EXPLANATORY STATEMENT

Issued by the authority of the Attorney-General

Australian Security Intelligence Organisation Act 1979

Australian Security Intelligence Organisation (Statement of Procedures) Instrument 2025

In accordance with Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act), the Director-General of Security may request the Attorney-General issue a warrant requiring a person to appear before a prescribed authority to give information, or produce a record or other thing, that is, or may be, relevant to intelligence that is important in relation to a questioning matter.

In response to a request, the Attorney-General may issue an adult questioning warrant for a person over 18 years that relates to the protection of, and the people of, the Commonwealth and the several States and Territories from espionage, politically motivated violence and acts of foreign interference.

The Attorney-General may also issue a minor questioning warrant for persons aged 14-18 years that relates to the protection of, and of the people of, the Commonwealth and the several States and Territories from politically motivated violence.

Subsection 34AF(1) of the ASIO Act provides that the Director-General of Security may prepare a written statement of procedures to be followed in the exercise of authority under a questioning warrant. Subsection 34AF(3) of the ASIO Act provides that the Director-General must give the statement to the Attorney-General for approval, and in accordance with subsection 34AF(4) of the ASIO Act the Attorney-General must approve or refuse to approve the statement.

On 22 December 2020 the then Attorney-General, the Hon. Christian Porter approved the *Australian Security Intelligence Organisation (Statement of Procedures) Instrument 2020* (the 2020 Statement of Procedures). Section 16 required 'the operation and continued suitability' of the 2020 Statement of Procedures to 'be reviewed in consultation with relevant stakeholders and ministers as appropriate, on a recurring basis to coincide with the review of the Minister's Guidelines'. The Attorney-General's Department commenced review of the 2020 Statement of Procedures in July 2023, appointing an independent reviewer who considered:

- the operation of, and compliance with, the 2020 Statement of Procedures to date, including any findings from the Inspector-General of Intelligence and Security (IGIS);
- the continued suitability of the 2020 Statement of Procedures and its interaction with the Minister's Guidelines;
- the application of the 2020 Statement of Procedures to the Australian Federal Police (AFP), where apprehension is authorised under section 10 of the 2020 Statement of Procedures; and
- any other relevant issues relating to the legal framework of the 2020 Statement of Procedures.

The independent reviewer completed their review in January 2024, finding that the 2020 Statement of Procedures remains fit for purpose, subject to a number of recommendations made in the report to improve its effectiveness (the Review).

The *Australian Security Intelligence Organisation (Statement of Procedures) Instrument 2025* (the Instrument) addresses the relevant recommendations of the Review.

Consultation

Consistent with subsection 34AF(2) of the ASIO Act, the Director-General of Security consulted the Inspector-General of Intelligence and Security and the Commissioner of the Australian Federal Police about the preparation of the Instrument. The Attorney-General's Department was also consulted.

Other issues

Financial Impact Statement

The Instrument does not have a financial impact.

Statement of compatibility with human rights

Subsection 34AF(5) of the ASIO Act provides that section 42 (disallowance) of the *Legislation Act 2003* (the Legislation Act) does not apply. Accordingly, a statement of compatibility with human rights is not required in accordance with subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* and paragraph 15J(2)(f) of the Legislation Act.

Incorporation of matter by reference

Section 16 of the Instrument provides that its operation and continued suitability will be reviewed on a recurring basis to coincide with the review of the Minister's Guidelines (the Guidelines) made under section 8A of the ASIO Act. Paragraph 1.14 of the Guidelines provides that:

- the first review will commence within 18 months of the commencement of the Guidelines, and be completed within 3 years after the commencement of the Guidelines, and
- a further review must be completed by every third anniversary of the Guidelines thereafter.

NOTES ON SECTIONS

Section 1 - Name

1. This section provides that the Instrument is the *Australian Security Intelligence Organisation (Statement of Procedures) Instrument 2025*.

Section 2 – Commencement, Revocation and Replacement

2. This section provides the whole of the Instrument commences on the day on which the instrument is approved. The 2020 Statement of Procedures is revoked and replaced in full by this Instrument.

Section 3 – Authority

3. This section provides that the Instrument is made under section 34AF of the ASIO Act.

Section 4 – Definitions

4. The note at the beginning of this section states that a number of expressions used in the Instrument are defined in the ASIO Act. The note is intended to provide clarity as to the meaning of these expressions as used in the Instrument.

