JOINT SUBMISSION TO THE PJCIS

REVIEW OF THE AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION AMENDMENT BILL (NO. 2) 2025

9 October 2025

A combined submission from:
NSW Council for Civil Liberties
Liberty Victoria
Queensland Council for Civil Liberties

Introduction and Summary of CCLs position

1. The Councils for Civil Liberties ("CCLs") [1] have come together to make this joint submission in opposition to the proposal to make permanent division 3 of Part III to the *Australian Security Intelligence Organisation Act 1979* ("the Act"). We submit that division 3 of Part III should be repealed, or allowed to lapse when its sunset date is reached, in accordance with the recommendations of the INSLM in 2016.[2]

2. The submission will proceed through the following issues in broadly the following terms:

    a. that Questioning Warrants ("QWs"), whether or not they require the arrest and immediate appearance of a subject, constitute a form of administrative detention without suspicion or conviction of criminal guilt. This is unacceptable in a democratic society subject to the rule of law. Of particular concern is that children as young as 14 can be subject to these warrants;

    b. that coercive questioning and the permitted uses of derivative material, including its disclosure to an actual or potential prosecutor of the subject, seriously diminishes the right of accused persons to a fair trial. Read in the context the division as a whole, the provisions on derivative use tend to characterise ASIO as a secret police force, rather than an intelligence gathering agency; and

    c. linked to this, the qualifications on the right of an accused to legal representation and advice, violate the subject's right to a fair trial and place the subject on an unequal footing with the state, in circumstances where the subject may suffer serious penal sanctions as a result of the interrogation.

3. We accept that ASIO and the Australian Federal Police play an important role in protecting Australians from terrorism. We acknowledge that security and law enforcement agencies must have appropriate powers to detect, prevent and prosecute terrorist activities.

4. But the Parliament's duty is not merely to protect the safety of the public at all costs. The Parliament must also preserve the democratic liberty which the public cherishes and is entitled to expect. The appropriate balance must be struck. If, in combatting extremism, this society descends into authoritarianism, then the Parliament has destroyed what it is seeking to save .

Questioning Warrants as Administrative Detention

5. The CCLs submit that the administrative detention of an individual upon executive action (ie without judicial oversight) constitutes an erosion of the separation of powers and is an intolerable incursion upon fundamental rights. In a free and democratic society no individual should be deprived of his or her liberty other than by a court of law, after evidence based determination, and after the individual has been afforded due process.

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[1] New South Wales Council for Civil Liberties, Liberty Victoria and Queensland Council for Civil Liberties.

[2] Roger Gyles, *INSLM Review of Certain Questioning and Detention Powers in Relation to Terrorism* (Report to Commonwealth Government, 31 October 2016) 1 ("INSLM Review").

6. A QW can be issued against an adult merely because the Attorney-General believes that the warrant will 'substantially assist the collection of intelligence that is important in relation to politically motivated violence, foreign interference or espionage and the issuing is 'reasonable in all the circumstances'.[3] There are several concerns that flow from this criteria:

   a. First, the issuing of a questioning warrant is capable of subjecting a person who is neither suspected, nor charged with an offence, under an obligation to submit to coercive interrogation on penalty of 5 years imprisonment, with no restrictions on the persons about whom questions can be asked (eg close family members);

   b. Secondly, although the criteria at 6(a) above place some restriction on the issuing of a QW, there is nevertheless a concern that notions such as *substantially assist* and *important in relation to* are broad, imprecise and potentially malleable. They are open to subjective interpretation, and there is a risk that over time there will be an expansion of the category of cases that justify their use;

   c. Thirdly, the phrase 'politically motivated violence' is even more nebulous than the previous formulation 'terrorist offence'. The powers under the division were introduced in 2003 and justified by reference to the 9/11 attacks, that is to say, quasi-militaristic assaults with the intent and capacity to kill large groups of people and damage critical infrastructure. 'Politically motivated violence' is capable of encompassing a very broad range of conduct, down to throwing a punch at a protest. Conduct may be caught which is unlikely to present harm to the public at large, more befitting the ordinary procedures of the criminal law. It is submitted that this is an example the 'category creep' identified above at 6(b);

   d. Fourthly, the threshold criteria does not limit the issuing of a detention warrant to the prevention of 'politically motivated violence' *prospectively*. It could include the collection of intelligence in relation to acts of 'politically motivated violence' already completed (where there is no immediate danger to the public). Again, it should not automatically be assumed that every "terrorism offence" will provide justification for executive detention, and such detention is harder to justify where there is no immediate threat to the public.

