

Appointed lawyer scheme

Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979*

The Department of Home Affairs is seeking expressions of interest from suitable criminal defence lawyers willing to represent subjects under the appointed lawyer provisions set out in Division 3 of Part III of the [Australian Security Intelligence Organisation Act 1979](#) (the **ASIO Act**).

Overview

The [Australian Security Intelligence Organisation Amendment Act 2020](#) (the **Amendment Act**) received Royal Assent on 17 December 2020.¹ The Amendment Act relevantly repealed the Australian Security Intelligence Organisation's (**ASIO**) questioning and detention powers in Division 3 of Part III of the ASIO Act, and introduced a reformed questioning framework to assist ASIO to gather intelligence in relation to politically motivated violence (including terrorism), espionage and acts of foreign interference.

Questioning of a subject under a questioning warrant is overseen by an independent prescribed authority appointed by the Attorney-General (s 34AD of the ASIO Act). A prescribed authority provides directions during the execution of the questioning warrant in accordance with Division 3 of Part III of the ASIO Act. In certain circumstances, the prescribed authority may make a direction to appoint a lawyer for the subject of a questioning warrant (ss 34FB and 34FC of the ASIO Act). For example, the prescribed authority must appoint a lawyer for the subject of an adult questioning warrant where:

- the warrant required the subject to attend questioning immediately, and
- a lawyer for the subject is not present at questioning, and
- the subject requests that a lawyer be present during questioning.

In these circumstances, the subject may also contact a lawyer of their own choice. To enable questioning to commence without delay, the subject will be questioned in the presence of the appointed lawyer until the subject's lawyer of choice arrives.

In addition to this, a minor must not be questioned in the absence of a lawyer under any circumstances. Therefore, to ensure questioning may commence without delay, the prescribed authority must appoint a lawyer for the subject of a minor questioning warrant where:

- the warrant required the subject to attend questioning immediately, and a lawyer for the subject is not present at questioning, or
- questioning has been deferred to enable the subject to obtain a lawyer, and after a reasonable time, a lawyer does not attend.

The prescribed authority would make any decision to appoint a lawyer independently of ASIO and the Australian government.

What would you do as an appointed lawyer?

Lawyers appointed for the subject of a questioning warrant may provide advice to the subject on the warrant, and be present while the subject is questioned before a prescribed authority (s 34FF of the

¹ Section references in this notice refer to the ASIO Act as modified by the Amendment Act, available at <<https://www.legislation.gov.au/Details/C2020A00134>>.

ASIO Act). A lawyer must not intervene in the questioning or address the prescribed authority during questioning, except to:

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

The prescribed authority must provide a reasonable opportunity for the lawyer to advise the subject during breaks in the questioning. During a break in questioning, a lawyer may request an opportunity to address the prescribed authority on a matter.

Eligibility requirements - skills and experience

The Department of Home Affairs seeks nominations from experienced criminal defence lawyers with strong advocacy skills and 5+ years post-admission experience.

Remuneration

Appointed lawyers will be remunerated at an hourly rate of \$290, inclusive of GST, to be billed in six-minute units. This hourly rate is consistent with the Commonwealth's cost assessment policy for legal financial assistance, available at <[Commonwealth Legal Financial Assistance Schemes Assessment of Costs—July 2012 \(ag.gov.au\)](#)>.

Pursuant to section 34JE of the ASIO Act, subjects of a questioning warrant are eligible to apply for financial assistance to cover legal and related expenses in relation to the person's appearance before a prescribed authority for questioning under the warrant. Grants under this ASIO scheme are made on written application at the discretion of the Attorney-General. Payment of fees for appointed lawyers by the Government is not contingent on a successful application for financial assistance by the subject of a questioning warrant.

Time commitment

Questioning may take place at short notice, for a maximum permitted questioning time of 24 hours, or 40 hours where an interpreter is present (s 34DJ of the ASIO Act). A questioning warrant may be in force for up to 28 days. Questioning may take place over several days within this 28-day period, provided the maximum permitted questioning time is not exceeded.

The prescribed authority may set breaks between periods of questioning as they see fit. While there is no prescribed number of breaks, a 30 minute break will be offered to an adult questioning subject every 4 hours. A minor may only be questioned for continuous periods of 2 hours or less, separated by breaks as directed by the prescribed authority. In addition to this, the subject must be given a break of sufficient duration in any 24 hour period to ensure they have an opportunity for continuous and undisturbed sleep (at least 8 hours for an adult, or 10 hours for a minor).

Nominated lawyers must be willing to attend as required for each questioning session under a questioning warrant. This may be during ordinary business hours or, in exceptional circumstances, outside of ordinary business hours (including at night).

The prescribed authority will work with any appointed lawyer to take into account their availability and other commitments when scheduling questioning sessions.

Secrecy requirements

Division III of Part 3 of the ASIO Act contains a number of secrecy offences in relation to information associated with a questioning warrant (s 34GF of the ASIO Act).

Strict liability applies in relation to the disclosure of operational information where the discloser is a lawyer who has been present during questioning, or contacted for the purpose of obtaining legal advice or representation in connection with a questioning warrant.

How to express your interest in being an appointed lawyer

Suitable criminal defence lawyers who wish to nominate their interest should provide:

- their full name
- their contact details (landline and mobile phone numbers, and email address)
- details of their employer (if any)
- date of admission to practise
- their curriculum vitae, and
- a copy of a current Australian legal practising certificate

to SecurityandIntelligencePolicy@homeaffairs.gov.au.

By providing this information to the Department of Home Affairs, applicants consent to the Department of Home Affairs and relevant Commonwealth agencies, collecting, using and disclosing their personal information for purposes connected with the appointed lawyer scheme in Division 3 of Part III of the ASIO Act. For further information on how your personal information will be collected, used, stored and disclosed please refer to the **attached** *Privacy Notice – Collection of personal information for the purposes of the Appointed Lawyer Scheme under the Australian Security Intelligence Organisation Act 1979 (APP 5)*.

What happens once you submit your nomination?

Individuals who express their interest in being an appointed lawyer will be assessed by the Department of Home Affairs and, if found suitable, included on a private register maintained by the Department of Home Affairs. The details of lawyers on the register will be made available to the prescribed authority responsible for overseeing questioning under a warrant in order to appoint a lawyer for the subject of a questioning warrant where necessary. Details of lawyers may also be provided to ASIO to assist in administrative arrangements in relation to questioning. Lawyers who are on the register will be contacted each year to confirm they are willing to remain on the register. Lawyers may request that they be removed from the register at any time.

Should the prescribed authority determine to appoint a lawyer in connection with a questioning warrant, the prescribed authority may select a lawyer from the register. Choice of lawyer will be at the prescribed authority's discretion, however, lawyers retain the discretion as to whether to accept or decline to act for the subject in any particular matter.

Lawyers who are contacted through the register may be asked to provide further information before appointment. Lawyers will also be provided with further information concerning the questioning process before they are required to represent a questioning subject. Terms of engagement will also be settled at that time.

There is no guarantee that lawyers included on the register will be appointed as lawyers in connection with a questioning warrant. ASIO's compulsory questioning powers are exceptional in nature and likely to be used sparingly.

Further information

If you would like further information about the role, please email SecurityandIntelligencePolicy@homeaffairs.gov.au.