5. This section is unchanged from the 2020 Statement of Procedures. It defines the meaning of a number of expressions used in the Instrument.

Section 5 – Application of Minister's Guidelines

6. This section requires ASIO to observe any guidelines given by the Minister to the Director-General under subsection 8A(1) or 8A(2) of the ASIO Act, to the extent it is relevant to a questioning warrant, including in relation to proportionality of ASIO's activities.

7. This section has been included to place beyond doubt that the Minister's Guidelines (which are to observed in the performance by ASIO of its functions or the exercise of its powers) must also be observed in the exercise of authority under a questioning warrant, to the extent relevant.

8. The phrase 'including in relation to proportionality of ASIO's activities' has been added to section 5 to address a recommendation from the Review. It is intended to recognise the fact that the concept of proportionality is central to how ASIO works.

Section 6 – Questioning warrant requests

9. Section 6 is unchanged from the 2020 Statement of Procedures.

10. Subsection 6(1) provides for additional matters that must be included in a request for a questioning warrant, in addition to the things in subsection 34B(4) of the ASIO Act.

11. Paragraph 6(1)(a) provides that a request must include a statement of warrants (other than questioning warrants) under which ASIO is, or has been within the last 6 months, authorised to do things in relation to the subject, and why the Director-General considers it necessary that the warrant should be issued. The purpose of this requirement is to ensure that the Attorney-General is able to consider all other warrants which have recently been issued in respect of the subject, and is provided with an explanation of why the Director-General considers it is necessary that the questioning warrant should be issued.

12. Paragraph 6(1)(b) provides that a request must include a statement of the particulars of any known risks involved in questioning the subject under a questioning warrant. The purpose of

this requirement is to ensure that any known risks, including but not limited to risks to the subject's health or wellbeing, or to operational security, are brought to the Attorney-General's attention as a part of the request. The requirement that the particulars of 'known risks' be included in the request does not require that the request set out the particulars of remote, far-fetched or fanciful risks; the risk must be known, in the sense that ASIO has specific information that the risk will, or is likely to, eventuate in certain circumstances.

13. Paragraph 6(1)(c) provides that a request must include a statement of the particulars of any known vulnerabilities (including a physical, sensory, intellectual or psychiatric disability, or medical condition) or sensitivities (including religious beliefs or cultural identities) in relation to the subject, to the extent they are relevant to the questioning.

14. Paragraph 6(1)(d) provides that, if a request is for a minor questioning warrant, the request must set out all information known to the Director-General about the matters mentioned in subsection 34BB(3) of the ASIO Act (best interests of the person), including the special protections that should be considered in relation to the best interests of a person who is at least 14 years old (which is the minimum age at which a person may be the subject of a questioning warrant) but less than 18 years old, taking into account the person's individual circumstances and needs (including their developmental status, any disabilities they may have, and whether the person belongs to any minority groups, as well as the other matters listed in subsection 34BB(3) of the ASIO Act. The requirement that the request set out all information 'known' to the Director-General about such matters does not create a requirement for the Director-General or ASIO to seek out information on such matters (such as whether the person has a meaningful relationship with family and friends, or whether the person is undergoing treatment for a physical or mental health condition).

15. Subsection 6(2) provides that, without limiting the circumstances in which a questioning warrant or a variation of a questioning warrant may be requested orally, the Director-General may request a warrant or variation orally if he or she reasonably believes the delay caused by making a written request may be prejudicial to security because (a) there may be an imminent threat to a person's safety, or (b) an act of politically motivated violence, espionage or foreign interference may be imminent. The purpose of subsection 6(2) is to provide examples of circumstances in which the Director-General may reasonably believe the delay caused by making a written request may be prejudicial to security; the subsection does not seek to extend the circumstances in which an oral request may be made. The circumstances listed in paragraphs 6(2)(a) and (b) are to be read subject to the ASIO Act—for example, the Director-General could only orally request a questioning warrant in relation to an adult in circumstances where there may be an imminent threat to a person's safety, where the threat relates to the protection of, and of the people of, the Commonwealth and the several States and Territories from espionage, politically motivated violence, or an act of foreign interference.

