

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

Division 3 of Part III of the ASIO Act contains a questioning framework to assist ASIO to gather intelligence in relation to politically motivated violence (including terrorism), espionage and acts of foreign interference. ASIO may only question an individual pursuant to the authority conferred by a warrant issued by the Attorney-General.

Questioning of a subject under a questioning warrant is overseen by an independent prescribed authority appointed by the Attorney-General (ss 34AD and 34BD of the ASIO Act). The 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 must make a direction to appoint a lawyer for the subject of a questioning warrant (ss 34FB and 34FC).

For example, under s 34FB(2)(a) the prescribed authority must give a direction that a specified person be appointed as the lawyer for the subject of an adult questioning warrant where:

- the warrant includes an immediate appearance requirement, and
- a lawyer for the subject is not present while the subject is appearing before a prescribed authority for questioning under the warrant, and
- the subject requests at any time that a lawyer be present during questioning.

In these circumstances, the subject may also contact a lawyer of choice other than the appointed lawyer. 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 give a direction that a specified person be appointed as the lawyer for the subject of a minor questioning warrant where:

- the warrant includes an immediate appearance requirement, and a lawyer for the subject is not present while the subject is appearing before a prescribed authority for questioning under the warrant (s 34FC(2)(a)), or
- questioning has been deferred to enable the subject to obtain a lawyer, and the prescribed authority is satisfied that such time as is reasonable to enable a lawyer for the subject to be present during the questioning has passed (s 34FC(3)(b)).

The prescribed authority has the authority 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 an adult questioning warrant must be present while the subject is questioned before a prescribed authority, unless the subject voluntarily chooses to be questioned in the absence of a lawyer (s 34FA), or the prescribed authority gives a direction that questioning can occur without a lawyer present (this can only occur in the limited circumstances set out in

s 34FB(3)(b) or 34FF(7)(c)(iii). The subject of a minor questioning warrant must not be questioned under the warrant in the absence of a lawyer for the subject.

The lawyer provides advice to the subject during breaks in questioning (s 34FF). 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, the 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. Appointed lawyers must be enrolled as a legal practitioner of a Federal or Supreme Court and hold a practising certificate granted under a law of a State or Territory and have 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, applications for financial assistance may be made to the Attorney-General in respect of the subject of a questioning warrant'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 period of 24 hours (s 34DJ of the ASIO Act), or 40 hours where an interpreter is present (s 34DK). A questioning warrant may remain in force for a period of no more than 28 days, although the Attorney-General may revoke the warrant before the period has expired. Questioning may take place over several days within this 28-day period, provided the maximum permitted questioning period is not exceeded.

The prescribed authority may set breaks between periods of questioning by giving appropriate directions under paragraph 34DE(1)(e) for the subject's further appearance before the prescribed authority for questioning under the warrant. While there is no prescribed number of breaks, a 30 minute break will be offered to an adult questioning subject every 4 hours.¹ A minor may only be questioned for continuous periods of 2 hours or less, separated by breaks as directed by the prescribed authority. The prescribed authority must provide a reasonable opportunity for the lawyer to advise the subject during breaks in the questioning.

¹ Australian Security Intelligence Organisation (Statement of Procedures) Instrument 2020, s 9(13).

In addition to this, the subject must be given a break of sufficient duration in any 24 hour period of questioning to ensure they have an opportunity for an appropriate amount of continuous and undisturbed sleep, having regard to the subject's age (at least 8 hours for an adult, or 10 hours for a minor).²

Appointed 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 3 of Part III 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 to paragraphs 34GF(1)(c) and (2)(c) where the subject of the warrant or their lawyer discloses information that indicates the fact that the warrant has been issued, or a fact relating to the content of the warrant, or to the questioning or apprehension of a person in connection with the warrant and/or the information is operational information.

A subject's lawyer is a lawyer who has at any time been:

- present, as the lawyer for the subject of the warrant, during the questioning of the subject under the warrant, or
- contacted for the purpose of the subject obtaining legal advice in connection with the warrant, or
- contacted for the purpose of the subject obtaining representation in legal proceedings seeking a remedy relating to the warrant or the treatment of the subject in connection with the 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 their current practising certificate as an Australian legal practitioner.

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. This includes consent for the Department of Home Affairs to provide their personal information to ASIO and the prescribed authority for purposes connected with the appointed lawyer scheme. For further information on how your personal information will be

² Australian Security Intelligence Organisation (Statement of Procedures) Instrument 2020,

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 against the criteria set out in this document 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 security and 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. While the choice of lawyer will be at the prescribed authority's discretion, 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.