



Parliamentary Joint Committee on Intelligence and Security

Inquiry into the Australian
Security Intelligence
Organisation Amendment
Bill 2020

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Submission by the
Australian Federal Police

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Introduction

1. The Australian Federal Police (AFP) welcomes the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security (the Committee) inquiry into the Australian Security Intelligence Organisation Amendment Bill 2020 (the Bill).
2. The AFP supports amendments to ensure that the Australian Security Intelligence Organisation (ASIO) has the necessary investigative and operational tools to quickly respond to and protect Australia and Australians from the threats to national security posed by espionage, politically motivated violence (including terrorism) and foreign interference.
3. The AFP's interest in this Bill relates to the modernisation of the compulsory questioning regime under Part III, Division 3 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act). Under these provisions, a police officer may be asked to assist ASIO in the service of a questioning warrant, and the apprehension and transport of the subject of a questioning warrant to the location of questioning.
4. This submission provides an overview of the practical arrangements between the AFP and ASIO, the AFP's role under the proposed new framework and operational case studies for the Committee's consideration.
5. The AFP was consulted throughout the development of this Bill in relation to the compulsory questioning framework and has worked closely with the Department of Home Affairs and ASIO to ensure the reforms are responsive to operational needs, and that provisions relating to AFP assistance are appropriate. As with the existing questioning framework, the amended framework will be supported by an agreement between the AFP and ASIO regarding practical and procedural arrangements for AFP assistance.

Schedule 1 – Amendments relating to compulsory questioning powers

Practical Arrangements between AFP and ASIO

6. The AFP and ASIO have a longstanding relationship of cooperation on national security issues. A Memorandum of Understanding (MOU) has been in place since October 2007, which provides governance for cooperation and practical operational arrangements to exercise the existing questioning and detention powers. The MOU ensures that powers exercised under these provisions are done so effectively and safely with appropriate consideration.
7. The existing MOU acknowledges that the execution of a warrant under the ASIO Act is likely to raise many issues which need to be considered and planned well in advance. This includes facilitating the security and effectiveness of the ASIO investigation and protecting the safety and interests of all involved. To ensure appropriately considered arrangements are in place, where ASIO envisages that AFP assistance under the ASIO Act may be sought, consultation occurs as early as possible.

8. The AFP is working with ASIO to revise the MOU to reflect the amendments in this Bill (if passed). This approach ensures ongoing cooperative and collaboration engagement prior to the exercise of any powers, balancing the interest of all parties involved.

Role of AFP in assisting with ASIO Questioning Warrants

9. Our understanding of how the AFP would support ASIO within the revised compulsory questioning framework set out in the Bill is at **Attachment A**.

Scope of questioning

10. The AFP has a positive, collaborative working relationship with ASIO with respect to the existing ASIO questioning and detention warrant regime, which has existed since 2003.
11. Under the existing arrangement, AFP *may* be asked to assist ASIO with the execution of a questioning warrant or questioning and apprehension warrant; where ASIO *believes* it will *substantially assist* in the collection of intelligence in relation to terrorism offences. The Bill expands this remit to espionage, politically motivated violence (including terrorism) and acts of foreign interference.
12. The AFP notes that State and Territory Police also have the power to assist with these types of warrants.

Replacement of the detention power with a limited apprehension power

13. The Bill removes the detention power and replaces it with a more limited apprehension power, to ensure that the subject complies with the requirement of a questioning warrant. The apprehension of a subject may occur when:
 - It has been authorised by the Attorney-General,
 - The questioning warrant includes an immediate appearance requirement and at the time of service of the warrant, a police officer believes on representations by the subject, that they may alert a person involved in an activity prejudicial to security that the activity is being investigated, the subject may not appear for questioning, or the subject may destroy, damage or alter a record or thing they have been or may be requested to produce in accordance with the warrant, or
 - If the person fails to appear for questioning as required.
14. Police apprehension based on representations is a new power but is exercisable only at the discretion of the police officer.

New Searches, seizure and screening

15. Under the Bill, a police officer may conduct an ordinary search of a subject of a questioning warrant and seize certain items found. The purpose of these powers are to ensure the safety of those involved in questioning and prevent the subject from communicating the existence of the warrant or recording the questioning proceedings.
16. This amendment was recommended by the 2016 review by the former Independent National Security Legislation Monitor, the Hon Roger Gyles AO QC and the 2018 PJCIS review of ASIO's questioning and detention powers, to ensure the safety of all individuals involved, including ASIO officers.

