remaining five were the subject of ongoing debate. The points of debate included: the ability to detain non-suspects; the ability for warrants to be issued to individuals as young as 14; restrictions on the ability of the individual to communicate with others, including a lawyer, while the subject of a warrant; and the introduction of a sunset clause.
- 5.18 Amidst this ongoing debate, the Bill was referred to the Senate Legal and Constitutional References Committee for further consideration. In a report in December 2002, that Committee reinforced the PJCAAD's earlier recommendations, and built on them. It recommended, among other things, that prescribed and issuing authorities be introduced substantially in the form they currently take, further safeguards against prolonged detention be introduced, and further provisions be made for the individual's access to legal representation.¹⁰⁵

¹⁰¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1930 (Darryl Williams, Attorney-General).

¹⁰² *Ibid* 1930–31.

¹⁰³ *Ibid*.

¹⁰⁴ See, PJCAAD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation legislation Amendment (Terrorism) Bill 2002* (2002).

¹⁰⁵ See, Senate Legal and Constitutional References Committee, Parliament of Australia, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and Related Matters* (2002).

- 5.19 At the end of 2002, the Bill was laid aside and reintroduced in 2003 as the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2003 (No 2) (Cth). While substantially the same as the previous Bill, a number of concessions were made on the Bill's provisions, which saw it eventually passed by Parliament in June 2003.¹⁰⁶ These concessions included a requirement that individuals be at least 16 years of age to be the subject of a warrant, provisions enabling limited access to lawyers, and the introduction of a three-year sunset clause.
- 5.20 In the years following, there were several technical amendments to the regime, and two substantial amendments. In 2003, the *ASIO Legislation Amendment Act 2003* (Cth) was passed, which among other things, made it an offence for an individual to disclose to another that they were the subject of a warrant. In 2006, in response to a further report by the PJCAAD in 2005,¹⁰⁷ the *ASIO Legislation Amendment Act 2006* (Cth) was passed. This provided an explicit right for individuals to access a lawyer, and clarified the role of the individual's lawyer. It also extended the sunset clause until 2016. In 2014, the sunset clause was again extended, this time until 7 September 2018.¹⁰⁸

¹⁰⁶ See, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth).

¹⁰⁷ See, PJCAAD, Parliament of Australia, *Review of the Operation, Effectiveness and Implications of Division 2 of Part III in the Australian Security Intelligence Organisation Act 1979* (2005).

¹⁰⁸ *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) s 33.

6 Agencies' Use of Powers

Crimes Act Pt IC

- 6.1 The AFP estimates that as at 18 July 2016, 40 individuals have been detained and charged pursuant to subdiv B of pt IC of the Crimes Act. Of those 40 individuals, 13 had their detention extended by magistrates, with extensions to investigation periods granted ranging from four to 20 hours. In most cases, however, only a portion of the additional investigation period ended up being used by the AFP.
- 6.2 Five of those 13 cases were also subject to orders for specified time. A total of 48 hours of specified time was ordered for four of those five cases, while seven days of specified time was ordered for the fifth case.
- 6.3 Total detention of the 13 cases (including the standard investigation periods and dead time provided for by pt IC, and the additional investigation periods and specified times provided by magistrates' orders) ranged from approximately 11 hours, to approximately 201 hours.

ACC Act Pt II Div 2

- 6.4 As at 26 June 2016, the ACIC had undertaken 77 examinations in relation to counter-terrorism operations and investigations, pursuant to the agency's special operation that covers counter-terrorism activities.¹⁰⁹ The breakdown according to year for these examinations is as follows:

Year	No of Examinations
2012	0
2013	6
2014	28
2015	22
2016 (as at 26 June 2016)	21

- 6.5 At the time of writing, the ACIC had provided a number of transcripts from examinations to ASIO pursuant to s 59AA of the ACC Act.¹¹⁰

¹⁰⁹ The ACIC's power to conduct investigations is not limited to circumstances involving terrorism or counter-terrorism. The ACIC has therefore conducted numerous other examinations in relation to other special investigations and special operations related to its role and responsibilities.

¹¹⁰ This information was obtained from classified correspondence with the ACIC and ASIO.

ASIO Act Pt III Div 3

6.6 At the time of writing, ASIO has obtained and used 16 QWs to coercively question 15 people. A breakdown of this use per year is as follows:

Year ending 30 June	QWs Issued	Persons Questioned
2004	3	3
2005	11	10
2006	1	1
2007	0	0
2008	0	0
2009	0	0
2010	1	1
2011	0	0
2012	0	0
2013	0	0
2014	0	0
2015	0	0
2016	0	0

6.7 ASIO has never obtained or used a QDW.

7 Review of Crimes Act Pt IC

Sufficiency of the Initial Investigation Period

- 7.1 The AFP has submitted that fundamentally, pt IC is an effective legislative tool, which is essential to the performance of its function of investigating terrorism. In the AFP's view, the safeguards within the regime have generally been well considered, and generally balance the interests of the state in investigating terrorism offences, against the rights of the individual.¹¹¹
- 7.2 The AFP does, however, express the view that the initial investigation period has become outdated with the proliferation of technology and evidence sources since pt IC's enactment. In the AFP's view, an initial investigation period of four hours is barely enough time to consider all relevant evidence and conduct an investigation into a low-level street offence such as a store robbery, let alone to consider the many additional components that form part of the investigation of a terrorism offence (eg, searches of multiple computers, mobile phones, vehicles, properties).¹¹² The AFP further notes the unique nature of terrorism offence investigations. To intervene before a terrorist act occurs, the AFP must often arrest individuals on the basis of a reasonable suspicion (rather than the normal, higher threshold of a reasonable belief), and then subsequently charge the individual (if appropriate) on the basis of a reasonable belief. The AFP must therefore use the investigation period to accumulate the additional evidence necessary to progress from a reasonable suspicion to a reasonable belief for charges to be laid. Accordingly, arrest in terrorism cases often represents the start rather than culmination of an investigation.¹¹³
- 7.3 The AFP reports that the inadequacy of the initial four hour period generally forces it to apply for extensions to investigation periods as a matter of course when commencing terrorism investigations. This requirement, the AFP submits, not only impedes and delays the completion of the investigation but, in some cases, can also unnecessarily prolong the detention of the individual under investigation, because the individual is held in detention while extensions to the investigation period are sought and this time is disregarded as dead time.¹¹⁴
- 7.4 In this regard, the AFP recommends that the initial investigation period for terrorism offences should be raised from four hours to at least eight hours. In making this submission, the AFP does not recommend the total possible length of an investigation period (ie, 24 hours) should be extended.¹¹⁵

¹¹¹ AFP, Submission to the INSLM, *Review into Terrorism Questioning and Detention Powers*, 2–4.

¹¹² *Ibid* 6–10.

¹¹³ *Ibid* 9.

¹¹⁴ *Ibid* 9–10.

¹¹⁵ *Ibid* 10.

- 7.5 The Law Council of Australia, supported by the Councils for Civil Liberties,¹¹⁶ expressed a general concern at the prospect of extending periods of executive detention without a trial or judicial hearing. These submissions were made on the basis of an absence of publicly available evidence demonstrating deficiencies in the current four hour time limit.¹¹⁷ Both the Law Council of Australia and the Councils for Civil Liberties further suggested that there was 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'.¹¹⁸
- 7.6 The AFP's submission was received after the submissions of the Law Council of Australia and the Councils for Civil Liberties. Accordingly, they did not have the benefit of considering the matters raised by the AFP. I also received classified information from the AFP to demonstrate some of the difficulties it claims to have with the initial investigation period, which the Law Council of Australia and the Councils for Civil Liberties did not have the benefit of accessing.
- 7.7 The concerns raised by the Law Council and Councils for Civil Liberties towards extensions to the potential length of executive detention without judicial oversight have weight, especially given Australia's commitment to the rule of law,¹¹⁹ and the adherence to the *International Covenant on Civil and Political Rights*. However, the report of the distinguished committee chaired by Sir Harry Gibbs, which led to the introduction of pt IC, not only recommended an initial investigation period of six hours for offences carrying a penalty of 12 months' imprisonment or more, but also observed that an initial investigation period of between six and 12 hours would not contravene art 9(3) of the *International Covenant on Civil and Political Rights*.¹²⁰ In this context, the Committee wrote:

[T]he law should provide police officers, and other officials whose duty it is to investigate criminal offences, with a reasonable opportunity to interrogate an arrested person, and to conduct other investigations before taking the arrested person before a magistrate. The questioning of persons suspected of having committed criminal offences is not in itself an evil. The interrogation of suspects plays a very important, and indeed a necessary, part in the process of law enforcement, and although objection may well be taken to the use of compulsion to answer questions, and to unfair or oppressive methods of questioning, there is nothing objectionable from the point of view of either law or moral principle in such questioning itself.¹²¹

¹¹⁶ Councils for Civil Liberties, Submission to the INSLM, *Review into Certain Questioning and Detention Powers in Relation to Terrorism*, 15 August 2016, 12–13.

¹¹⁷ Law Council of Australia, Submission to the INSLM, *Review into Certain Questioning and Detention Powers in Relation to Terrorism*, 16 June 2016, 26.

¹¹⁸ *Ibid.*

¹¹⁹ See eg, *R v Shrestha* (1991) 173 CLR 48; *Leeth v the Commonwealth* (1992) 174 CLR 455; *Taikato v the Queen* (1996) 186 CLR 454.

¹²⁰ Harry Gibbs, R S Watson, and A C C Menzies, *Review of Commonwealth Criminal Law: Detention Before Charge* (Commonwealth of Australia, 1989) 35–36.

¹²¹ *Ibid* 30.

- 7.8 Classified records of individuals recently detained pursuant to pt IC provided by the AFP show that in the majority of cases, the AFP only used a percentage of the additional investigation period time granted through an extension. This is consistent with the AFP's reported approach of pre-emptively seeking extensions at the start of investigations. The figures provided also suggest that a four hour increase to the investigation period, as suggested by the AFP, may substantially reduce the need for this pre-emptive seeking of extensions.

Complex Drafting of Pt IC

- 7.9 As the previous INSLM noted, the provisions of pt IC are long and complex.¹²² They contain many cross-references between sections. Yet despite their complexity, the provisions are also vague in some key respects. For example, as part of an application to a magistrate for either an extension to the investigation period, or a declaration of specified time, ss 23DC and 23DE respectively require the AFP to provide 'reasons [why the investigating official believes] the investigation period should be extended', and 'reasons why [the investigating official believes] the period should be specified'. Section 23DC provides examples of the kinds of reasons the AFP may provide as part of an application for specified time, but s 23DE provides no such guidance for applications for investigation period extensions.
- 7.10 Section 23DD provides, *inter alia*, that a magistrate may make an order declaring certain time specified time if satisfied it is appropriate to do so, having regard to the application, representations of the parties, and other relevant matters, and the detention is necessary to preserve or obtain evidence to complete the investigation into the offence or another terrorism offence. Section 23DF provides, *inter alia*, that a magistrate may make an order extending the investigation period if satisfied the additional detention is necessary to preserve or obtain evidence related to the offence, or to complete the investigation into the offence or another terrorism offence.
- 7.11 None of these provisions contain a clear legislative test for exactly what the AFP must establish when applying for these orders, and exactly what the magistrate must be satisfied of when considering whether to grant the orders.
- 7.12 The AFP has noted, as part of classified correspondence, that the absence of a clear legislative test has prolonged hearings for applications for specified time and extensions to investigation periods, on occasions for many hours. As noted above, those who are the subject of the proposed order are held in detention while the application is being heard. It is therefore desirable that the process for applying for and obtaining these orders be as clear as possible, to avoid unnecessary extensions to detention. The AFP further submits that clarification of what must be established when making applications would also make the application process more efficient for them, enabling the AFP to devote more resources to the investigation taking place, and thus potentially reducing the time the individual must be detained.¹²³

¹²² Bret Walker, *Annual Report: 16 December 2011* (Commonwealth of Australia, 2011), 45.