7. We note that minors, unlike adults, can only be subjected to a questioning warrant because its subject matter is related to protecting 'the people of the Commonwealth… from politically motivated violence', [4] and accept this formulation is more similar to the concept of 'terrorism' which originally justified the passing of the division, it is still infected with ambiguities identified above at 6(c).

8. The CCLs welcome the earlier removal of 'questioning and detention warrants' from the Act. We note however that:

   a. individuals can still be required to appear for questioning without delay merely

[3] *Australian Security Intelligence Organisation Act 1979* ("*ASIO Act*) s 34BA(1).

[4] *ASIO Act* s 34A.

because the Attorney-General (without judicial oversight) considers it 'reasonable and necessary'; [5]

b. police can arrest the subject of a QW, search their person, and forcibly bring the subject before the Prescribed Authority; [6]

c. QWs can be repeatedly issued in respect of the same person; [7]

d. persons can be subjected to up to 24 hours 'questioning time' without an interpreter and 40 hours with an interpreter; and [8]

e. almost everything except time during which the subject is being directly questioned is not counted as 'questioning time', potentially extending the time a subject is detained beyond the 24 or 40 hour limit as the case may be. [9]

9. Taken cumulatively it is submitted that these features of the Act constitute nothing more than a softer form of questioning detention warrant. Moreover, the fact that warrants can be repeatedly issued in respect of the same person opens the possibility that an individual could be harassed by ASIO, the kind of eventuality that the principle of *res judicata* in the criminal procedure was developed to prevent.

10. These powers are inconsistent with fundamental human rights, including freedom of movement and the notion that an individual should only be deprived of their liberty after having been afforded due process. What the powers mean in effect is that a person, indeed a child, who has committed no crime, but rather, is thought to have knowledge about some vaguely construed past or future act of 'politically motivated violence', can be arrested, frisked and taken to an office of the administrative government and there subjected questioning of up to 40 hours duration on pain of imprisonment with significantly curtailed access to legal representation. This is a power which no democratic polity requires.

Derivative Material, privilege against self-incrimination and the right to a Fair Trial

11. The accusatorial system of criminal adjudication was hard won, from centuries of bitter experience, and should not lightly be thrown aside. As Justice Murphy observed in *Hammond v Commonwealth* 'the privilege against self-incrimination is part of our legal heritage where it became rooted as a response to the horrors of the Star Chamber... In Australia it is a part of the common law of human rights.' [10]

12. Under the division the right is curtailed in a number of ways. 'Questioning material' can be disclosed by or to a prosecutor of the subject in order to obtain 'derivative material'

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[5] *ASIO Act* s 34BE(1).
[6] *ASIO Act* s 34C.
[7] Ibid s 34BE(5)
[8] Ibid s 34DJ(3) and 34DK(5).
[9] Ibid s 34DL.
[10] (1982) 152 CLR 188, 200.

about the subject.[11] Derivative material can also be disclosed by ASIO to a prosecutor of the subject [12] which can be used for prosecution.[13] Derivative material is defined as 'any evidence, information, record or other thing obtained directly or indirectly from questioning material.'[14]

13. The definition of 'derivative material' suggests that almost anything which is not the specific answers which the subject has given, or evidence they have otherwise produced under the interrogation is encompassed. The High Court has noted the difficulty with applying the distinction between direct and derivative use of evidence in practice and the tendency of coercive questioning to prejudice the possibility of a fair trial on a number of occasions.[15] For example in *X7 v Australian Crime Commission* Justices Hayne and Bell observed that:

> *Compulsory examination by a member of the executive… might prejudice the fair trial of the person examined where the prosecution is, as a result, afforded an unfair forensic advantage … a use immunity alone does not place an accused person in as good a position as he or she would be if able to rely on the privilege against self-incrimination, because material establishing that a person is guilty of an offence "may place [a person] in real and appreciable danger of conviction, notwithstanding that the answers themselves may not be given in evidence"… An unfair forensic advantage may therefore take the form of the prosecution making use of derivative evidence to obtain a conviction.* ***The clearest example is when the prosecution tenders derivative evidence which could not have been obtained, or the significance of which could not have been appreciated, but for the compulsorily obtained evidence****.*[16]