17. Any apprehension, search and transport of a subject for ASIO questioning, will be undertaken in accordance with legislative provisions under the ASIO Act, AFP legislative powers under the *Crimes Act 1914*, and procedural guidelines agreed between ASIO and AFP.
18. Where ASIO requests AFP assistance, the AFP would undertake a risk analysis, in conjunction with ASIO, to determine an appropriate course of action to ensure that the subject will appear at the place of questioning, does not alert others involved in acts prejudicial to security that the activity is being investigated, or does not destroy, damage or alter a record or other thing that subject has been or may be required to produce in accordance with the warrant.
 - Note, where a warrant authorising apprehension has been issued, police would always assist ASIO with the service of the warrant and transport the person to the place of questioning.
19. At the place of questioning, a police officer is required to conduct a search of the person if deemed necessary in accordance with the "screening" procedures outlined in the bill.

Questioning of minors

20. The Bill amends the age for questioning a subject from 16 to 14 years where the individual is *likely engaged in, or is likely to engage in acts of politically motivated violence*. Further, before issuing a questioning warrant for a minor, the Attorney-General must consider the best interests of the child.
21. The AFP concurs with ASIO's concerns that vulnerable and impressionable young people continue to be at high risk of being radicalised through extremist propaganda and become involved in the planning and carrying out of politically motivated violence attacks. Extremist groups continue to disseminate propaganda online and through social media to radicalise, recruit and inspire terrorist attacks. Young people are particularly vulnerable and susceptible to being influenced and having their mind set and values shaped by external sources.
 - The AFP is aware that since 2014, children, particularly orphans, have been recruited by Islamic State for the purposes of being involved in conflict. This risk remains.
 - We are also aware of, and concerned by, reporting on an emerging issue that children under 14 years are being influenced by extreme right wing ideology, particularly overseas.
22. Our experience is that the current threat environment demonstrates minors have been influenced and radicalised to carry out acts of terrorism against the general public. These minors may hold particularly unique human intelligence that without compulsory questioning, ASIO would not otherwise have access to.
23. The AFP supports the need for ASIO to exercise compulsory questioning powers on minors of 14 years of age for this limited purpose and with appropriate protections and considerations, to allow ASIO to collect intelligence and collaborate quickly in a predictive and anticipatory capacity.
 - The AFP notes the Independent National Security Legislation Monitor recently published a report on young people prosecuted and sentenced for terrorism

offences, indicating that since 2014 the risk of children committing terrorism offences has emerged as a significant issue.

- In 2015, an individual who was 14 years of age at time of offending, was sentenced to an 18 month bond for four NSW Firearm offences. The individual was further charged with conspiracy to commit acts in preparation for, or planning of, a terrorist attack, receiving a 13 year, 6 month head sentence with 10 years and 1 month non-parole period (reduced to 10 years and 9 months with an 8 year non-parole period on appeal).
24. The AFP notes that limiting these powers to individuals over 14 years of age aligns with age thresholds for Control Orders in counter terrorism matters. The *Counter-Terrorism Legislation Amendment Act (No 1) 2016* recognised that 14 years of age is an appropriate threshold for the application of control orders. Prior to these amendments, the threshold was also set at 16 years of age.
25. ACT Policing statistics indicate that between 1 May 2018 and 31 May 2020 there were 585 charges laid against 103 offenders aged between 14 and 16.
- Noting the frequency police come into contact with offenders as young as 14, and sometimes younger, law enforcement agencies are well equipped to manage interviews with children and young people.
 - Legislation and internal governance provide guidelines for how children are to be interviewed if they have been arrested for an offence, including Part 1C of the *Crimes Act 1914*, which requires that a parent or guardian be present during the interview and contain time limitations on questioning periods.
 - ACT Policing regularly question minors in the course of performing their duties. While ACT Policing's main goal in interviewing young offenders is to divert them away from the criminal justice system, the techniques and processes involved remain the same regardless of the severity of the offending.
26. The AFP notes that the protections afforded in the Bill to individuals younger than 18 years, generally align with protections available for minors being interviewed for general criminal matters. Moreover, in questioning a minor who is suspected of being involved in terrorism matters, in some circumstances there may be an opportunity to intervene and safeguard the welfare of that child.

Existing cooperation between AFP and ASIO

Joint Counter-Terrorism Teams

27. In support of a nationally consistent counter-terrorism framework, the Joint Counter-Terrorism Teams (JCTTs) were established in each State and Territory in 2002-2003, comprising of members from the AFP, State and Territory Police and ASIO (and the NSW Crime Commission in NSW).
28. The JCTTs provide a coordinated and consistent approach to combating terrorism. The JCTTs work collaboratively to prevent, disrupt, respond to and investigate terrorism threats and attacks in Australia.

29. The JCTT do not work in isolation, but draw on resources and capabilities of the participating domestic law enforcement, intelligence community and foreign partner agencies to facilitate greater intelligence sharing. The JCTTs have access to a broad range of resources and legislative powers, which serve as a force multiplier to swiftly respond to the heightened national security threat environment.