¹²³ AFP, above n 111, 7–8.

- 7.13 The Law Council of Australia has also raised concerns with the complexity of pt IC. It submits that the inaccessibility of the provisions undermines rule of law principles, and strains the provisions' proper application by law enforcement officers and others trying to observe them.¹²⁴ The Council submits that either redrafting the part, or developing a plain-English user guide, may remedy the issue.¹²⁵
- 7.14 In my view most, if not all, of the obscurity of the regime stems from the dead time provisions. The calculation of dead time requires detailed records to be kept of the various headings, which are essentially indefinite in nature. The police are the repository of this information. The rationale for the headings vary — some are periods when questioning is impossible or unfair, others are periods when investigation is taking place. The purpose and effect of s 23DB(9) is opaque.
- 7.15 The 2016 New South Wales model is much simpler and clearer than pt IC. There is a period of investigative detention of four days; an eligible judge can extend that period by warrant for a period not exceeding seven days; and there can be successive warrants so long as the total period of detention after arrest does not exceed 14 days. There is no dead time concept or calculation.
- 7.16 The scope for arrest and detention is considerably narrower than pt IC. A terrorist act is more narrowly defined; the time period related to the terrorist act is closely confined; and the initial and subsequent periods are linked to satisfaction that the detention will substantially assist in responding to or preventing the terrorist act.
- 7.17 In effect, a longer period of initial detention is traded off against no dead time, a fixed outer limit, and a narrower operation.

Process for Remote Applications

- 7.18 Once a magistrate makes an order either declaring specified time, or extending an investigation period, the magistrate must provide a copy of the instrument containing the order to the AFP.¹²⁶ If, however, the application was made by 'telex, fax or other electronic means', the magistrate must inform the AFP of the matters included in the instrument (eg, by telephone call).¹²⁷ As soon as practicable after being informed of those matters, the AFP must complete a form of the instrument, including the particulars of the instrument as informed by the magistrate, and then forward that form to the magistrate.¹²⁸ If the form does not accord with the terms of the instrument signed by the magistrate in all material respects, then the instrument has no effect.¹²⁹

¹²⁴ Law Council of Australia, above n 117, 25.

¹²⁵ *Ibid* 27.

¹²⁶ Crimes Act ss 23DD(5)(a), 23DF(5)(a).

¹²⁷ Crimes Act ss 23DD(5)(b), 23DF(5)(b).

¹²⁸ Crimes Act s 23E(2).

¹²⁹ Crimes Act s 23E(3).

- 7.19 The AFP submits that this process is outdated, noting that telex and fax are now rarely used. The requirement to complete a form, and then send it back to the magistrate, where the application is made by electronic means, also duplicates the process. The invalidity of the instrument arising from any material error in the form, even if not central to the application or use of the form, poses a significant risk to the AFP in carrying out its functions legally.¹³⁰
- 7.20 An application could now be made remotely via email or video-link to a magistrate and, if an order is made in response to that application, a copy of the order could easily be provided back to the AFP via email. Given this technology, the benefit of completing a form of the instrument and returning it to the magistrate for verification is lost. However, the present drafting of pt IC requires the completion of the form if an application is made by ‘other electronic means’,¹³¹ which would include email.
- 7.21 The AFP has advised that at times in the past it has experienced difficulty obtaining in-person access to magistrates (not specifically in relation to terrorism offences), either due to the remote locality of the operation, or because the operation took place outside of courts’ normal sitting hours in a jurisdiction where no after-hours duty magistrate was available.¹³² This experience demonstrates the utility in being able to effectively and efficiently make applications remotely via modern technology such as email.
- 7.22 The AFP also suggests amending pt IC so it can approach other ‘issuing officers’ for orders under pt IC.¹³³ ‘Issuing officer’ is defined in s 3C of the Crimes Act to mean a magistrate, or a justice of the peace or other person employed in a court of a state or territory who is authorised to issue search warrants or warrants for arrest. Part IC was initially drafted to enable justices of the peace and bail justices to issue orders declaring specified time and granting extensions to investigation periods. However, it was amended to limit the power to magistrates in 2010.¹³⁴

¹³⁰ AFP, above n 111, 11–12.

¹³¹ Crimes Act ss 23DD(5), 23DF(5).

¹³² INSLM Private Hearing, 26 May 2016.

¹³³ AFP, above n 111, 12.

¹³⁴ *National Security Legislation Amendment Act 2010* (Cth) s 16.

Use of Pt IC Powers in Conjunction with Other Powers

- 7.23 Concerns were raised about the capacity of pt IC, when used in conjunction with other executive powers, to result in injustice and oppression. In particular, Dr Cosmos Moisisidis noted the risk to justice posed by the prospect of ASIO providing material from previous questioning under a QW or QDW to the AFP, to guide the AFP's questioning during the investigation of a terrorism offence under pt IC.¹³⁵ The consequent risk is that material from the QW or QDW process, which was previously inadmissible, could be recreated in an admissible form through the admissions of the individual during the AFP interview.¹³⁶ To mitigate this risk, Dr Moisisidis recommended that admissions obtained through such a method should also be inadmissible if the individual is prosecuted. He also recommended that when making an application pursuant to pt IC, the AFP should be required to disclose to the presiding magistrate whether the subject of the application had previously been the subject of a QW or QDW. Further, he recommended that a prohibition be introduced on the AFP carrying out any questioning with an individual who has also been subject to a QW or QDW until the individual has received legal advice. He proposed that once the individual received that legal advice, questioning by the AFP may only take place in the presence of the lawyer, and the individual cannot waive their right for the lawyer to be present during the questioning.¹³⁷
- 7.24 The potential overlap in use of pt IC with other counter-terrorism powers was also a matter of concern for the Law Council of Australia. It noted the risk of individuals becoming confused by multiple processes, potentially causing them to make admissions during non-coercive processes under the mistaken view that they are required to answer questions during the process, as they may have been during other processes.¹³⁸ To mitigate this risk, the Council recommended that either the IGIS or the Commonwealth Ombudsman be empowered to make a determination of proportionality where multiple powers are used.¹³⁹

Reporting Use of Pt IC Powers

- 7.25 A final matter raised in the submissions was the lack of transparency in the use of pt IC. The Law Council of Australia noted that there is currently no requirement for the AFP to publicly report on non-identifiable and non-sensitive matters related to pt IC, such as how many individuals have been detained using it, how long they have been detained, and how many applications for extensions to investigation periods and declarations of specified time have been made pursuant to pt IC.¹⁴⁰

¹³⁵ Cosmos Moisisidis, Submission to the INSLM, *Review into Terrorism Questioning and Detention Powers*, 26.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Law Council of Australia, above n 117, 34.

¹³⁹ Ibid 35.

¹⁴⁰ Ibid 27–28.

7.26 The Law Council noted that the absence of such reporting diminishes accountability.¹⁴¹ It also inhibits public examination and discourse in relation to the powers and the continued need for them. The Law Council recommended that the pre-charge detention regime should be subject to a reporting requirement similar to that of the QW and QDW regime, requiring annual reports of the basic circumstances in which the powers have been used.¹⁴²

Conclusions

7.27 This review of pt IC is primarily focused on the questioning aspects of detention post-arrest and prior to charge.

7.28 As such, the provisions are relatively non-controversial. For an arrest to be valid, an officer must suspect on reasonable grounds that the person has committed or is committing a terrorist offence. The privilege against self-incrimination is not abrogated. The provisions differ from the ACIC and ASIO questioning powers in both respects. No changes are recommended in relation to questioning.

7.29 However, the review has necessarily required an examination of the overall operation of the scheme in relation to terrorism offences. This raised various issues of significance particularly relevant to detention. Although it is noted that, apart from the Haneef case, there have been no formal complaints to supervisory bodies by individuals.

7.30 The provisions have considerable reach. A terrorist offence is widely defined in the Crimes Act and extends back into preparatory acts that may be minor in themselves and may be committed by bit players. There is no requirement for imminent danger or anything similar. The change in the threshold for arrest from believe on reasonable grounds to suspect on reasonable grounds in 2014¹⁴³ significantly added to the breadth of practical operation of the power of arrest and subsequent detention prior to charge. The scope for pre-emptive arrest for preparatory acts as a means of disruption of threatened attacks needs to be understood in considering the role and powers of the ACIC and ASIO. The ease of using pt IC may explain the sparing use by police of control orders and preventative detention orders, each with more stringent requirements.

7.31 I accept terrorism offences do not necessarily require more 'complex investigations' than many other offences. Most recent arrests relate to one-off or small local groups that are radicalised by, but are not agents of or under the direction of, an overseas terrorist group. However, it does not follow that terrorism investigations do not require additional powers or processes to address the unique threats and challenges specifically posed by terrorism. Narcotics importation, serious organised crime, fraud, and cyber-crime, do not normally pose the same immediate or rapid extreme threat to life that terrorism may.

¹⁴¹ Ibid.

¹⁴² Ibid 28.

¹⁴³ See, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) s 47, which introduced s 3WA into the Crimes Act.

7.32 Sections 23DC(5) and (7), 23DD(4), 23DE(4) and (6), and 23DD(4), mean that extended detention might be based on material withheld from the detainee. That natural justice issue – noted by Mr Clarke in his Haneef report – is similar to that which may arise in control order applications, which led to the recommendation for special advocates in that context.¹⁴⁴

7.33 The purpose of the investigation period should be to bridge the evidentiary gap between arrest and charge – from (in terrorism cases) suspect on reasonable grounds to (in the case of an investigating police officer) an honest belief in the guilt of the accused on a reasonable basis.

A reasonable basis for a decision by an investigating police officer to lay a charge is not to be equated with a magistrate's decision as to committal for trial or a trial judge's ruling on whether there is a case to go to the jury. The hypothetical reasonable prosecutor is not a judge or barrister specialising in criminal law. Neither is it necessary that the prosecutor be assured that all necessary witnesses will attend the hearing and give evidence in accordance with the information provided by them. The prosecutor may not be a public official. The decision to charge will often be taken promptly, if not immediately, in all kinds of circumstances. Investigations can be expected to continue where necessary, at least up to preparation of the brief of evidence for committal. That is not to suggest that these topics are not properly to be considered under this head. A practical assessment is required. Situations vary so much that it is not helpful to endeavour to lay down strict ground rules... (citations omitted)¹⁴⁵

Once there is sufficient basis to do so, the detainee should be charged and brought before a court. A person should not be kept in detention while a complete brief for prosecution is prepared.

7.34 Notwithstanding the reaction to the Haneef case, there is no absolute time limit for detention. As noted earlier, there is a limit of 24 hours for the investigation period. There is a limit of seven days on time that may be specified by a magistrate pursuant to s 23DB(9)(m), but no limit on dead time otherwise. A number of the other heads of s 23DB(9) – particularly (f), (g), (h), (k), and (l) – can well involve extended periods. In one recent case, the total time of detention was approximately 201 hours because of considerable dead time. Indefinite detention has the potential for oppression. I share Mr Clarke's reservations about the ability of a magistrate – or any judicial officer – to second guess police opinion in this sensitive area. The lack of an outer limit assists the argument that the provisions breach Australia's international human rights obligations. In my view, no person should be in detention after arrest on suspicion and before charge for more than 10 days no matter what the circumstances may be.

