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**THE HON KAREN ANDREWS MP
MINISTER FOR HOME AFFAIRS**

Ref No: MS21-002396

Senator James Paterson
Chair of Parliamentary Joint Committee on Intelligence and Security
Parliament House
CANBERRA ACT 2600

Dear Chair *James*

I am writing to provide the Parliamentary Joint Committee on Intelligence and Security with a joint briefing prepared by the Department of Home Affairs and the Australian Security Intelligence Organisation (ASIO), in response to the Committee's December 2020 *Advisory Report on the Australian Security Intelligence Organisation Amendment Bill 2020*.

In the Advisory Report, the Committee stated it:

...would welcome the Government providing a written briefing to the Committee within 12 months of this report on its considerations of the inclusion of an Independent Child Advocate in the questioning warrant regime.

The Government is committed to ensuring that its national security legislation is effective and subject to rigorous safeguards and oversight, particularly where it applies to minors. The briefing considers whether the role of an Independent Child Advocate should be included in ASIO's minor questioning warrant framework as an additional safeguard to ensure the best interests of minors who may be the subject of a minor questioning warrant. As a result of comprehensive policy analysis, as set out in the briefing, the Government has concluded the current extensive safeguards for minor questioning warrants would not be enhanced by the introduction of an Independent Child Advocate, and that doing so could impact the operational effectiveness of the compulsory questioning framework.

This letter and the Briefing are unclassified and can be published on the Committee's website, should you choose to do so.

Yours sincerely



KAREN ANDREWS

7 11/2/2021

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Australian Government
Department of Home Affairs



Australian Government
Australian Security Intelligence Organisation

Briefing - Independent Child Advocates and the Australian Security Intelligence Organisation's Compulsory Questioning Powers

**Parliamentary Joint Committee on Intelligence and
Security**

December 2021

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1. EXECUTIVE SUMMARY

1.1. Overview

The Department of Home Affairs (the **Department**) and the Australian Security Intelligence Organisation (**ASIO**) welcome the opportunity to provide this briefing to the Parliamentary Joint Committee on Intelligence and Security (the **Committee**). This briefing responds to the Committee's December 2020 *Advisory Report on the Australian Security Intelligence Organisation Amendment Bill 2020* (the **Advisory Report**), in which the Committee stated it:

...would welcome the Government providing a written briefing to the Committee within 12 months of this report on its considerations of the inclusion of an Independent Child Advocate in the questioning warrant regime.¹

The *Australian Security Intelligence Organisation Amendment Act 2020* (the **Amendment Act**) reformed ASIO's compulsory questioning powers in Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (the **ASIO Act**). The reforms repealed ASIO's existing compulsory questioning and detention powers, and replaced them with a new compulsory questioning framework accompanied by stronger safeguards and a more limited apprehension power. Relevantly, due to the changing age profile of those exposed to and radicalised by violent extremist ideologies, the Amendment Act lowered the minimum age of questioning from 16 to 14 years of age for politically motivated violence (including terrorism), but only where the questioning subject is the target of an investigation.

As expressed in the Explanatory Memorandum, the reforms

... address the changing security environment in which ASIO is expected to work. It is essential that ASIO has comprehensive human intelligence powers to assist in filling the gap posed by technological advancement, such as encryption and anonymising technologies.²

The Amendment Act strikes an appropriate balance between protecting Australians from serious threats to security and protecting civil liberties and human rights, including the best interests of the child under the *Convention on the Rights of the Child*, which was central in the development of these reforms.

1.2. The Government's position

The Government is committed to ensuring that its national security legislation is effective and subject to rigorous safeguards, particularly where it applies to minors. For the reasons set out in this briefing, the Government considers that introducing an Independent Child Advocate into ASIO's compulsory questioning framework is neither required nor desirable. Due to existing strong safeguards, neither the Department nor ASIO have identified any gap which an Independent Child Advocate would address. Rather, the inclusion of an Independent Child Advocate would replicate

¹ Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Australian Security Intelligence Organisation Amendment Bill 2020*, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIOAmendmentBill2020/Report, [4.20].

² Revised Explanatory Memorandum, ASIO Amendment Bill 2020.

the effect of existing safeguards. In addition, introducing this new role could impact the operational effectiveness of the compulsory questioning framework.

This briefing provides further information on these existing safeguards, including a number that are reflected in ASIO's operational policies and procedures.