14. In democratic polities, intelligence organisations have been permitted to operate in secret and without the public accountability mechanisms that apply to police because they neither produce evidence, nor exercise coercive powers. Division 3 departs from this principle[17]. It empowers ASIO, at the request of a cabinet minister, to force a legally innocent person to answer questions. Those answers may then be used to obtain admissible evidence against the person, or disclosed directly to a prosecutor for that purpose. This creates an incentive for the executive to conduct 'fishing expeditions' against individuals who could not otherwise be investigated under ordinary criminal procedure. Given the breadth of the concept of 'political violence,' the CCLs are concerned that the effect of the division is to transform ASIO from an intelligence agency into a secret police force.

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[11] *ASIO Act* s 34EA.

[12] Ibid s 34EB.

[13] Ibid s 34EE.

[14] Ibid s 34A.

[15] *Hammond v Commonwealth of Australia* (1982) 152 CLR 188; *Sorby v The Commonwealth* (1983) 152 CLR 281; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *X7 v Australian Crime Commission* (2013) 248 CLR 92.

[16] *X7 v Australian Crime Commission* (2013) 248 CLR 92, 123 [53], quoting Gibbs CJ in *Sorby v The Commonwealth* (1983) 152 CLR 281, 294.

[17] see the discussion by Peter Edwards *Keeping Australians and their civil liberties safe: The principles of the Hope model* The Strategist Australian Strategic Policy Institute 4 May 2020

15. It is clear from the numerous severance provisions in the division that the Parliament is aware that many of the powers in division 3 impair the right to a fair trial and are otherwise potentially unconstitutional. [18] It is important that Parliament observes and upholds the rule of law, including the constitutional limits on its powers, especially when the law concerns basic rights and freedoms.

Concerns in relation to legal representation

16. The CCLs welcome the repeal of section 34Q which permitted ASIO to monitor conversations between a subject and their lawyer. The CCLs also acknowledge that it is now clear under the Act that a subject is entitled to be questioned in the presence of a lawyer of choice. However, it is submitted that the subject's access to a lawyer is still impermissibly curtailed. In particular it is noted that the subject's lawyer:

    a. can be given a redacted warrant; [19]

    b. cannot intervene in the interrogation and indeed can be removed for being 'disruptive'; and [20]

    c. cannot address the Prescribed Authority without permission.[21]

17. A lawyer who is given redacted evidence, who cannot speak for their client as of right, and who cannot intervene to object to unlawfulness by the interrogator, cannot effectively represent that client. Nor can the lawyer advise the subject to refuse to answer questions, as doing so would expose the subject to criminal liability. In these circumstances, the lawyer is stripped of their essential function of safeguarding fairness and is reduced to a bystander — a witness with legal training who may only advise, after the fact, whether the executive has exceeded the limited constraints placed on its powers under the Act.

Concluding remarks

18. In 2016 the INSLM recommended that division 3 of the legislation be permitted to lapse, and that the balance of Part III be repealed. His reasons for doing so were that:

    a. Linking the power to a 'terrorism offence' rather than the prevention or disruption of a terrorist act elides 'the fundamental distinction between the collection of intelligence and law enforcement';[22]

    b. ASIO, along with the federal and state police and other executive bodies, already have sufficient powers necessary to prevent and disrupt terrorist attacks and may

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[18] *ASIO Act* ss 34BB(1)(5), 34BD(5), 34DB(2), 34E(4), 34EA(2), 34EC(5), 34ED(5).
[19] *ASIO Act* s 34FE.
[20] Ibid ss 34FF(3) and (6).
[21] *ASIO Act* s 34FF(4).
[22] Gyles, *INSLM Review* 40

co-ordinate with each other to do so;[23]

c. detainment without court involvement is potentially unconstitutional; [24]

d. the division is in breach of Australia's international human rights obligations; [25]

c. the provisions had been seldom used and no explanation for this had ever been given by ASIO and therefore the incursion on liberty was unjustified and disproportionate; [26] and

d. the terms of imprisonment for offences under the division (mostly 5 years) were excessive and should be reduced to 2 years if the division was retained.[27]

19. The CCLs agree with these findings of the INSLM.

20. At present, we understand that only 20 questioning warrants have ever been issued.[28] Between 2012 and 2021 no warrants were issued. It is our understanding that no questioning detention warrant was ever issued. Due to the secrecy around ASIO's operations, it is impossible to say to what effect these warrants were put, whether or not they achieved the purported goal of preventing 'politically motivated violence.' In light of this the CCLs concur with the INSLM that the powers are unnecessary.