¹⁴⁴ See, Roger Gyles, *Control Oder Safeguards (INSLM Report) Special Advocates and the CounterTerrorism Legislation Amendment Bill (No1) 2015* (Commonwealth of Australia, 2016).

¹⁴⁵ *HD v State of New South Wales* [2016] NSWCA 85 [104] (Gleeson JA) citing *Thomas v State of New South Wales* [2008] NSWCA 316 [105].

- 7.35 The reason for having both discretionary dead time and discretionary extensions to the investigation period, and the overlap of the grounds for each is not obvious. Broadly speaking, each is based on proper and unavoidable delay in completing the investigation to the point of charge or not. The distinction between the basis for the respective orders is unclear and confuses the making and determination of applications. The rationale and effect of s 23DB(9)(m) should be reconsidered. It is the principal cause of the problems with this regime. The grounds have little, if anything, to do with dead time and there are no clear criteria for extension. An extension of the initial investigation period in terrorism cases plus the possibility of successive extensions of that period for up to a total of 24 hours should be all that is required. In practice, tandem or consecutive applications to a magistrate are made with the consequent wasted time and effort counted as dead time. Whether time involved in such applications should be dead time is contested with some justification. However, the proposed outer limit should ameliorate the effect of that dead time.
- 7.36 There is merit in the AFP's submission that the initial period of four hours after arrest is too short and virtually compels an immediate application for an extension in many cases. The Gibbs Committee recommendation in 1989 of an initial investigation period of six hours for serious offences (ie, offences that carried a penalty of at least 12 months' imprisonment) did not expressly relate to terrorism offences and contemplated a valid investigation period of between six and 12 hours. If that recommendation is taken as a yardstick then, in my view, an initial period of eight hours (four hours if the person appears to be under 18, or an Aboriginal person or a Torres Strait Islander) with a maximum of 16 hours of extensions would be reasonable and should help to avoid some of the current wasted time and effort in obtaining extensions. It should also be clearly understood that a decision to charge or not should be taken as soon as possible. This increase is balanced to an extent by an outer limit on detention.
- 7.37 There is also merit in the AFP's submission that the procedures have not caught up with the electronic age. However, I do not support a widening of those able to make orders beyond magistrates.
- 7.38 Reporting of arrest and detention for terrorism suspects has an immediate attraction. However, pt IC detention will occur after many police arrests in many locations, with persons arrested as terrorism suspects being a subset of those arrests. Reporting on that scale could be onerous.
- 7.39 Future INSLM scrutiny of terrorism arrests and the result of those arrests should provide a more secure basis for considering a reporting regime.
- 7.40 The New South Wales model departs from the Gibbs Committee model. It solves some of the problems with the current div 2 of pt IC. It concentrates on contemporaneous and serious terrorist threats. It has clear time limits and should be easier to understand and administer than the dead time provisions of div 2.

- 7.41 The four day initial period seems excessive at first blush. However, in practical terms, the potential for dead time under div 2 in many cases would lead to an initial investigation period measured in multiples of the four hour period before any extension as such is sought or granted. If four days is not needed, then the subject is to be charged or released. The period could be reduced and the model retained.
- 7.42 The 14 day period of detention while deciding whether to charge or not seems excessive. As pointed out earlier, the period should not be used to prepare a complete brief for prosecution. However, that period is only reached by issue of successive warrants by a judge on cause shown and, as noted, only applies to a narrower class of case than is covered by div 2. It could also be reduced and the model retained.
- 7.43 If div 2 of pt IC were amended to accord with the New South Wales model, or a variation of it, it would not be consistent with div 1, and so that division would also need to be reviewed.
- 7.44 If the New South Wales model is adopted throughout the states and territories, with the possible exception of the Australian Capital Territory, the result is likely to be that div 2 would increasingly fall into disuse, with the state and territory police arresting and detaining suspects in cases covered by state or territory legislation.
- 7.45 The states and territories do not have the same constitutional limitations as the Commonwealth and are not parties to the same international instruments. Those factors would have to be taken into account in considering the Commonwealth response to the COAG resolution.
- 7.46 The recommendations that follow are based on improving the current div 2, but the adoption of an alternative approach based on the COAG/New South Wales model should be kept under active consideration.

RECOMMENDATION

It is recommended that:

- 1. the initial investigation period be increased to eight hours (four hours if the person appears to be under 18 years of age, or an Aboriginal person or a Torres Strait Islander);**
- 2. there should be a reasonable outer limit to the period for detention without charge, regardless of dead time — a period for investigation should not be an indefinite de facto preventative detention power. In my view, 10 days is that outer limit;**
- 3. the procedures should be revised to ensure they are up-to-date with electronic capability;**
- 4. in the absence of a compelling justification, s 23DB(9) of the Crimes Act and related provisions ought to be repealed. If justified, the section should be redrafted to clearly indicate the basis on which it should be exercised and distinguished from s 23DF and related provisions;**
- 5. the substance of the application of pt IC to terrorism cases should be reviewed together with control orders and preventative detention orders when those powers are reviewed pursuant to the INSLM Act. A part of that review should be to see how many arrests with periods of extended detention do not lead to a charge or lead to a charge that is dropped before trial. This will assist in judging whether the power is being misused. Another should be to review the natural justice issue referred to in para 7. 32; and**
- 6. the adoption of an alternative approach based on the COAG/New South Wales model should be kept under active consideration.**

8 Review of ACC Act Pt II Div 2

- 8.1 As demonstrated by para 6.4 above, the ACIC's coercive questioning powers have been exercised a significant number of times in relation to counter-terrorism activities (with further uses in relation to other matters not related to counter-terrorism). This has been without complaint to either the Commonwealth Ombudsman,¹⁴⁶ or the Australian Commission for Law Enforcement Integrity (**ACLEI**).¹⁴⁷
- 8.2 Several objections were raised in this review regarding the ACIC's questioning powers. In particular, both the Law Council of Australia and the Councils for Civil Liberties expressed concerns about the impacts an ACIC examination may have on the subsequent prosecution of an examinee, noting that examinations can take place either before or after an individual is charged. The Law Council was concerned that during an examination, an examinee may prejudice their defence to any prosecution.¹⁴⁸ The Councils for Civil Liberties went further, suggesting the ACIC's coercive questioning powers were tantamount to 'compelling a person to participate in their own prosecution'.¹⁴⁹ For both, the examination powers pose a risk to the adversarial system of justice in Australia, by potentially compelling examinees to disclose matters they would not otherwise disclose (eg, self-incriminating matters they would not disclose during an interview with the AFP).¹⁵⁰
- 8.3 On the basis of these concerns, the Law Council recommended changes to prevent coercive questioning by the ACIC until any charges the examinee may face have been disposed with.¹⁵¹ Alternatively, if examinations were to take place while an examinee was or may be subject to pending charges, the Law Council submitted that there should be strict regulations on who may be present at the examination, what use may be made of material obtained from the examination, and the subject matter that can be covered during the examination.¹⁵² The Law Council also recommended that authorisation from a Federal Court judge should be required prior to an examiner being able to issue a summons for an examination.¹⁵³
- 8.4 The Councils for Civil Liberties, on the other hand, recommended that the ACIC should be prohibited from coercively questioning any person who is either charged with a criminal offence, or suspected of having committed a criminal offence, or is under investigation for a criminal offence.¹⁵⁴ In the alternative, they recommended greater limits should be placed on the sharing of information between the ACIC and other government agencies.¹⁵⁵

¹⁴⁶ Letter from Commonwealth Ombudsman to the INSLM, 24 May 2016.

¹⁴⁷ Email from Executive Director Secretariat of the Australian Commission for Law Enforcement Integrity to the INSLM, 7 July 2016.

¹⁴⁸ Law Council of Australia, above n 117, 31.

¹⁴⁹ Councils for Civil Liberties, above n 116, 14.

¹⁵⁰ *Ibid* 15–16; Law Council of Australia, above n 117, 31.

¹⁵¹ Law Council of Australia, above n 117, 31.

¹⁵² *Ibid*.

¹⁵³ *Ibid*.

¹⁵⁴ Councils for Civil Liberties, above n 116, 18.

¹⁵⁵ *Ibid*.

Conclusions

- 8.5 Inquisitorial bodies able to compel answers will always be controversial, particularly if those bodies are acting in secret, notwithstanding their proliferation at the state and federal levels in Australia. The ACIC is no exception. However, it and its predecessors have now operated for many years and can be considered part of the landscape in the field of combating organised crime. Counter-terrorism is only part of the ACIC's remit and its remit does not cover the whole field of counter-terrorism. That being the case, it is unlikely that this review would recommend changes to that regime without clear evidence of abuse in counter-terrorism cases. No such evidence was provided. Indeed, the use of the questioning power in counter-terrorism matters over recent years has been instructive. It provides an example of what an effective questioning power might look like.
- 8.6 Views may differ on the merit of both the recent legislative solution to the post-charge questioning issue and the High Court's reasoning that led to that solution. The controversy is unlikely to go away and the related constitutional questions also remain to be considered. While these matters will be considered and resolved in the future, the current regime represents a recent considered response to the issue by Parliament and assists in clarifying uncertainty.

9 Review of ASIO Act Pt III Div 3

Questioning and Detention Warrants

- 9.1 The case for abolishing ASIO QDWs was made by the previous INSLM,¹⁵⁶ and is also made in submissions to this review from the Law Council of Australia, the Councils of Civil Liberties, and the Gilbert + Tobin Centre.¹⁵⁷ The case for abolition, and other criticisms of the power, has also been made in previous academic literature.¹⁵⁸ ASIO has argued for retention in the evidence of the Director-General.¹⁵⁹ The submission from the Attorney-General's Department refines the argument.¹⁶⁰ It is not necessary to repeat all of the arguments canvassed in those sources that are readily accessible. The case for abolition is compelling. Some salient points follow.
- 9.2 A warrant enabling a person to be 'detained in custody, virtually incommunicado without even being accused of involvement in terrorist activity, on grounds which are kept secret and without effective opportunity to challenge the basis of his or her detention', to use the words of former High Court Chief Justice Sir Gerard Brennan (on the basis of possession of intelligence in relation to a terrorism offence),¹⁶¹ is an extraordinary power. Further, the decision on whether the grounds to make a QDW application rather than a QW application lies with a member of the executive. No precedent in any comparable country has been identified.

¹⁵⁶ See, Bret Walker, *Declassified Annual Report: 20th December 2012* (Commonwealth of Australia, 2012), chs IV and V.

¹⁵⁷ See, Law Council of Australia, above n 117; Councils for Civil Liberties, above n 116; Gilbert + Tobin Centre of Public Law, Submission to the INSLM, *Review into Certain Questioning and Detention Powers in Relation to Terrorism*, 24 June 2016. All of these submissions are on the INSLM website at:

<http://www.inslm.gov.au/submissions/terrorism-detention>.

¹⁵⁸ See eg, 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; George Williams, 'ASIO's Extraordinary Powers' (2013) 8 *Journal of Policing, Intelligence and Counter-Terrorism* 66; Greg Carne, 'Detaining Questions or Compromising Constitutionality? The ASIO Legislation Amendment (Terrorism) Act 2003 (Cth)' (2004) 27 *University of New South Wales Law Journal* 524.

¹⁵⁹ See, Transcript of Proceedings, *Review into Terrorism Questioning and Detention Powers Public Hearing*, 19 August 2016, 24–29. The transcript is on the INSLM website at: <http://www.inslm.gov.au/current-review-work>.

¹⁶⁰ Attorney-General's Department, Submission to the INSLM, *Review into Terrorism Questioning and Detention Powers*, 18 August 2016.