Section 7 – Arrangements for liaison

16. Subsection 7(1) provides that the Director-General must cause the IGIS to be notified of any request for a questioning warrant (a) if it is practicable to do so – before the request is made, or (b) otherwise – as soon as practicable after the request is made. Subsection 35B(5) of the ASIO Act provides that, if the Director-General makes an oral request for a questioning warrant, the Director-General must, before or as soon as practicable after the request is made, cause the IGIS to be notified that the request will be or has been made. Subsection 7(1) extends this requirement to apply to all requests for questioning warrants.

17. Subsection 7(2) provides that, as soon as practicable after a questioning warrant is issued or varied, the Director-General must cause the IGIS, a prescribed authority, and the Commissioner of the AFP or the relevant police force or police service, to be informed of (a) the details of the warrant, (b) the proposed arrangements for the execution of the warrant, and (c) details of any variations to the warrant.

18. The purpose of the requirements in section 7 are to ensure that the IGIS, prescribed authority, and Commissioner are promptly notified of the request or issuance (as the case may be) of a questioning warrant, to enable them to immediately begin preparing to undertake their functions under Division 3 of Part III of the ASIO Act.

19. Subsection 7(2)(c) has been added to the Instrument to address a recommendation from the Review that seeks to clarify that any variations to a warrant must also be communicated to the Commissioner of the AFP, IGIS and the prescribed authority.

Section 8 – Written record in relation to a questioning warrant

20. Section 8 is unchanged from the 2020 Statement of Procedures.

21. Subsection 8(1) provides that the Director-General must cause the maintenance of a written record of (a) the identity of the subject of a questioning warrant, (b) the authority for the questioning and apprehension (if any) of the subject, (c) the place, day and time of questioning under the warrant and the details of any time disregarded under section 34DL of the ASIO Act, and (d) the place, day, time and duration of any apprehension of the subject.

22. Subsection 8(2) provides that the Director-General must cause this record to be included in the report to the Attorney-General under section 34HA of the ASIO Act.

23. In addition to ensuring that the Attorney-General is provided with detailed information, the requirements in section 8 will also support oversight by the IGIS, and may also support the review of the exercise of authority under the warrant.

Section 8A – Written record of any breach

24. Subsection 8A(1) provides that ASIO must keep a written record of any breach of the Instrument.

25. This section is new. It is intended to address a recommendation from the Review to expressly require ASIO to keep a written record of any known breach of this Instrument. Although the Review noted that this would already occur as a matter of course, expressly including the requirement is intended to provide assurance and transparency about the process.

Section 9 – Conduct of questioning

Manner

26. Subsection 9(1) provides that in addition to the requirements under subsection 34AG(2) of the ASIO Act, all persons present during questioning under a questioning warrant or any period of apprehension must interact with the subject in a manner that is both humane and courteous, and must not speak to the subject in a demeaning manner. The requirement to interact with the subject in a courteous manner in subsection 9(1) does not preclude the use of the minimum force reasonably necessary in the circumstances, if a police officer is authorised to use force under sections 34CA or 34CD of the ASIO Act, or the use of force in self defence.

27. Subsection 9(2) provides that in addition to the requirements under subsection 34AG(2) of the ASIO Act, that the subject must not be questioned in a manner that is unfair or oppressive in

the circumstances. The requirement in subsection 9(2) does not preclude the close or forensic questioning of a person. However, such questioning must not be unfair or oppressive in the circumstances.

28. Subsection 9(3) provides that, for the purpose of exercising a power or performing a function or duty as an IGIS official, an IGIS official may be present at the questioning or apprehension of the subject. This requirement replicates section 34JB of the ASIO Act. The purpose of including this requirement in the Instrument is to ensure that it is contained in the statement of procedures that is required to be given to the subject of a questioning warrant when they first appear before a prescribed authority, under subsection 9(7) of the Instrument.

Understanding questioning

29. Subsection 9(4) provides that information given to the subject or a minor's representative, including the written notice provided to the subject under section 34BH of the ASIO Act must (a) in relation to the subject – 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) in relation to the subject, and (b) in relation to both the subject and the minor's representative – be given in a language the person can understand. The purpose of the requirements in subsection 9(4) is to require ASIO to provide information to the subject and minor's representative (if any) in a manner and form that is likely to be able to be understood by them, and in a language that they can understand.

30. Subsection 9(5) provides that an interpreter must be provided for the subject under sections 34DN or 34DO of the ASIO Act if the prescribed authority believes on reasonable grounds that the subject is unable to communicate with reasonable fluency in the English language because (a) of inadequate knowledge of that language, or (b) they are physically unable to communicate in that language—for example, because the subject has a speech or hearing impairment. Subsection 9(5) does not limit the circumstances in which an interpreter may be provided.