To further strengthen these safeguards, and the overall protection of children who may be the subject of questioning, the Government will, where possible, seek to identify and appoint prescribed authorities with relevant experience or qualifications in working with children.

The Department also notes the Committee may commence a review of the operation, effectiveness and implications of the questioning framework by 7 September 2023.³ The additional protections set out in the *Australian Security Intelligence Organisation (Statement of Procedures) Instrument 2020*⁴ (the **Statement of Procedures**) must be reviewed during 2022-23. These reviews provide the opportunity to consider the operation of the existing framework, including the extensive legislative framework, operational and procedural safeguards, before determining whether any further reforms are required. The Department and ASIO look forward to contributing to this review.

2. COMPULSORY QUESTIONING FRAMEWORK FOR MINORS

2.1. Compulsory questioning safeguards

The Amendment Act incorporated six recommendations by the Committee, two of which enhanced the protection of individuals subject to questioning. The first, which directly enhanced the protection of minors, requires the Attorney-General to take into account the best interests of the child as a primary consideration in deciding whether to issue a minor questioning warrant.⁵ The second requires any legal practitioner appointed as a prescribed authority to have engaged in legal practice for at least 10 years and be a Queen's Counsel or Senior Counsel, thereby ensuring that, in all circumstances, questioning is overseen by an appropriately qualified legal practitioner.⁶

2.1.1. Safeguards for all compulsory questioning warrants

The ASIO Act contains a range of strong safeguards which apply to all compulsory questioning warrants, including for minors:

- Questioning is overseen in all circumstances by a prescribed authority who is independent of ASIO and law enforcement⁷ and, except in certain limited circumstances, is not subject to directions from the Director-General of Security or the Attorney-General.⁸

³ Paragraph 29(1)(ce) of the *Intelligence Services Act 2001*.

⁴ Made under section 34AF of the ASIO Act: <https://www.legislation.gov.au/Details/F2020L01714>.

⁵ Subsection 34BB(2) of the ASIO Act.

⁶ Paragraph 34AD(1)(c) of the ASIO Act.

⁷ Subsection 34AD(2) of the ASIO Act.

⁸ Subsection 34DH(2) of the ASIO Act.

- The prescribed authority is obliged to explain certain matters regarding the questioning warrant to ensure the subject of the questioning warrant understands the nature of the proceedings.⁹
- Criminal offences, carrying penalties of up to two years' imprisonment, apply to anyone who knowingly contravenes the questioning warrant safeguards, including directions given by the prescribed authority appointed to oversee questioning.¹⁰
- An express prohibition on torture, cruel, inhuman or degrading treatment.¹¹
- The Statement of Procedures requires, among other things, the humane treatment of individuals subject to questioning warrants and provides for the protection of the health and welfare of subjects in questioning.¹²
- The Inspector-General for Intelligence and Security (IGIS) or an IGIS official may attend apprehension and questioning, and may raise concerns about any impropriety or illegality.¹³
- The prescribed authority must consider any concern raised by the IGIS, and may issue a direction to suspend questioning until the IGIS's concern has been satisfactorily addressed.¹⁴
- The questioning subject has the right to contact the IGIS at any time during, and after, questioning to make a complaint concerning their treatment under questioning.¹⁵
- The IGIS can conduct an inquiry in response to a complaint or of its own motion, and has powerful information-gathering powers akin to a Royal Commission.
- ASIO must comply with the requirements set out in the Minister's Guidelines issued under section 8A of the ASIO Act, which include requirements in relation to the performance by ASIO of its functions and the exercise of its powers.

2.1.2. Additional protections for minors

The compulsory questioning powers in the ASIO Act include a range of additional protections specifically for minors, in addition to those which apply to all individuals subject to a compulsory questioning warrant.

Minor questioning warrants can only be issued to a minor who is the target of an investigation in relation to politically motivated violence (including terrorism). A minor questioning warrant cannot be issued to a minor who is of associated or peripheral interest to an investigation targeting a separate individual.¹⁶ There is no ability for ASIO to obtain a questioning warrant in relation to a child under 14.¹⁷ Unlike an adult questioning warrant, a minor questioning warrant cannot be

⁹ Section 34DC of the ASIO Act.

¹⁰ Section 34GE of the ASIO Act.

¹¹ Section 34AG of the ASIO Act.

¹² Section 9 of the Statement of Procedures.

¹³ Section 34JB of the ASIO Act.