¹⁶¹ Gerard Brennan, 'Law and Justice for All; Justice for Each' (Speech delivered at 2007 Law and Justice Foundation's Justice Awards, Sydney, 31 October 2007).

- 9.3 The measure was proposed in the aftermath of the twin towers attack in the United States in September 2001, which had a dramatic effect on Western perceptions of the terrorist threat, then posed by Al Qaeda led by Osama bin Laden, followed by the 2002 Bali bombing.¹⁶² The legislative framework for counter-terrorism was not well developed at that time. The measure caused much controversy both within and outside Parliament.¹⁶³ One response was introducing a sunset clause. That clause has been successively extended, presently expiring on 7 September 2018.¹⁶⁴
- 9.4 No QDW has been issued, nor has an application for a QDW been refused, since this power was introduced in 2003. ASIO has had to respond to many terrorist threats of varying kinds in Australia over that time. Nonetheless, ASIO argues for the power to remain, to be used if necessary.
- 9.5 The power is not limited to prevention or disruption of an imminent terrorist act. It is possible to envisage circumstances where there may be reasonable grounds to believe that if served with a QW, a person who potentially has some relevant information may alert others, may not appear for questioning, or may destroy evidence even though this would be a breach of the law. In those circumstances, an intelligence organisation has to balance risk and reward. If the potential reward is sufficient, then a QW can be used. If not, then all the other means of collecting intelligence remain to be used. Further, the width of the definition of a ‘terrorist offence’ – in particular, the extension to preparatory acts – gives great reach to the power.
- 9.6 Linking the power to a ‘terrorism offence’ rather than to prevention or disruption of a terrorist act elides the fundamental distinction between the collection of intelligence and law enforcement; a distinction stressed in the submission by the Attorney-General’s Department. ASIO is not a law enforcement organisation.¹⁶⁵ The investigation and prosecution of a terrorist offence is the province of federal, state and territory police and prosecution authorities. Intelligence collected by ASIO can assist that process, but is not part of it.

¹⁶² See, section 4 above.

¹⁶³ See eg, Commonwealth, *Parliamentary Debates*, Senate, 13 June 2016, 129 (Natasha Stott Despoja); see also, the range of submissions made to the Parliamentary Joint Committee on ASIO, ASIS and DSD when considering the QW and QDW powers in 2005 at: Parliamentary Joint Committee on ASIO, ASIS and DSD, *Submissions* (2005) House of Representatives Committees <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_representatives_Committees?url=pjcaad/asio_ques_detention/subs.htm>.

¹⁶⁴ ASIO Act s 34ZZ.

¹⁶⁵ See, ASIO Act s 17.

- 9.7 In any event, this power is not necessary to prevent or disrupt a terrorist act. ASIO has all of its other powers and capacities including QWs. The federal, state and territory police have their powers and capacities including: arrest and questioning, and pre-charge detention if there is reasonable suspicion or suspicion on reasonable grounds of a preparatory act;¹⁶⁶ warrants of various kinds (eg, search warrants,¹⁶⁷ delayed notification search warrants,¹⁶⁸ warrants for arrest¹⁶⁹); control orders;¹⁷⁰ and preventative detention.¹⁷¹ The ACIC and some state bodies have intelligence-gathering powers including questioning.¹⁷² There is co-ordination between these various organisations related to the exercise of these powers. There is a risk that the power to immediately detain in addition to questioning could be used as a power to detain for the purpose of disruption — de facto preventative detention. History, including recent history, teaches that power can be misused by the well-intentioned as well as those deliberately abusing the power. Procedural safeguards cannot entirely rule out that possibility.
- 9.8 The fundamental distinction between those believed to be implicated in terrorism and those who are not is also elided in relation to this power.
- 9.9 The constitutional validity of these provisions has not been tested, as the provisions are yet to be used. The issue of a warrant for detention without the involvement of the courts certainly tests the doctrine of the separation of powers. Both a QW and a QDW are issued by the issuing authority on the request of the Director-General with the consent of the Minister.¹⁷³ The issuing authority has to be satisfied of the same thing in each case: that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.¹⁷⁴ The difference lies in the matters the Minister must be satisfied of before consenting to a QDW.¹⁷⁵ Thus, the effective decision about the use of that warrant rests with the Director-General and the Minister rather than with the issuing authority. In any event, the issuing authority is not to be equated with a court, although it may be a judge. That judge would act in a personal capacity, as *persona designata*, and would be chosen and appointed by the Minister either directly, or possibly as one of a member of a class.¹⁷⁶ Even if valid, executive orders for detention are odious and no case can be made for them in this context.
- 9.10 There is much in the argument that QDWs breach Australia's international human rights obligations.¹⁷⁷ It can be concluded that QDWs are not proportionate to the threat of terrorism and are not necessary to carry out Australia's counter-terrorism and international security obligations. It is time to accept that the capacity to secretly and immediately detain persons whether or not they are implicated in terrorism is a step too far.

¹⁶⁶ See eg, Crimes Act s 3WA, pt IC subdiv B.

¹⁶⁷ See eg, Crimes Act pt IAA div 2.

¹⁶⁸ See, Crimes Act pt IAAA.

¹⁶⁹ See eg, Crimes Act s 3ZA.

¹⁷⁰ See eg, Commonwealth *Criminal Code* div 104.

¹⁷¹ See eg, Commonwealth *Criminal Code* div 105.

¹⁷² See eg, ACC Act pt II div 2.

¹⁷³ ASIO Act ss 34E(1)(a), 34G(1)(a).

¹⁷⁴ ASIO Act s 34E(1)(b), 34G(1)(b).

¹⁷⁵ See, ASIO Act s 34D(4); cf ASIO Act s 34F(4).

¹⁷⁶ ASIO Act s 34AB.

¹⁷⁷ See eg, Law Council of Australia, above n 117, 19; Councils for Civil Liberties, above n 116, [15].

RECOMMENDATION

- 7. Subdivision C of div 3 of pt III of the ASIO Act should be repealed or cease when the sunset date is reached. Successive extensions of the sunset date since 2006 should end.**

Questioning Warrants

- 9.11 The previous INSLM had no objection in principle to QWs. He was influenced by the existence of similar powers in other bodies, particularly the then Australian Crime Commission. He saw the warrants as effective and worthwhile based on his examination of the result of warrants issued up to that time. He recommended amendments, some of which were adopted, while others were not.¹⁷⁸ The submission to this review by the IGIS does not disclose any major problems in the limited use of the power.¹⁷⁹
- 9.12 The non-use of the power since 2010 is striking. Two QWs have been issued since 2005; one in 2006 and the other in 2010. The number of potential terror incidents has increased rather than diminished during that time.¹⁸⁰ The necessity for, and the efficacy of, the power comes into question. No entirely satisfactory reason for non-use has been given by ASIO. The changing nature of the threat from large-scale targets requiring considerable planning to one-off single incidents with little notice is cited.¹⁸¹ However, during the same period, the similar power of the ACIC was used in a number of counter-terrorism cases and the transcripts of a number of witnesses were provided to ASIO (pursuant to the ACC Act), although the remit of the ACIC in counter-terrorism was more limited than ASIO's. The ACIC demonstrated the usefulness of compulsory questioning in gathering intelligence, although there are limitations the more closely the examinee is associated with a target.¹⁸² The procedure governing the ASIO power is more complicated than the procedure governing the ACIC power. This may affect the ease of use of the ASIO power, and involve more time and effort, but would hardly preclude its use. Both ASIO and the ACIC state there is no arrangement or understanding that the ACIC powers will be used to circumvent the restrictions on the ASIO powers, although acknowledge co-operation through institutional arrangements.¹⁸³

¹⁷⁸ See, Walker, above n 156, 61–87.

¹⁷⁹ IGIS, submission to INSLM, *Review into Certain Questioning and Detention Powers in Relation to Terrorism*, 13 July 2016.

¹⁸⁰ See, Roger Gyles, *Annual Report 2015–2016* (Commonwealth of Australia, 2016), 1–3.

¹⁸¹ See eg, Transcript of Proceedings, *Review into Terrorism Questioning and Detention Powers Public Hearing*, 19 August 2016, 26.

¹⁸² Classified correspondence with the ACIC.

¹⁸³ Classified correspondence with the ACIC and ASIO.

- 9.13 I accept that a compulsory questioning power to gather intelligence is a useful tool for ASIO's counter-terrorism work, despite its sparse use to-date. I also accept that the potentially serious impact of terrorism on the community justifies this inroad into civil liberties. That premise is now generally uncontentious. I accept that the power can properly extend to those not accused or suspected of implication in terrorism. That extension carries limitations. The collecting of intelligence must not be confused with law enforcement. A questioning power for that purpose should not be considered or justified as a front-line method of preventing imminent terrorist attacks.
- 9.14 The power as it stands lacks utility and cannot be regarded as effective. The reform suggestions by ASIO and the Attorney-General's Department must be taken seriously, although they lessen the safeguards. Other criticisms of the safeguards in the current provisions must also be addressed. Reform is needed for there to be an effective but reasonable questioning power.
- 9.15 There is a case for aligning the questioning powers of the ACIC and ASIO more closely. They are broadly similar organisations. They have a similar function — intelligence gathering rather than law enforcement,¹⁸⁴ although they each co-operate with law enforcement. They have extraordinary questioning powers because of the nature of their targets. The power is not restricted to those implicated in a potential breach of the law. They operate in secrecy. They have partially overlapping responsibilities with regard to counter-terrorism.
- 9.16 Furthermore, the ASIO questioning power should be considered in the light of the plethora of state and federal organisations that can now conduct secret and compulsory questioning of persons known colloquially as 'Star Chambers'.¹⁸⁵ There have been substantial inroads into the right (or liberty) to remain silent. The courts are still grappling with the consequences for criminal justice.¹⁸⁶
- 9.17 Controversial QW issues will now be canvassed before returning to draw conclusions.

¹⁸⁴ See, ASIO Act s 17; ACC Act s 7A.

¹⁸⁵ See eg, Michael McKenna, 'Star Chamber the Weapon of Choice in Tough Cases', *The Australian* (Australia), 22 September 2016; see also, INSLM, 'Cross-Section of Coercive Questioning Powers', available on the INSLM website.

¹⁸⁶ See eg, *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Lee v NSW Crime Commission* (2013) 251 CLR 196; *Lee v the Queen* (2014) 88 ALJR 656.

Warrant Authorisation

- 9.18 ASIO submits that the two-stage external authorisation procedure followed by separate external supervision of questioning, when added to oversight by the IGIS, is cumbersome, resource-intensive, time consuming, and unnecessary, so reducing the potential use of the power, particularly where the threat being addressed requires urgent action.¹⁸⁷ This contrasts with the ACIC procedure that involves one external person, the examiner, filling all roles. Indeed, none of the other bodies with compulsory questioning powers has comparable external authorisation procedures.¹⁸⁸ The procedure is also out of step with authorisation of the use of other ASIO special powers by the Minister, without involving any separate issuing authority.¹⁸⁹
- 9.19 There is no external support for any streamlining. Rather, there is support for the previous INSLM's recommendation that the issuing authority (normally a sitting judge), in addition to the Minister, should be independently satisfied that all of the criteria are met.¹⁹⁰
- 9.20 As noted in relation to QDWs, there are issues related to those criteria, particularly tying the power to a 'terrorism offence' as defined in s 4 of the ASIO Act.¹⁹¹ This definition is very wide, encompassing conduct well removed from the threat of any imminent terrorist act.¹⁹² On the other hand, the definition is narrow – relating to a completed offence rather than preventing future conduct – and blurs the distinction between intelligence and law enforcement. Furthermore, it is narrower than the definition in s 3(1) of the Crimes Act and so excludes foreign incursions and recruitment offences in pt 5.5 of the Commonwealth *Criminal Code* or the terrorism financing offences in the *Charter of the United Nations Act 1945* (Cth).
- 9.21 There is a real question about the practical value of external assessment by either the Minister or a judge, regarding whether there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence important in relation to a terrorist offence, where the Director-General of ASIO has provided facts and grounds on which the Director-General considers it necessary that the warrant should be issued. To fail to be satisfied would involve the Minister or judge finding that the Director-General had no reasonable grounds for the necessary belief. The possibility of that occurring based on information provided by the Director-General alone, without a contradictor in a field where ASIO and the Director-General can be taken to have the relevant expertise, is remote indeed. The judge does not sit in an ordinary judicial capacity, making a decision based on evidence after hearing both sides. It is suggested, with some justification, that the involvement of a judge gives a veneer of respectability to the process.¹⁹³ There is a point of view that the involvement of a sitting judge chosen by the executive as *persona designata* in a secret

¹⁸⁷ Transcript of Proceedings, *Review into Terrorism Questioning and Detention Powers Public Hearing*, 19 August 2016, 28–29.