31. Subsection 9(6) provides that an interpreter must be provided for the minor's representative if the prescribed authority believes on reasonable grounds that the minor's representative is unable to communicate with reasonable fluency in the English language because (a) of inadequate knowledge of that language, or (b) they are physically unable to communicate in that language—for example, because the minor's representative has a speech or hearing impairment. Subsection 9(6) does not limit the circumstances in which an interpreter may be provided.

Explanation of certain matters

32. Subsection 9(7) provides that, in addition to the requirements of sections 34DC and 34DD of the ASIO Act, when the subject first appears before a prescribed authority for questioning under a questioning warrant, the prescribed authority must (a) cause the subject to be given a copy of the Instrument, (b) inform the subject that their right to make a complaint of the kind referred to in paragraph 34DC(1)(i) of the ASIO Act includes a right to make a complaint in relation to any contravention of the Instrument, (c) inform the subject of the use which may be made of any information given, or record or other thing produced, by the subject, including any derivative use for the purpose of criminal investigations, and (d) at least 30 minutes before questioning commences, provide the subject and their legal representative, a written document in English, or translated into a language the subject can understand, summarising the matters described in sections 34DC of the ASIO Act and, if relevant section 34DD of the ASIO Act and subsection 9(7)(b) and 9(7)(c).

33. Subsection 9(7)(d) is new. It is intended to address a recommendation from the Review to ensure that the subject, and their legal representative understand the opening statement made by the prescribed authority which will outline, among other things, what is authorised under the warrant in accordance with section 34DC, and if relevant s 34DD, of the ASIO Act and if relevant section 34DD of the ASIO Act. This is in addition to the existing requirement in subsection 9(7)(a) to provide a copy of the Instrument itself to the subject.

34. Subsection 9(8) provides that the prescribed authority must satisfy themselves that the subject has understood the explanations given to the subject under sections 34DC and 34DD of the ASIO Act, and under subsection 9(7) of the Instrument.

35. Subsection 9(9) provides that, if the subject has a known vulnerability (including a physical, sensory, intellectual or psychiatric disability, or medical condition) which may be relevant to their understanding of the explanations referred to in subsection 9(8), the prescribed authority may at any time obtain advice from an appropriate medical practitioner or psychologist to satisfy themselves that the subject will understand, or has understood, the explanations. Subsection 9(9) does not displace or limit the requirement under subsection 9(8) that the prescribed authority must so satisfy themselves.

Conditions of questioning

36. Subsection 9(10) provides that the subject, and if applicable, a minor's representative for the subject must have access to fresh drinking water and clean toilet and sanitary facilities at all time during questioning, and the subject and minor's representative must be permitted to use the toilet and sanitary facilities in private as required.

37. Subsection 9(11) provides that, if food is provided to the subject or a minor's representative, the food must meet dietary requirements of the subject or minor's representative. The expression 'dietary requirements' takes its natural and ordinary meaning, and refers to requirements that a person may have due to allergies or intolerances, or for religious or cultural reasons.

38. Subsection 9(12) provides that, where the subject of a minor questioning warrant or adult questioning warrant has been questioned for at least 4 hours in total, they, and where applicable a minor's representative, are to be provided with food. The requirement in subsection 9(12) applies to each period of at least 4 hours for which the subject has been questioned.

39. Subsection 9(13) provides that the subject of an adult questioning warrant must not be questioned continuously for more than 4 hours without being offered a break. Subsection 34DJ(3) of the ASIO Act sets out the permitted questioning period, being 8 hours or if a prescribed authority before whom the subject is being questioned has extended the period in accordance with subsections 34DJ(4) or 34DJ(5), that longer period. Paragraph 34BD(2)(b) provides that the subject of a minor questioning warrant may only be questioned for continuous periods of 2 hours or less, separated by breaks directed by the prescribed authority. The purpose of the requirement in subsection 9(13) is to ensure that the subject of an adult questioning warrant is offered a break if they have been questioned continuously for 4 hours. Compliance with this requirement will be achieved if the subject is offered a break slightly before the end of 4 hours of continuous questioning—for example, at the conclusion of an answer to a question. If the subject elects to take the offered break, it must be provided.