¹⁴ Section 34DM of the ASIO Act.

¹⁵ Paragraph 34GF(5)(f) of the ASIO Act.

¹⁶ Paragraph 34BB(1)(b) of the ASIO Act.

¹⁷ Section 34BC of the ASIO Act.

issued in relation to espionage or acts of foreign interference, but can only be issued in relation to politically motivated violence.¹⁸

Minors cannot be questioned in the absence of a lawyer.¹⁹ Minors may organise for a lawyer of their choosing to be present during questioning. However, if the chosen lawyer cannot be present, the prescribed authority must appoint a lawyer for the minor.²⁰

Except in very limited circumstances,²¹ questioning of a minor also requires the presence of a non-lawyer minor's representative.²² The role of the minor's representative is to represent the minor's interests and, if necessary, provide physical, social and emotional support to the minor before, during and after questioning. The minor's representative may also support the minor in deciding whether to seek a lawyer of choice and provide any assistance the minor may require in selecting and contacting such a lawyer. The minor's representative must be independent of ASIO and law enforcement,²³ and can be a parent, legal guardian or other trusted adult.

Under section 13 of the Statement of Procedures, the subject of a minor questioning warrant may only be apprehended, searched or questioned under conditions that take account of the subject's particular needs and any special requirements having regard to the subject's age and any known vulnerabilities (including any physical, sensory, intellectual or psychiatric disability, or medical condition). ASIO may seek expert advice in assessing these particular needs and special requirements.²⁴

Under section 9 of the Statement of Procedures, any information given to the minor or the minor's representative, including the written notice of the questioning warrant provided to the minor under section 34BH of the ASIO Act, must have regard to the subject's age, and to the extent practicable and relevant, any known vulnerabilities (including a physical, sensory, intellectual or psychiatric disability, or medical condition), and must be given in a language the person and the minor's representative can understand.²⁵

Other key features of the safeguards in the questioning framework for minors include:

- requiring warrant requests to include all information known to the Director-General about the best interests of a minor, including any special protections that should be considered in relation to their best interests²⁶
- requiring the Attorney-General to consider the best interests of the minor as a primary consideration in issuing the compulsory questioning warrant²⁷

¹⁸ Paragraph 34BB(1)(b) of the ASIO Act.

¹⁹ Subsection 34FA(1) of the ASIO Act.

²⁰ Section 34FC of the ASIO Act.

²¹ Section 34FD of the ASIO Act provides for limited circumstances in which the prescribed authority can direct that a minor be questioned without a dedicated minor's representative being present, for example, if the warrant includes an immediate appearance requirement, or if the minor waives that right. In such circumstances, the prescribed authority, must direct that the minor's lawyer act as both the minor's lawyer and minor's representative.

²² Paragraph 34BD(2)(a) of the ASIO Act.

²³ Section 34AA of the ASIO Act.

²⁴ Subsection 13(6) of the Statement of Procedures.

²⁵ Subsection 9(4) of the Statement of Procedures.

²⁶ Paragraph 6(1)(d) of the Statement of Procedures.

²⁷ Subsection 34BB(2) of the ASIO Act.

- imposing additional obligations on the prescribed authority to explain certain matters to minors regarding the conduct of questioning²⁸
- allowing permitted disclosures pursuant to the secrecy regime to be made allowing the minor to disclose certain information regarding questioning to a parent, guardian or other appropriate trusted adult,²⁹ and
- requiring that questioning for minors can only occur for continuous periods of two hours or less.³⁰

2.1.3. Operational safeguards

When executing a minor questioning warrant, ASIO will plan and conduct all operational activities with the minor's welfare as a primary consideration. In particular, ASIO procedures recognise that, in some instances, it may be in the best interests of the minor for ASIO to engage directly with the minor's parent, guardian or other appropriate trusted adult to help facilitate any necessary support – whether legal or otherwise. This may involve assistance to identify legal representation or other specialist support. In instances such as these, ASIO would facilitate the necessary engagement and disclosures in accordance with the permitted disclosures framework in the ASIO Act.

In each case involving questioning of a minor, ASIO will consider the needs of the minor, including whether it would be appropriate to provide post-questioning support. In determining what support is required, ASIO will take into account various factors, such as:

- the minor's developmental status
- the potential existence of a situation of vulnerability, and
- whether counselling or psychological support would be of benefit to the minor.