¹⁸⁸ See, INSLM, above n 185.

¹⁸⁹ See, ASIO Act pt III div 2.

¹⁹⁰ See eg, Law Council of Australia, above n 117, 20–21.

¹⁹¹ See, [9.5].

¹⁹² See, ASIO Act s 4 (definition of 'terrorism offence').

¹⁹³ Burton et al, above n 158. This article was submitted to the INSLM as part of Nicola McGarrity and George Williams' submission to the INSLM: see, Nicola McGarrity and George Williams, Submission to INSLM, *Review into Certain Questioning and Detention Powers in Relation to Terrorism*, 24 June 2014, Annexure A.

process of this kind could diminish respect for the judiciary.¹⁹⁴ On the other hand, judicial issue of warrants occurs in state jurisdictions and under other Commonwealth statutes.¹⁹⁵ There is discretion as to certain aspects of the form of the warrant (eg, whether appearance of the individual is required immediately or later, and the duration of the warrant). However, the issuing authority has no discretion, as it is bound by the form of the draft warrant. There are no statutory criteria in relation to these important matters, particularly a warrant for immediate attendance.

- 9.22 The Director-General must, as soon as practicable, give the IGIS a copy of any draft request for the Minister's consent to issue a questioning warrant. The IGIS has powers that enable substantive review of the request,¹⁹⁶ albeit behind closed doors.

Freedom of Movement

- 9.23 As noted above, the warrant may require immediate attendance.¹⁹⁷ Not to do so is an offence with a penalty of five years.¹⁹⁸ If the person fails to appear, then a police officer may take the person into custody and bring him or her before a prescribed authority,¹⁹⁹ using such force as is necessary and reasonable.²⁰⁰ Once the person is before the prescribed authority, the authority may give a direction to detain the person, if satisfied there are reasonable grounds for believing that if not detained: the person may alert someone involved in a terrorism offence that the offence is being investigated; the person may not continue to appear or appear again; or the person may destroy, damage, or alter, a record or thing the person has been requested to produce.²⁰¹ Overseas travel is prohibited.²⁰² A person in detention may be subject to ordinary and strip searches with such force as is necessary.²⁰³
- 9.24 This is a substantial matrix of restrictions. The power of an administrator – the prescribed authority – to direct detention is out of the ordinary, although it has never been used. The ACC Act authorises detention through an examiner, only as an ancillary to an application to a court for contempt.²⁰⁴

¹⁹⁴ Ibid.

¹⁹⁵ See eg, *Independent Commission Against Corruption Act 1988* (NSW) s 35(6); *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) ss 91, 137; *Crime and Corruption Act 2001* (Qld) ss 157–165; *Integrity Commission Act 2009* (Tas) sch 6 cl 2(5), (6); ACC Act s 31.

¹⁹⁶ ASIO Act ss 34P, 34Q, 34Z1.

¹⁹⁷ ASIO Act s 34E(2).

¹⁹⁸ ASIO Act s 34L(1).

¹⁹⁹ ASIO Act s 34K(7).

²⁰⁰ ASIO Act s 34V.

²⁰¹ ASIO Act s 34K(1)(a), (4).

²⁰² ASIO Act ss 34W, 34X, 34Y, 34Z.

²⁰³ ASIO Act ss 34ZB, 34ZC.

²⁰⁴ ACC Act s 34D.

9.25 The role to be played by a prescribed authority throws the spotlight on that position, particularly as ASIO (through the Attorney–General’s Department) suggests that it could be played by an ASIO officer, or an Australian Government Solicitor lawyer.²⁰⁵ There is remarkably little formality attached to the appointment — the Minister simply appoints a qualified person by writing, provided that person consents.²⁰⁶ There is no statutory tenure or terms of engagement. There is no process for disclosure of appointment. There is no public list of prescribed authorities. There is no limit to the number of appointees. Presumably, as a case arises, the Minister chooses one of the appointed persons. A prescribed authority fulfils an administrative function, whether or not they are a former or current judge or President or Deputy President of the Administrative Appeals Tribunal, and can only be seen as a nominee of the Minister. In contrast, an examiner under the ACC Act has less power than a prescribed authority, particularly regarding detention, but the nature of the appointment is more formal and an examiner holds a statutory office on terms likely to promote independence.²⁰⁷ The Governor–General makes the appointment for a term specified in the instrument.²⁰⁸ There is security of tenure for the term, subject to dismissal for cause set out in the legislation.²⁰⁹ Remuneration is provided for and other appropriate matters are covered.²¹⁰ However, there is no minimum term and the qualification — five years as a legal practitioner — is undemanding.²¹¹

9.26 On the basis that the QDW would be abolished, the previous INSLM recommended that the provisions of the ASIO Act relating to QWs should be amended to:

- a. permit a police officer to arrest the subject of a warrant when serving that warrant, if the officer believes on reasonable grounds from anything said or done by the person that there is a serious possibility the person intends not to comply with the warrant; and
- b. permit the prescribed authority to direct detention after service of a QW, but before the time specified in the QW 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.²¹²

That recommendation needs to be revisited in light of the experience of ASIO, the ACIC and the AFP in the intervening years.

Secrecy

9.27 The secrecy obligations imposed by s 34ZS are extensive. They have been criticised in submissions.²¹³

²⁰⁵ Attorney–General’s Department, above n 160.

²⁰⁶ ASIO Act s 34B.

²⁰⁷ See, ACC Act pt II div 3 subdiv B.

²⁰⁸ ACC Act s 46B.

²⁰⁹ See, ACC Act s 46H.

²¹⁰ See, ACC Act ss 46C, 46D.

²¹¹ See, ACC Act s 46B(3).

²¹² Walker, above n 156, 95.

²¹³ See eg, McGarrity and Williams, above n 193, 10–11.

- 9.28 The most immediate criticism, for present purposes, is that during the currency of a warrant, nobody (including the subject of the warrant) can disclose information indicating the fact that the warrant has been issued, or a fact relating to the content of the warrant, or to the questioning or detention of a person in connection with a warrant, save for a limited category of permitted disclosures that do not include family (except in the case of a minor), employers or friends, unless permission is granted by the Director-General, the Minister, or the prescribed authority.²¹⁴ Strict liability applies to the subject of the warrant and the subject's lawyer.²¹⁵ The penalty is imprisonment for five years.²¹⁶
- 9.29 As a result, a person (whether or not implicated in terrorism) can be served with a warrant requiring immediate or imminent attendance for compulsory questioning with the possibility of being detained, but is prohibited from disclosing this in order to make necessary personal or business arrangements, without approval.
- 9.30 The ACC Act contains comparable provisions. However, ss 29A and 29B of the ACC Act provide for a structure that differs from s 34ZS of the ASIO Act in some significant respects. The examiner issuing the summons makes a decision regarding the application of the statutory criteria and has a discretion as to the circumstances of disclosure. This approach is more nuanced than the broad brush of s 34ZS. The penalty for breach is imprisonment for two years, or 120 penalty units (ie, \$21,600²¹⁷), or both.²¹⁸ There is no special fault provision.
- 9.31 The previous INSLM recommended that the length of imprisonment for offences against the secrecy obligations should be reduced to two years.²¹⁹
- 9.32 The impact of s 34ZS on the subject of a warrant is discussed above.²²⁰ There are wider concerns about the secrecy provisions. Some of the problems identified in the INSLM report on s 35P of the ASIO Act are also present in s 34ZS. Indeed, in that report, I said: 'section 34ZS was not subject to the close examination that section 35P has received. If that had occurred, problems of the kind identified in relation to section 35P would have emerged.'²²¹ They have now emerged.

²¹⁴ See, ASIO Act s 34ZS(1), (2), (5) (definition of 'permitted disclosure').

²¹⁵ ASIO Act s 34ZS(3).

²¹⁶ ASIO Act s 34ZS(1), (2).

²¹⁷ Crimes Act s 4AA.

²¹⁸ ACC Act s 21C(1).

²¹⁹ Walker, above n 156, 70–71.

²²⁰ See, [9.28].

²²¹ Gyles, above n 14, 19 [33].

9.33 It is not necessary to repeat the discussion in that report and its appendices. While s 34ZS is not as wide in scope or as uncertain in operation as s 35P, similar basic flaws in its operation in relation to ‘outsiders’ are present. For this purpose, the examinee and the lawyer identified in s 34ZS(3) can be regarded as ‘insiders’: (1) there is no express harm requirement for breach by an ‘outsider’; (2) recklessness is the fault element in relation to the circumstances in s 34ZS(1)(c) and (2)(c);²²² and (3) disclosure of information in the public domain is prohibited.²²³ While there is doubt as to the meaning of ‘disclosure’ in s 35P, the meaning here is made clear by s 34ZS(11).²²⁴

Legal Representation

9.34 A number of issues arise in relation to legal representation that are of particular concern.

9.35 One issue is the limit on contact with the subject’s lawyer of choice, on the direction of the prescribed authority pursuant to s 34ZO, if the prescribed authority is satisfied on the basis of circumstances relating to the lawyer that the lawyer might release information to persons involved in terrorism. Although the subject of the warrant can contact another lawyer, questioning can proceed in the interim.²²⁵

9.36 Another issue is that contact between the subject and the lawyer must be made in a way that can be monitored by a person exercising authority under the warrant, except for an appearance for questioning.²²⁶

9.37 A further issue is the limited role a lawyer can play in an examination. The lawyer cannot intervene in questioning or address the prescribed authority during questioning, except to request clarification of an ambiguous question or, with leave, address the prescribed authority on a matter during a break in questioning.²²⁷ The prescribed authority can direct the removal of a lawyer if they are regarded as unduly disruptive, and questioning can proceed pending any new lawyer appearing.²²⁸

9.38 By contrast, a person giving evidence before an ACIC examiner may be represented by a legal practitioner and, in some circumstances, a practitioner can be granted leave to represent a person not giving evidence.²²⁹

²²² ASIO Act s 34ZS(3).

²²³ ASIO Act s 34ZS(1) and (2) prohibit the disclosure of information unless it is a ‘permitted disclosure’ as defined by s 34ZS(5). The fact that information is already in the public domain does not result in a disclosure of that information being a ‘permitted disclosure’ under the definition. See also, ASIO Act s 34ZS(11).

²²⁴ Subsection (11) provides: ‘To avoid doubt, subsections (1) and (2) apply whether or not the discloser has the information that he or she discloses as a result of a disclosure by somebody else’.

²²⁵ ASIO Act s 34ZP; see, McGarrity and Williams, above n 193, 8–9; Councils for Civil Liberties, above n 116, 6–8.