40. Subsection 9(14) provides that a break as required by subsection 9(13) or paragraph 34BD(2)(b) of the ASIO Act (in relation to the subject of minor questioning warrant) must be at least 30 minutes in duration.

41. Subsection 9(15) provides that, despite subsections 9(13) and 9(14) and 9(15A), the subject may, at any time (a) in the case of an adult questioning warrant – elect to forego a break, or (b) in the case of an adult questioning warrant or minor questioning warrant – elect to take a break shorter than 30 minutes, provided that the prescribed authority is satisfied that this election is entirely voluntary. The purpose of the provision in subsection 9(15) is to allow the subject of a warrant to voluntarily speed up the questioning process by taking a shorter break, or in the case of an adult questioning warrant, waive the requirement for a break entirely.

42. Subsection 9(15A) provides that in addition to subsections 9(13) and 9(14), the prescribed authority may at any time they determine appropriate (a) offer the subject of an adult questioning warrant breaks at intervals shorter than every four hours; and (b) where a break is offered at an interval shorter than four hours, reduced the break time to a minimum of 15 minutes.

43. Subsection 9(15A) is intended to address a recommendation from the Review to clarify that the prescribed authority may offer more frequent breaks to decrease any possible risk of the subject becoming overburdened by the questioning warrant process.

44. Subsection 9(16) provides that the subject of a questioning warrant 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 for the subject's age.

45. Subsection 9(17) provides that the amount of continuous and undisturbed sleep referred to in subsection 9(16) must be at least 8 hours. For minors this period of sleep must be at least 10 hours.

46. Subsections 9(16), 9(17) and 9(18) must be read together—that is, the break referred to in subsection 9(16) must be of sufficient duration to allow the subject of a questioning warrant to have an opportunity for an appropriate amount of continuous and undisturbed sleep, having regard to their age, that is at least 8 hours (in the case of an adult questioning warrant) or 10 hours (in the case of a minor questioning warrant). The period of the break referred to in subsection 9(17) must be sufficient to allow the subject to, for example, travel to their accommodation, complete any necessary ablutions, religious observations, and to eat, before and after sleeping—which will generally necessitate a break that is longer than 8 or 10 hours, as the case may be. Depending on the circumstances (where applicable), as per subsection 9(18), the subject may be afforded transport, food, nearby accommodation or other assistance as required.

47. Subsections 9(19) and 9(20) provide that the prescribed authority may warn a lawyer, or a minors representative, that they may be removed from questioning for unduly disrupting the questioning of the subject, before directing the lawyer or minor's representative to be removed under subsection 35FG(2) of the ASIO Act. The express ability for a prescribed authority to warn a lawyer or minor's representative has been included to address a recommendation from the Review. It is intended to provide a fair and practical way to balance the subject's right to their preferred lawyer with the power to direct removal under subsection 35FG(2) of the ASIO Act. Subsection 34FG(3) of the ASIO Act outlines the process to be followed following a direction for the removal of a minor's representative.

Section 10 – Where apprehension is authorised

48. Section 10 is unchanged from the 2020 Statement of Procedures.

49. Subsection 10(1) provides that section 10 applies if a police officer is authorised to apprehend the subject under a questioning warrant or section 34C of the ASIO Act.

50. Subsection 10(2) provides that a police officer must make the arrangements for the apprehension, and undertake the apprehension. One or more police officers may be involved in the making of the arrangements for, or undertaking the apprehension. The police officer or officers involved in the making of arrangements for the apprehension do not need to be the same police officers who undertake the apprehension. 'Apprehension' refers to the process involving the initial apprehension of the subject and the steps involved in bringing them before the prescribed authority for questioning under the warrant. Subsection 10(2) does not preclude an ASIO employee or affiliate being present while the subject is apprehended or being brought before the prescribed authority, provided they do not undertake the apprehension.

51. Subsection 10(3) provides that, before the subject is apprehended, ASIO must take all reasonable steps to ensure:

    a. the prescribed authority
    b. a police officer
    c. the persons who will be questioning the subject on behalf of ASIO
    d. if the prescribed authority has appointed a specified person as the lawyer for the subject – that person
    e. if ASIO is satisfied that the prescribed authority is likely to appoint one or more specified persons as the lawyer for the subject – one such person
    f. if an interpreter is required – an interpreter, and
    g. if ASIO is satisfied that an interpreter is likely to be required – an interpreter

    will be present when the subject arrives at the place where they are appearing for questioning under a questioning warrant. This is to ensure that questioning can commence as soon as the subject arrives at the place of questioning.