In addition to the above operational safeguards, the Commonwealth Child Safe Framework (CCSF) has been developed to set out requirements that all Government agencies must adhere to when dealing with children.³¹ The standards set out in the CCSF apply to ASIO, and this extends to ASIO's operational activities in relation to the acquisition and execution of minor questioning warrants.

The CCSF sets out minimum standards required of Commonwealth entities to protect children. Under the CCSF, ASIO:

- undertakes risk assessments annually, in relation to its activities, to identify the level of responsibility for, and contact with, minors, evaluate risks to minors' safety, and put in place appropriate strategies to manage identified risks
- is establishing a system of training and compliance, to make staff aware of, and compliant with, the CCSF, relevant legislation and mandatory reporting requirements.
- has adopted and is implementing the National Principles for Child Safe Organisations, and

²⁸ Sections 34DD, 34FC and 34FD of the ASIO Act.

²⁹ Paragraph 34GF(5)(f) of the ASIO Act.

³⁰ Subsection 34BD(2) of the ASIO Act.

³¹ Australian Government, *Commonwealth Child Safe Framework*, <https://chilfsafety.pmc.gov.au/what-we-do/commonwealth-child-safe-framework>.

- publishes an annual statement of compliance with the CCSF, including an overview of its annual child safety risk assessment.

Each of the above operational safeguards have been developed in accordance with the CCSF.

3. INDEPENDENT CHILD ADVOCATES

3.1. Overview

Independent Child Advocates, or their equivalent, exist in comparable jurisdictions to Australia such as Canada and the United Kingdom.³² An Independent Child Advocate acts as an impartial support for a minor being interviewed, including, though not limited to, where a minor would otherwise be unaccompanied, or where their parent or guardian cannot represent their best interests.

The purpose of an Independent Child Advocate is to:

- provide physical, social and emotional support to a minor before, during and after an interview process
- ensure that the interview process is adequately explained to, and understood by, the minor, and that the minor is given the opportunity to ask questions and have their questions answered
- maintain a physical presence in the interview room and ensure that treatment of the minor during interviewing is appropriate and reasonable, and
- be attentive to the needs of the minor during interviewing, including recognising signs that the minor is experiencing distress and recommending suspension or termination of the interview if appropriate.

As discussed further below, these characteristics of an Independent Child Advocate are already addressed in the existing framework through a combination of the minor's representative, legal representative, and the prescribed authority.

In its submission to the Committee, the Law Council of Australia (**Law Council**) recommended additional specific safeguards for minors subject to questioning warrants.³³ The Law Council specifically recommended the inclusion in the questioning framework of an Independent Child Advocate for all minors, in addition to their lawyer and non-lawyer minor's representative.

The Law Council recommended, among other things, that such an Independent Child Advocate must:

- be a qualified youth social worker or child psychologist
- be independent of ASIO and all Australian police forces

³² For example, the *Police and Criminal Evidence Act 1984* (UK) requires an Appropriate Adult to attend the police interviews of children and vulnerable persons. In Canada, an Independent Child Advocate was established to provide advocacy services on the rights of children in child protection settings. This role is now part of the Ontario Ombudsman.

³³ Law Council of Australia, Submission 31: ASIO Amendment Bill 2020, June 2020, [119].

- act only in the best interests of the minor, and
- not be subject to compulsion to disclose information that is obtained in the course of performing their functions as an Independent Child Advocate to the independent prescribed authority, ASIO, a law enforcement agency, a court or any other entity exercising coercive information-gathering powers.³⁴

In the Advisory Report, the Committee:

...accept[ed] that there may be unintended consequences or operational risks if it were to make a recommendation regarding an Independent Child Advocate. However, the Committee consider[ed] that ASIO, when using questioning powers, might consider the inclusion of an Independent Child Advocate as an additional safeguard for minors under the questioning framework. In addition, the Committee would welcome the Government providing a written briefing to the Committee within 12 months of this report on its considerations of the inclusion of an Independent Child Advocate in the questioning warrant regime.³⁵

3.2. The potential role of an Independent Child Advocate is already addressed by existing safeguards

The Government considers that the existing safeguards framework already addresses the attributes desired of an Independent Child Advocate. For example:

- The minor's non lawyer representative, who will usually be a person familiar to the minor, is well placed to provide emotional and other support to them.
- The prescribed authority may seek specialist advice from an appropriate medical practitioner or psychologist under section 9 of the Statement of Procedures to satisfy himself or herself that the subject will understand, or has understood, the explanations required to be given by the prescribed authority.
- The minor's non lawyer representative, the minor's lawyer and the prescribed authority are all required by statute to be independent of ASIO and law enforcement.
- The minor's representative and the minor's lawyer are present to safeguard the minor's interests, under the impartial supervision of the prescribed authority.
- The Attorney-General is expressly required to consider the best interests of the minor prior to issuing a minor's questioning warrant.
- The IGIS, or an IGIS official, may attend questioning in order to oversee the proceedings.
- The minor's lawyer and non-lawyer representative may both act as a liaison between the minor and the IGIS.