²²⁶ ASIO Act s 34Q(2), (3); see, Law Council of Australia, above n 117, 23; McGarrity and Williams, above n 193, 8–9; Councils for Civil Liberties, above n 116, 6–8.

²²⁷ ASIO Act s 34ZQ(5)–(10); see, McGarrity and Williams, above n 193, 8–9.

²²⁸ ASIO Act ss 34ZP, 34ZQ(9), (10).

²²⁹ ACC Act s 25A(2).

Questioning

9.39 The previous INSLM made the following recommendations that have not been implemented.

9.40 He first recommended that 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 the questioning given the circumstances of the individual case.²³⁰

No explanation has been offered for not taking up this apparently reasonable recommendation.

9.41 The previous INSLM also recommended that the

QW provisions should be amended to make clear that a person charged with a criminal offence cannot be subject to questioning until the end of the criminal trial.²³¹

That recommendation raises the vexed topic of the relationship between compulsory questioning and criminal justice that has played out over recent years, particularly in relation to ACIC questioning, and the more general topic of the use of answers to compulsory questioning.

9.42 The subject of a warrant cannot refuse to give information or produce a record or thing on the ground of self-incrimination.²³² However, information given or records or things produced are not admissible against a person in criminal proceedings (other than proceedings for breach of the questioning and production provisions).²³³ As noted in paras 4.17 and 4.18, this is called a 'use immunity'. There is no other relevant restriction as to the use that ASIO may make of what is learned. There is no so-called 'derivative immunity'. That seems reasonable as long as the information is kept at the intelligence level. ASIO collects intelligence and any information obtained assists that process. A person does not need to be involved in any terrorist activity to be the subject of a warrant. However, information obtained, when added to other information, may reveal terrorist activity by the subject or some other person or persons.

9.43 The issue of use of the information obtained arises as there is no restriction on the power of the Director-General to authorise disclosure of the information, including to law enforcement bodies.²³⁴ In the current climate, this can be expected to take place, bearing in mind the express powers in s 19A of the ASIO Act and the joint task force arrangements. The use immunity of the subject will remain, but there is no other statutory restraint on derivative use against the subject or any use against others, including those charged with an offence.

²³⁰ Walker, above n 156, 113.

²³¹ Ibid.

²³² ASIO Act s 34L(8).

²³³ ASIO Act s 34L(9).

²³⁴ ASIO Act ss 18–18D, 34ZS(5).

- 9.44 This was broadly the position in relation to the ACIC (then the Australian Crime Commission) when examined by the High Court, leading to the current legislative ACIC regime outlined previously.²³⁵ That regime permits the questioning of a person charged with a criminal offence, albeit with restrictions.²³⁶ Current High Court authority makes it desirable that the questioning of a person charged with a criminal offence be expressly dealt with in relation to ASIO powers, regardless of the split on the Court and criticisms of the historical basis for the decisions.²³⁷ The practical choice is between blanket prohibitions and the ACIC model.
- 9.45 The High Court decisions,²³⁸ and the previous INSLM recommendation under discussion, are concerned with the effect of questioning on criminal trials of those questioned, rather than with investigation by law enforcement bodies, or wider issues as to the use of information obtained from citizens under compulsion. There is no limitation on the use that police may make of a transcript of questioning or a document or thing produced, including confronting a terrorism suspect with the evidence and calling the subject of the warrant to give evidence at a trial of a person charged with a terrorism offence. The rights of an accused are one thing; the rights of third parties are another. Similar questions arise in relation to the plethora of bodies with powers to compel answers to questions.²³⁹
- 9.46 The previous INSLM made no other recommendations in relation to the process of questioning. While there has been some concern as to the length of questioning,²⁴⁰ I am not disposed to revisit that issue in the absence of experience since the previous INSLM review.

ADJR

- 9.47 It has been suggested that decisions by ASIO should not continue to be excluded from the *Administrative Decisions (Judicial Review) Act 1977* (Cth).²⁴¹ This raises issues that go beyond this review. Other means of judicial review remain and are noted at s 34J of the ASIO Act.

²³⁵ *X7 v Australian Crime Commission* (2013) 248 CLR 92.

²³⁶ See ACC Act ss 24A, 25A.

²³⁷ See eg, Cosmos Moisisdis, above n 135; Law Council of Australia, above n 117; Mark Weinberg, 'The Impact of Special Commissions of Inquiry/Crime Commissions on Criminal Trials' (speech delivered at Supreme Court of New South Wales Annual Conference, Sydney, 1 August 2014); Edward Greaves, 'High Court in *Lee v the Queen* Restricts Access to Compulsory Examination Material' (2014) 41 *Brief* 14; Edward Greaves, 'To What Extent Does *X7 v Australian Crime Commission* Remain "Useful" Law?' (2013) 40 *Brief* 35.

²³⁸ See, *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Lee v NSW Crime Commission* (2013) 251 CLR 196; *Lee v the Queen* (2014) 88 ALJR 656.

²³⁹ See, INSLM, above n 185.

²⁴⁰ See eg, McGarrity and Williams, above n 193, 10.

²⁴¹ See eg, *ibid* 14;

Conclusions

- 9.48 The present questioning power is heavy duty with heavy duty safeguards. It is unwieldy and not being used, but has the potential for oppression. It was devised at a time when Australia had a different counter-terrorism framework and is no longer fit for purpose. The key to an effective but reasonable questioning power for ASIO is to accept that it should not be seen as a front-line means of disruption of an imminent terrorist attack, nor as a primary means of collecting evidence to support a criminal prosecution, but rather it should be seen as a tool for the collection of intelligence relating to the threat of terrorist activity.
- 9.49 The task of amending the present provisions to give ASIO a more streamlined procedure but satisfy legitimate concerns about the scope for executive over-reach and oppression would be formidable and the result would be unlikely to satisfy all, or even most. The obvious solution is to adopt the ACC Act model as closely as possible.
- 9.50 As noted, ASIO and the ACIC are similar Commonwealth bodies with similar roles in their fields. Those fields have overlapped to an extent for some years. During that time, the ACIC questioning power has been used on many occasions in relation to counter-terrorism, gathering useful intelligence without any known complaints. The results have been provided to ASIO. The ACC Act provisions have also regularly been used across a broad range of serious criminal activity and are known and understood in the legal profession. They have been scrutinised by the courts and by Parliament in recent times. That model addresses most of the legitimate complaints about the ASIO provisions and would give ASIO a proven and practical procedure. The provisions relating to post-charge questioning have been criticised, as noted in my consideration of the ACC Act powers. However, they represent the outcome of recent close parliamentary scrutiny. They will continue to apply to the range of organised criminal activities within the purview of the ACIC. It does not seem sensible to constrain the collection of intelligence about terrorism more than organised crime. The ACC Act and similar ASIO provisions will continue to be scrutinised by a range of interested parties, including the INSLM. The lack of a detention power in the ACC Act provisions as adapted would be appropriate.
- 9.51 The previous INSLM did not have the experience of the last five years to guide him when considering these powers — particularly, the successful use of the ACIC powers, the non-use of the ASIO powers, and the regular use by the AFP of the pt IC power. There is a plethora of state inquisitorial bodies and each has different functions, powers, and safeguards. Different constitutional considerations apply to those than to Commonwealth bodies. The ACC Act is the appropriate model and it would not be appropriate to cherry-pick parts of other models and graft them on, or to excise some parts unless it is necessary to accommodate the different repository of the power.

RECOMMENDATION

- 8. The balance of div 3 of pt III of the ASIO Act should either be repealed, or not extended beyond the present sunset date, and should be replaced by a questioning power following the ACC Act model as closely as possible. A sunset clause should not be necessary for such a questioning power.**
- 9. In that context, the definition of a 'terrorism offence' should be amended to include the foreign incursion and recruitment offences in pt 5.5 of the Commonwealth *Criminal Code* and the terrorism financing offences in the *Charter of the United Nations Act 1945 (Cth)*, and the phrase 'important in relation to a terrorism offence' should be amended to read 'important in relation to an actual or threatened terrorism offence' wherever appearing.**

10 Multiple Questioning

- 10.1 Attention has been drawn to the real possibility of oppression where there are serial compulsory examinations of a person by different bodies with overlapping responsibilities, particularly where there is information sharing between these bodies.²⁴² Oppression could occur without any deliberate plan.
- 10.2 Consecutive questioning of a person on the same topic or topics by different bodies under compulsion should not occur if there is information sharing between those bodies so that, in effect, the person is examined on the earlier statement. This is oppressive in itself, but also has the potential to manufacture discrepancies that can be used to allege that answers to one or the other are false, making the examinee liable to prosecution.
- 10.3 However, what if the second body, due to its compulsory questioning, has relevant information to hand before the second interrogation that was either not available to the first body, or not used in the first questioning? What if one body is interested in one aspect of the same general topic, and the second body is interested in another aspect? What if one body is federal and the other is a state or territory body? These questions indicate the difficulty of a statutory blanket ban.
- 10.4 One solution would be to make the existence of an earlier compulsory examination a factor to be taken into account by the issuing authority and the examiner (the one person) if the recommendations as to QWs are implemented, accompanied by a register of examinees to be kept and shared with the bodies concerned. As there is no evidence of a current practical problem, this may be an over-reaction. However, this may change if ASIO has and exercises a more practical questioning power.
- 10.5 There is also the issue of the police's use of answers obtained from prior compulsory questioning by other bodies.²⁴³ Can a person be examined by police on such answers? The use of answers against an accused post-charge was recently dealt with by amendment to the ACC Act. There is no restriction on the use of answers during the investigation phase. The same applies to answers given by a person who is not a suspect but is a potential witness. He or she can be confronted with such answers by police. Some oppose this freedom to use compulsory answers during the investigation phase. However, ASIO and the ACIC do not collect intelligence for its own sake. Co-operation with law enforcement is a legitimate by-product of that intelligence, provided that the police tail does not wag the ASIO or the ACIC dog. There is no evidence of this occurring in terrorism matters. The IGIS has the means of ensuring that this does not take place in the case of ASIO, which has a primary role in counter-terrorism intelligence collecting. The concern that police may use compulsorily obtained information unfairly during the investigation phase can be monitored by the Ombudsman, ACLEI, and the INSLM. Furthermore, the police cannot compel answers to their questions.

²⁴² See eg, Law Council of Australia, above n 117, 32–34.

²⁴³ See, [7.21]–[7.22].

RECOMMENDATION

- 10. A protocol be developed between ASIO, the ACIC, and any relevant state body that shares information obtained by compulsory questioning, to avoid oppression by successive examinations. This protocol should then be approved and given appropriate status by the Attorney-General. The INSLM and other supervisory bodies such as the IGIS and the Commonwealth Ombudsman should be able to monitor how this protocol operates in practice.**

Appendix 1: Conduct of Review

Advertisements calling for submissions were placed in the *Australian Financial Review* and *The Australian* on 6 May 2016.

Public submissions were received from (in order of receipt):

- the Law Council of Australia;
- the Gilbert + Tobin Centre of Public Law, represented by Dr Nicola McGarrity and Prof George Williams;
- the Inspector–General of Intelligence and Security;
- Dr Cosmos Moisisdis;
- the Councils for Civil Liberties;
- the Attorney–General’s Department;
- the Australian Federal Police;
- the Law Council of Australia (supplementary submission); and
- the Attorney–General’s Department (supplementary submission).

The INSLM held a public hearing on 19 August 2016. A transcript of the proceedings is available on the INSLM’s website at: <http://www.inslm.gov.au/current-review-work>.