52. Subsection 10(4) provides that the arrangements for apprehension must be consistent with applicable police practices and procedures in relation to apprehension, and in accordance with any applicable legislation. The purpose of subsection 10(4) is to place beyond doubt that the apprehension of a subject will be in accordance with any applicable legislation, and done in accordance with or in a manner that is consistent with applicable practices and procedures.

53. Subsection 10(5) provides that the transportation to bring the subject before a prescribed authority for questioning under the warrant must be undertaken in a way which would not expose the subject to unnecessary physical hardship. For the avoidance of doubt, 'unnecessary physical hardship' does not include:

    a. confinement of the subject to a particular vehicle while being transported, and
    b. the restraint of the subject, to the extent that it is necessary.

54. Subsection 10(6) provides that a minor's representative for the subject of a minor questioning warrant is permitted to be present at any time while the subject is apprehended. This requirement is in addition to the requirement in paragraph 34BD(2)(a) of the ASIO Act, that the subject of a minor questioning warrant may be questioned only in the presence of a minor's representative for the subject. The purpose of this requirement is to ensure that a minor's representative for the subject is permitted to be with the subject from the point in time at which they are apprehended, as well as being required to be present while the subject is being questioned.

55. Subsection 10(7) provides that, if the subject wishes to contact a person under section 34CB of the ASIO Act while apprehended, the subject must be given facilities to enable the contact to be made which may, without limiting paragraph 34CB(2)(c) of the ASIO Act, include (a) a device as referred to in paragraph (a) of the definition of communication device (that is, a communication device other than a surveillance device), (b) contact details for any person the subject is permitted to contact, and (c) an interpreter.

Section 11 – Conduct of ordinary or frisk searches and screening

56. Subsection 11(1) provides that an ordinary or frisk search of the subject under subsection 34CC(2) or 34D(2)(c) of the ASIO Act must be conducted with appropriate sensitivity. What constitutes appropriate sensitivity will depend on all of the circumstances, but may require consideration of factors such as:

    a. if the subject is the subject of a minor questioning warrant—whether a minor's representative of the subject is present or available to support the subject
    b. whether the subject has particular vulnerabilities or sensitivities (including particular religious beliefs or cultural identities) that are relevant to the conduct of the search, and
    c. whether the police officer has reasonable grounds to suspect that the subject has, or is likely to have, a dangerous item (within the meaning of the ASIO Act) in their possession—which may make it appropriate to conduct a search with less sensitivity.

57. Subsection 11(1A) provides that subject to subsection 11(1), a minor's representative is permitted to be present during an ordinary or frisk search of the minor under subsection 34CC(2) or 34D(2)(c) of the ASIO Act. This is a new subsection and is intended to address a recommendation from the Review to reflect more fully the role of a minor's representative during the questioning of a minor.

58. Subsection 11(2) provides that, if records or other things are seized by a police officer under subsections 34CC(4) or 34CC(5) of the ASIO Act, or given to a police officer under subsection 34D(5) of the ASIO Act, a police officer or person exercising authority of the warrant must cause:

    a. the record or things to be itemised in an inventory which must be signed by the subject, or if the subject is a minor, the minor's representative, if he or she is able and willing to do so
    b. the subject, and if the subject is a minor, the minor's representative, to be given a copy of the inventory (whether or not the subject has signed the inventory)
    c. the subject, and if the subject is a minor, the minor's representative, to be given a written notice informing them of (i) the procedure for requesting the return of the records and things, and (ii) the subject's rights to make a complaint of the kind referred to in paragraph 34DC(1)(i) of the ASIO Act in relation to the records or things
    d. the records or things to be retained in safe custody, and
    e. the subject, or if the subject is a minor, the minor's representative, to be asked to sign a receipt on returning the record or things to the subject.

59. Minor amendments have been made to subsection 11(2) to address a recommendation from the Review to reflect more fully the role of a minor's representative at the questioning of a minor.

60. The requirement in paragraph 11(2)(d) that the records or things be retained in safe custody does not prevent ASIO from dealing with the record or thing in accordance with section 34CE

of the ASIO Act, for example by inspecting or examining the record or thing, or in the case of a record, making a copy of the record.