3.3. Enhanced focus on working with children for prescribed authorities

Under subsection 34AD(1) of the ASIO Act, the prescribed authority must have certain minimum qualifications to be appointed. A prescribed authority must be either a former judge who has

³⁴ Law Council of Australia, Submission 31: ASIO Amendment Bill 2020, June 2020, pp. 37-38.

³⁵ Committee, *Advisory Report*, [4.20].

served at least five years as a judge of a superior court; a President or Deputy President of the Administrative Appeals Tribunal who has been enrolled at least five years as a legal practitioner; or a Queen's Counsel or Senior Counsel with at least ten years' experience as a legal practitioner. In appointing the prescribed authority, the Attorney-General must also be satisfied the person has the skills and knowledge to properly undertake the role.³⁶

Unlike a minor's representative, who must be able to represent the minor's interests,³⁷ there is no equivalent requirement for the prescribed authority to have a special background in working with children.³⁸

The Government acknowledges the benefits of having a prescribed authority with qualifications, capabilities or experience in working with children and considers it appropriate that a prescribed authority overseeing a minor questioning warrant should have such a background to properly execute this function. In terms of the relevant qualifications, capabilities and experience, this could include a prescribed authority with qualifications in adolescent developmental needs, or skills in trauma-informed or child-informed practice. This could also include a prescribed authority who has worked in contexts involving children, particularly vulnerable children, such as family law, domestic violence and child protection.

Having a prescribed authority with this background would provide an additional layer of assurance regarding the prescribed authority's ability to satisfy himself or herself that the minor's representative is able to represent the minor's interests, as required by section 34AA of the ASIO Act. In addition to the statutory criteria outside above, the Government will, where possible, seek to identify candidates who have backgrounds which include working with children for possible appointment as prescribed authorities, to oversee questioning of minors. This can be facilitated without legislative change.

3.4. Other considerations

ASIO, as Australia's security intelligence agency, conducts its activities in a complex security environment. ASIO's compulsory questioning powers are subject to operational constraints that are not typically found in other settings, including the requirement to manage the need for secrecy, as is reflected in the legislation that governs these activities. For security reasons, it is highly preferable that the minimum number of people possible are involved in questioning to ensure that sensitive national security information is not compromised. Moreover, should sensitive information about the minor's involvement in the questioning warrant, or the information they provide, be compromised, this could have very real adverse impacts on the minor.

Under the existing framework, attendees in the room during a questioning session may include: the prescribed authority, the minor's lawyer, the minor's non-lawyer representative, officers from the Office of the IGIS, officers from ASIO, and when required an interpreter. It is preferable that this list not be expanded further, unless there is a role that cannot be met by an existing attendee or addressed by an existing safeguard.

³⁶ Subsection 34AD(3) of the ASIO Act.

³⁷ Paragraph 34AA(2)(a) of the ASIO Act.

³⁸ This was also raised by Relationships Australia, Submission 15: ASIO Amendment Bill 2020, June 2020, page 4.

4. CONCLUSION

The Government considers that the formal introduction of an Independent Child Advocate in the questioning warrant framework is unlikely to materially enhance the protection of minors. The ASIO Act already contains targeted safeguards to ensure the wellbeing of minors and provides broad safeguards which ensure appropriate conduct under a minor questioning warrant. These legislative safeguards are accompanied by operational policies and procedures, overseen by the IGIS and developed consistent with the Commonwealth Child Safe Framework. A focus on appointing prescribed authorities with a background in working with children, where possible, will enhance these safeguards.

The Committee is able to review Division III of Part 3 of the ASIO Act before the provisions sunset in September 2025. That review is an opportunity for the Committee to further consider the operation and effectiveness of the questioning framework for minors, and specifically the legislative, operational and procedural safeguards, in protecting the rights of children.