The INSLM also held private consultations and hearings with the:

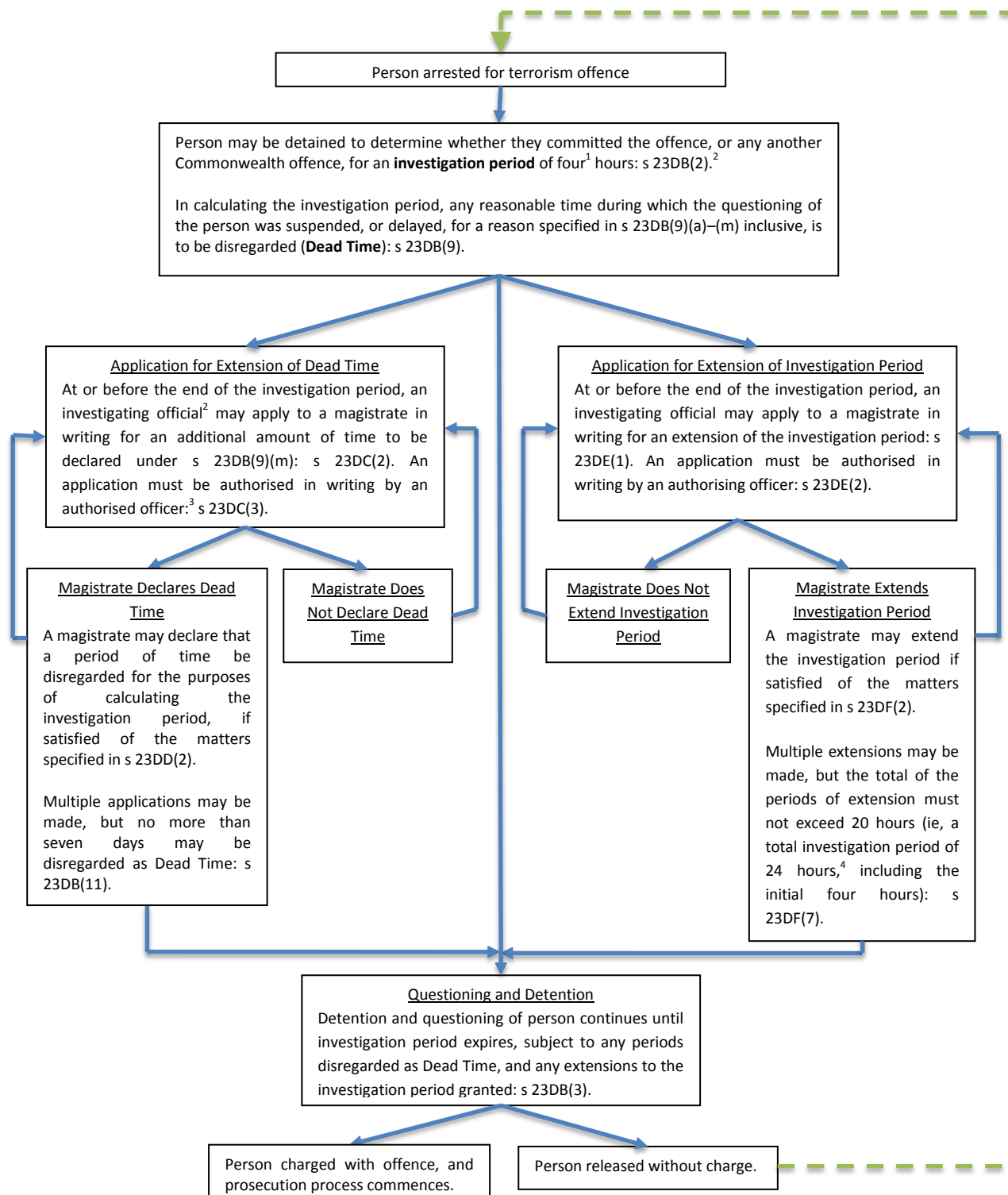
- Australian Federal Police;
- Australian Security Intelligence Organisation;
- Australian Criminal Intelligence Commission; and
- Attorney–General’s Department.

The INSLM also received correspondence from the Commonwealth Ombudsman, the Commonwealth Director of Public Prosecutions, and the Australian Commission for Law Enforcement Integrity.

I acknowledge the great assistance provided by my Senior Adviser, Mark Mooney, and my Adviser, Mark Woodberry, in conducting this review and preparing this report.

Appendix 2: Process of Pt IC of the Crimes Act

Terrorism Offences



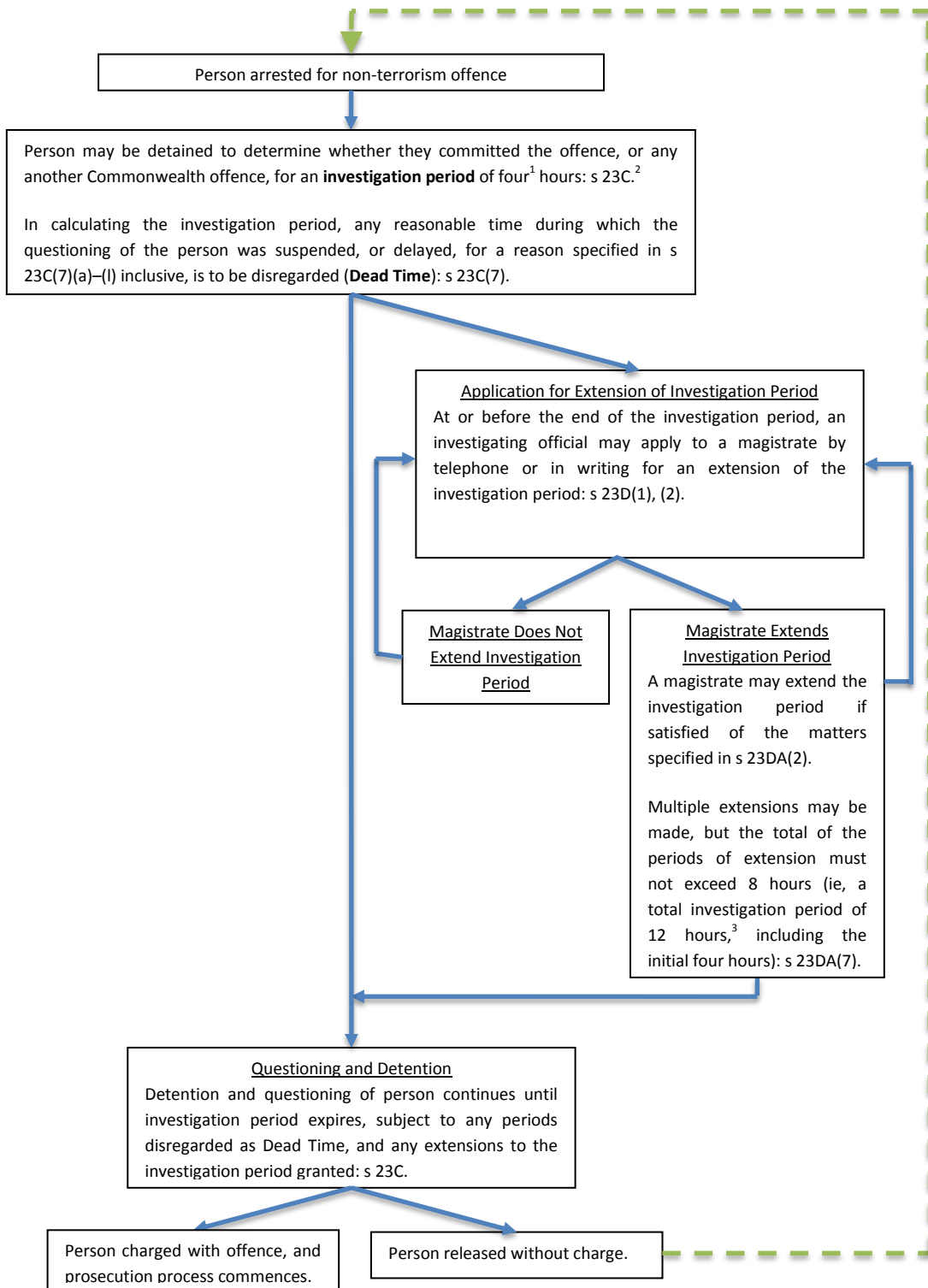
¹ If the person appears to be under 18 years of age, or Aboriginal or Torres Strait Islander, they may only be held for four hours.

² An ‘investigating official’ is a member or special member of the Australian Federal Police, a member of the police force of a state or territory, or a person who holds an office whose functions include the investigation of Commonwealth offences and who is empowered by a law of the Commonwealth by virtue of that office to make arrests in respect of such offences: s 23B (definition of ‘investigating official’).

³ An ‘authorising officer’ is an Australian Federal Police officer who is the rank of a superintendent or higher, and the equivalent in state and territory police forces.

⁴ Or 22 hours for persons who appear to be under 18 years of age, or Aboriginal or Torres Strait Islander.

Non-Terrorism Offences

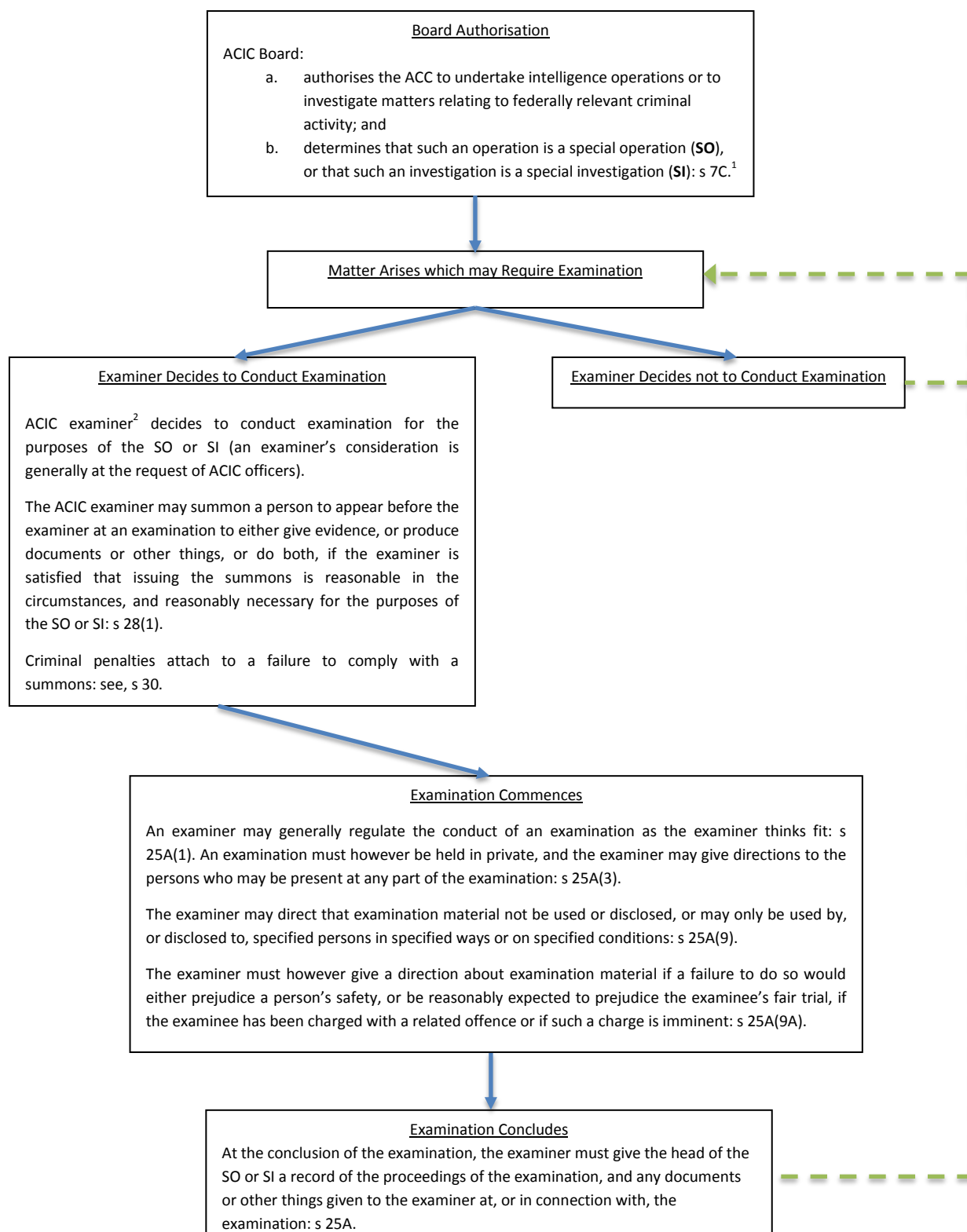


¹ If the person appears to be under 18 years of age, or Aboriginal or Torres Strait Islander, they may only be held for four hours.