21. ASIO itself admits no warrant has been issued against a minor and has recommended the powers in this regard should be abolished.[29] Not even ASIO thinks it is necessary to coercively question minors. It is ironic that the Government has put forward this bill contemporaneously with its social media ban, justified as the ban was in the name of protecting children.

22. The powers are totally unprecedented in comparable democracies. Neither MI6, nor CSIS in Canada, nor the various American intelligence agencies, have the power to detain and coercively question the citizens of their respective nations.[30] While Canada permitted 'investigative hearings' *before a judge in open court* pursuant to the *Terrorism Act 2001*, there was no power of detainment, and the provisions were repealed in 2019 without apparent surge in terrorism incidents.[31]

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[23] Ibid 41

[24] Ibid 41

[25] Ibid 41

[26] Ibid 42-43

[27] Ibid 47.

[28] Gyles, *INSLM Review* 25*;* ASIO, *Annual Reports* (Financial Years 2019 to 2024).

[29] Matthew Doran, 'ASIO tells Parliament it no longer needs powers to question 14-year-olds, as threat facing the nation changes' *ABC News* (Online, 23 May 2024); Daniel Hurst, 'ASIO offers to repeal one of its powers' *The Guardian* (Online, 3 March 2024).

[30] Nicola McGarrity, 'Coercive Questioning and Detention by Domestic Intelligence Agencies' (2014) 9(1) *Journal of Policing, Intelligence and Counter Terrorism* 48, 54-61.

[31] Government of Canada, 'Parliamentary Passage of Bill C-59: the National Security Act, 2017 - Strengthening Security and Protecting Rights: Overview of New Measures' (Press Release, 19 June 2019); National Consortium for the Study of Terrorism, 'Canada', *Global Terrorism Database* (accessed 1 October 2025) < https://www.start.umd.edu/>.

23. Conversely, states with similar powers to those under division 3 include China, which permits 'Residential Surveillance at a Designated Location' without legal representation, [32] Qatar, which permits executive detention for threats to 'state security' [33] and Singapore, which permits executive detention for renewable periods of 2 years for acting 'in a manner prejudicial' to the 'security' of Singapore.[34] Making Division 3 permanent would align Australia with regimes where human rights are routinely violated, rather than the liberal democracies of which it is purportedly member.

24. The CCLs agree with the view of the INSLM that '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… The present questioning power is heavy duty with heavy duty safeguards. It is unwieldy and not being used but has the potential for oppression.' [35]

Recommendations

25. Accordingly, the CCLs recommend that division 3 be repealed or, in the alternative, allowed to lapse when the sunset date is reached.

26. If the division is to be retained, the CCLS recommend that:

a. that the division continues to be subject to a sunset clause;

b. the powers to issue warrants against minors be repealed;

c. the issue of warrants be subject to oversight by a public interest monitor;

d. warrants should be approved by senior judicial officers;

e. 'adult questioning matters' be limited to information that might lead to the prevention or disruption of an imminent terrorist attack;

f. questioning material cannot be disclosed for the purposes of obtaining derivative material and that derivative material is inadmissible;

g. a subject's lawyer is able to address the Prescribed Authority as of right;

h. questioning time be decreased to 8 hours maximum;

i. the powers permitting the issuance of repeat warrants be abolished and replaced with provisions providing that further warrants cannot be issued in relation to the same matter either at all, or for a certain period, say 12 months; and

j. offences relating to the refusal to answer questions be decreased to 2 years.

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[32] *Criminal Procedure Law*, Arts 39 and 75.

[33] *Law No. 17 of 2002 on the Protection of the Community*; *Law No. 27 of 2019*.

[34] The *Internal Security Act 1960*, see esp. s 8(1).

[35] Gyles, *INSLM Review* 41 and 51.

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Please direct correspondence concerning this letter to president@qccl.org.au

Yours Faithfully

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For and on behalf of the Councils for Civil Liberties
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