Counter-Foreign Interference Task Force

30. On 2 December 2019, the Prime Minister and Minister for Home Affairs announced the establishment of the Counter Foreign Interference Task Force (CFITF).
31. The CFITF is a multi-agency task force, focused on operationalising respective agency capabilities to counter foreign interference. The CFITF is intelligence led through ASIO and draws on the unique capabilities of law enforcement partners through co-location with the AFP and other partner agencies namely AUSTRAC, Australian Signals Directorate, Australian Geospatial Organisation and the Office of National Intelligence.

Operational Case Studies

32. The following case studies demonstrate recent experience with minors, and how police assistance in relation to ASIO questioning powers would work in practice.

Case Study 1: Strike force Peqin/Fellows - CT investigation involving a 15 year-old minor

Demonstrating the involvement of young people in terrorism offences

On 2 October 2015, a 15-year-old boy carried out an attack, shooting and killing Curtis Cheng, a civilian NSW Police Force employee outside the NSW Police Headquarters in Parramatta. The offender was subsequently shot and killed by special constables who responded to the shooting.

The planned and deliberate acts of the 15-year-old in this case demonstrates that minors have been involved in terrorist activities and the need for ASIO to have the power to question minors appropriately, limited to where they are the subject of a terrorism investigation.

This demonstrates that young people under 18 years of age are involved and capable of planning and carrying out terrorism-related offences. It also demonstrates the need for ASIO to be able to question these individuals in relation to these activities, with appropriate consideration and protections.

Hypothetical Case Study 2: apprehension based on representations at service

Demonstrating AFP role in bringing a person immediately to the place of questioning and search powers at time of apprehension

The AFP is asked to and agrees to assist ASIO with service of a questioning warrant, which includes a requirement to appear before a prescribed authority immediately for

questioning. At that point, ASIO does not have sufficient evidence to suggest the person will fail to appear, alert a person involved or destroy evidence.

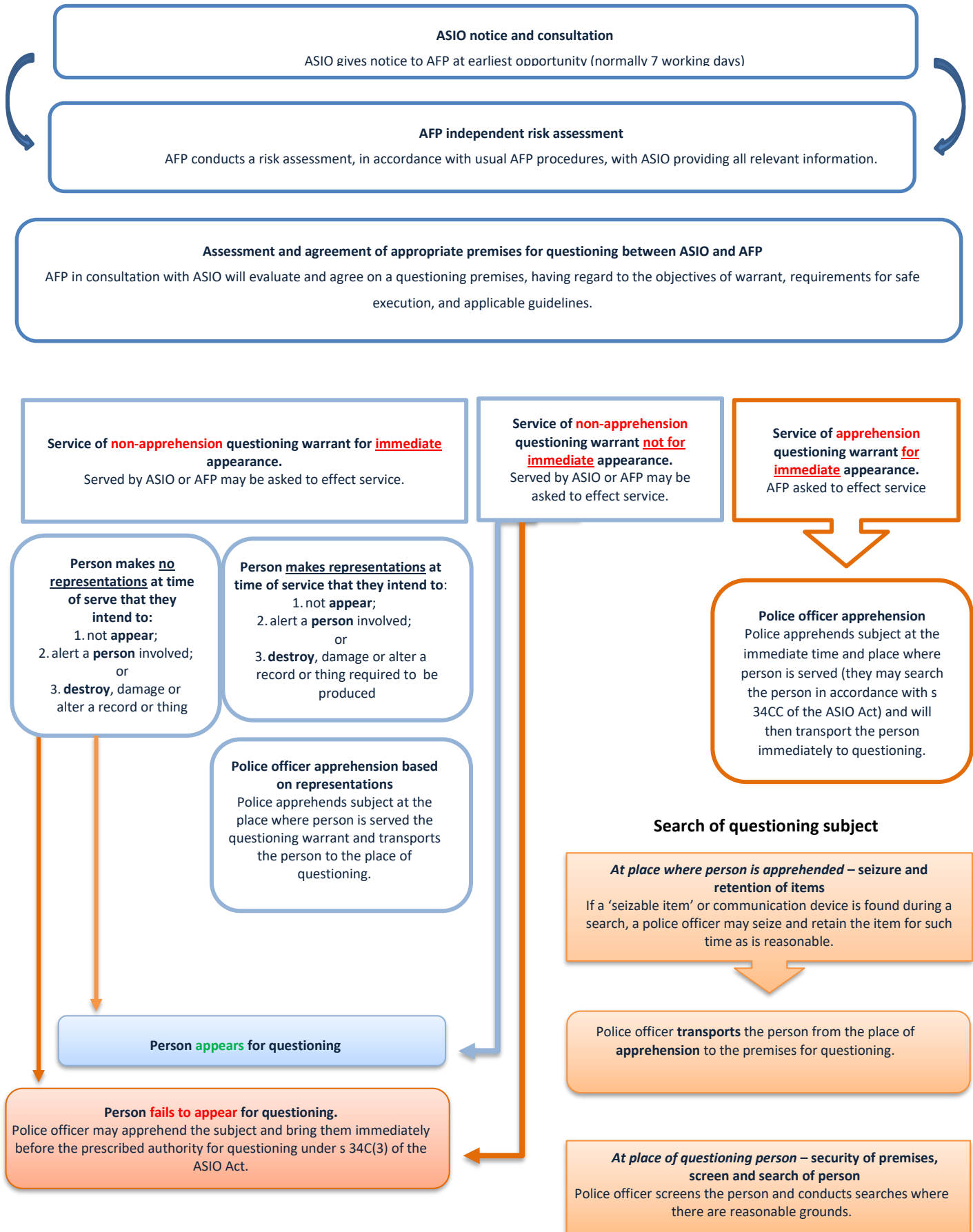
During service of the warrant, the AFP observes that the individual has tickets for an international flight scheduled for that day and packed luggage, indicating the person is an immediate flight risk and will likely fail to appear.