² An ‘investigating official’ is a member or special member of the Australian Federal Police, a member of the police force of a state or territory, or a person who holds an office whose functions include the investigation of Commonwealth offences and who is empowered by a law of the Commonwealth by virtue of that office to make arrests in respect of such offences: s 23B (definition of ‘investigating official’).

³ Or 10 hours for persons who appear to be under 18 years of age, or Aboriginal or Torres Strait Islander.

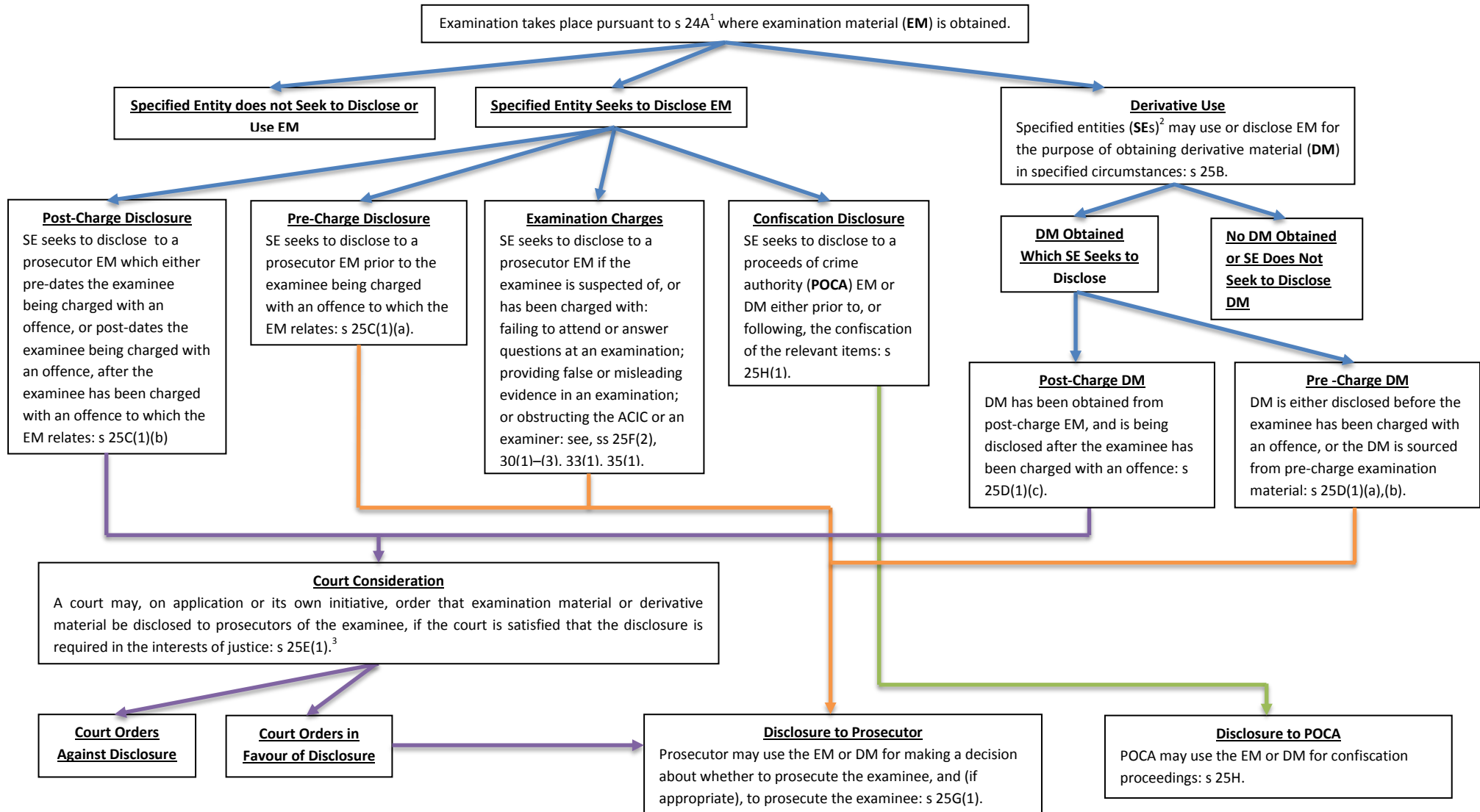
Appendix 3: Process for ACIC Examinations



¹ All legislative references are to the *Australian Crime Commission Act 2002* (Cth).

² 'Examiners' are individuals appointed to that role by the Governor-General pursuant to s 46B, following the Minister's consultation with the Inter-Governmental Committee on the appointment. A person is eligible to be appointed as an examiner if they are enrolled as a legal practitioner, and have been so for at least five years. Examiners may be appointed on a full-time or part-time basis: s 46B.

Appendix 4: ACIC Uses of Examination Material

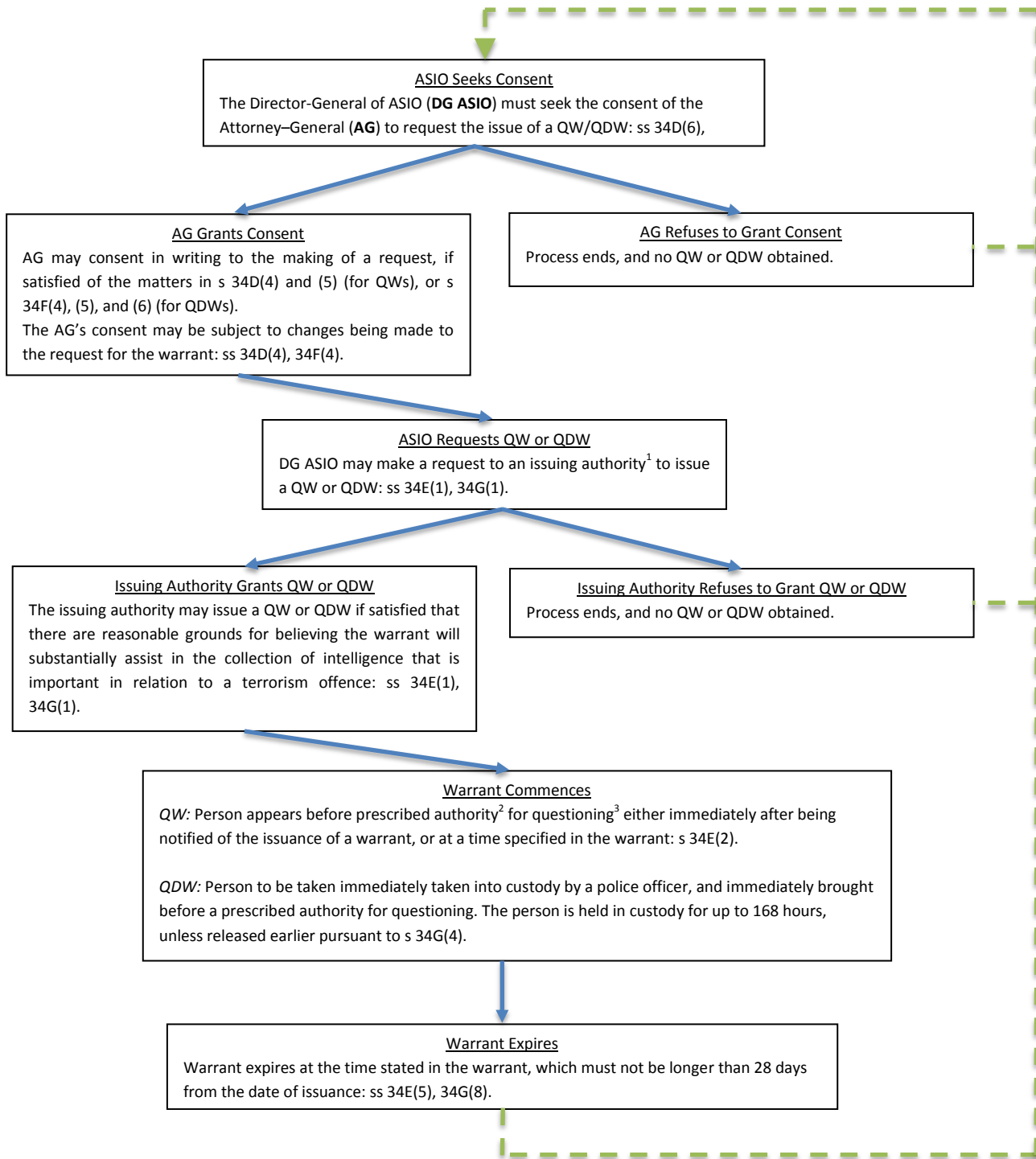


¹ All legislative references are to the *Australian Crime Commission Act 2002* (Cth).

² SEs are: an examiner; the CEO or a member of the staff of the ACIC; a person or body investigating whether the examinee committed an offence against a law of the Commonwealth, or of a state or territory; a prosecutor of the examinee; a prosecuting authority; a proceeds of crime authority; or any other person or body lawfully in possession of EM: s 25B(1), (3).

³ All uses of EM, other than post-charge disclosures of EM ordered by a court pursuant to s 25E(1), is subject to any relevant direction given by the examiner under s 25A(9): see eg, s 25C(2). Where the court is considering whether to order a post-charge disclosure of EM, the court will have regard to any direction under s 25A(9): s 25C(2) note.

Appendix 5: Process for Obtaining QWs and QDWs



¹ An 'issuing authority' is a judge who has been appointed by the AG: s 34AB.

² Per s 34B, a 'prescribed authority' is a person appointed by the AG who:

- a. has served as a judge in one or more superior courts for a period of five years and no longer holds a commission as a judge; or
- b. (if the AG is of the view there is an insufficient number of persons referred to in para a) is currently serving as a judge in a state or territory Supreme Court; or
- c. (if the AG is of the view there is an insufficient number of persons referred to in paras a and b) currently holds an appointment to the Administrative Appeals Tribunal as President or Deputy President, is enrolled as a legal practitioner of a federal court or the Supreme Court of a State or Territory, and has been so enrolled for at least five years.

³ Section 34L makes it an offence for a person appearing before a prescribed authority to fail to give information requested in accordance with the QW or QDW. While s 34L(9) offers a safeguard for the person, by stating that information provided by the person pursuant to a request under the QW or QDW is not admissible in evidence against the person in criminal proceedings (other than an offence for failing to provide the information pursuant to the QW or QDW), s 34L(9) does not explicitly prevent authorities from using the information received pursuant to the QW or QDW to subsequently locate additional evidence which could then be admitted in evidence against the person.