Based on this information, the police officer serving the questioning warrant may take immediate action to ensure the person appears before the questioning authority. Where a person is apprehended, they would be subject to a frisk or ordinary search and the AFP may seize certain items located on them, until they are required to be returned to the person. The AFP would then transport the person immediately to the questioning location.

Schedule 2 – Amendments relating to tracking devices

33. The AFP understands ASIO cannot currently internally authorise and deploy tracking devices. Schedule 2 of the Bill will enable ASIO to deploy tracking capabilities more quickly in support of physical surveillance, which would align their capabilities with law enforcement. Under section 39 of the *Surveillance Devices Act 2004*, the AFP can internally authorise the immediate deployment of tracking devices to support physical surveillance activities.
34. Aligning ASIO's capabilities with law enforcement would improve interoperability in the JCTTs and the CFITF, allow physical surveillance to be supported by tracking devices to reduce physical risks to officers and ensure surveillance continues where physical surveillance is not safe or practical. A hypothetical scenario, setting out current process for AFP and ASIO to apply for a tracking device is at **Attachment B**.

Attachment A – AFP understanding of process for assistance with service of ASIO Questioning Warrant



Attachment B – hypothetical scenario to demonstrate current AFP process (and AFP understanding of ASIO process) for authorising the use of a tracking device

JCTT operation - officers identify need for a tracking device on the exterior of a terrorist suspects' vehicle that does not require entry into a premises or inside a vehicle.
 ASIO officer and AFP officer both present and must separately go through the following in order to use a device in a **time critical circumstance**

AFP Internal Authorisation
 (Surveillance Devices Act)

ASIO – emergency Director-General authorised surveillance devices warrant
 (ASIO Act)

ASIO – standard Attorney-General authorised surveillance devices warrant
 (ASIO Act)

Application – AFP officer drafts an application in line with the SD Act.

Application to Director-General – Section 29 of the ASIO Act provides that the Director-General must:

- determine that the A-G has not issued, or refused to issue a warrant as a result of the request and has not, in the preceding three months, refused to issue a substantially similar warrant,
- determine that the Director-General, has not, within the preceding three months, issued a substantially similar warrant, and
- be satisfied that the facts of the case would justify the issue of a warrant by the A-G, and that if the action authorised by the warrant does not commence before a warrant can be issued and made available by the A-G, security will be, or is likely to be, seriously prejudiced.

This means that information that is usually required for a warrant request still needs to have been prepared and sent to the A-G before the D-G can decide to issue an emergency warrant.

Application – ASIO drafts a surveillance device warrant application in line with section 26 of the ASIO Act

Authorisation – AFP must provide this to a senior AFP officer (Commander/ SES Band 1) who internally authorises the tracking device.

Authorisation – ASIO must provide this to the Attorney-General for consideration

AFP TIMEFRAMES
 In most cases an AFP officer would spend no more than 1-2 hours preparing the relevant affidavit, and a Commander about 1-2 hours to authorise.

Authorisation – Attorney-General issues surveillance devices warrant.

ASIO TIMEFRAMES
 It may take ASIO and the Attorney-General anywhere between 1-2 weeks to prepare and issue a surveillance devices warrant.

Authorisation – Director-General issues the emergency warrant for a specified time period – **no longer than 48 hours**.

Provide copy – Director-General must furnish a copy of the warrant to the Attorney-General, who may revoke the D-G issued warrant at any time before expiration.

Installation and Variation– ASIO installs tracking device and may maintain, enhance or temporarily remove or replace while warrant is still in force.

Application to the Attorney-General for use of the device after expiration of D-G authorised warrant – Application to Attorney-General to issue surveillance devices warrant under section 26 of the ASIO Act.