Section 12 – Use of force

61. Section 12 is unchanged from the 2020 Statement of Procedures.

62. Subsection 12(1) provides that section 12 of the Instrument applies if a police officer is authorised to use force under section 34C or 34CD of the ASIO Act.

63. Subsection 12(2) provides that a police officer may only use the minimum force reasonably necessary in the circumstances. The requirement that a police officer may only use the minimum force reasonably necessary in the circumstances may require that, for example:

    a. a police officer may only use instruments of restraint as is reasonably necessary in the circumstances, and
    b. a police officer must not use force or instruments of restraint as punishment—as doing so would never be reasonably necessary.

Section 12A – Dual involvement of police

64. Subsection 12A(1) provides that ASIO will inform the AFP or relevant state or territory police service that a police officer who has provided support under section 10, 11 or 12, must not have any involvement in any current or future investigation, or prosecution involving the subject, other than the role as outlined under sections 10, 11 or 12 of the Instrument, where that investigation or prosecution arises from or is in connection to information obtained during questioning.

65. This is a new section. It is intended to address a recommendation from the Review to create a firewall and effective information barriers between those police officers who have provided support under section 10, 11 or 12 and limit involvement in any current or future investigation, or prosecution arising from or connected to the questioning warrant.

Section 13 – Health and welfare

Questioning place

66. Subsection 13(1) is unchanged from the 2020 Statement of Procedures.

67. Subsection 13(1) provides that the place where the subject is appearing for questioning under a questioning warrant:

    a. must have adequate fresh air and ventilation, floor space, and heating and cooling appropriate to the climactic conditions—for the avoidance of doubt, ‘fresh air’ may include air drawn through a heating, ventilation or air-conditioning system
    b. must have sufficient natural or artificial light to permit reading
    c. need not be the same throughout the period of the warrant—for example, to allow questioning to occur in multiple rooms or buildings, if required, and
    d. must be appropriately furnished.

68. What constitutes ‘appropriate’ furnishings for the purposes of paragraph 13(1)(d) will depend on all of the circumstances. In general, appropriate furnishings would include tables and chairs for all participants, that are suitable to allow for the conduct of questioning to be undertaken without undue discomfort. However, additional or different furnishings may be appropriate if required to address particular vulnerabilities or sensitivities that the subject or another person may have, or if required to address particular risks to safety or health.

Health care

69. Subsection 13(2) is unchanged from the 2020 Statement of Procedures.

70. Subsection 13(2) provides that the subject must be provided with necessary medical or other health care.

71. Subsection 13(3) provides that arrangements must be made for any recommendation made or treatment prescribed by a medical or health professional to be given effect. This includes recommendations made or treatment prescribed before the subject attends the questioning place or is apprehended—that is, recommendations or treatments relating to pre-existing conditions.

Religion

72. Subsection 13(4) is unchanged from the 2020 Statement of Procedures.

73. Subsection 13(4) provides that, subject to subsection 13(5), the subject must be permitted to engage in religious practices in accordance with the subject's religion. The effect of subsection 13(4) may be to require that additional breaks be provided to enable the subject to engage in religious practices in accordance the subject's religion—which may be undertaken at or nearby the questioning place, or elsewhere (for example, at a place of worship).

74. Subsection 13(5) provides that the prescribed authority and persons exercising authority under the warrant may limit any religious practices under subsection (4) in accordance with the requirements of safety or security, or under the ASIO Act. Examples of situations where a prescribed authority or person exercising authority under the warrant may limit a religious practice may include:

    a. by requiring that the subject of the questioning warrant undertake the religious practice at or nearby the questioning place, including at a nearby place of worship, if doing so is in accordance with the requirements of security, if it is necessary that the person be questioned in a timely fashion
    b. by requiring that the subject of the questioning warrant not undertake the religious practice, or undertake the practice at a later time, if the subject is to be questioned in relation to an imminent or urgent threat to public safety or security, or
    c. by limiting the subject of a warrant from engaging in a religious practice outside Australia, if the requirements of safety or security are such that the person should not be permitted to leave the country.

Subject of a minor questioning warrant

75. Subsection 13(6) provides that the subject of a minor questioning warrant may only be apprehended or questioned under conditions that consider the subject's particular needs and any special requirements having regard to the subject's age and any known vulnerabilities. ASIO must seek expert advice in assessing a minor's particular needs and special requirements.

76. Subsection 13(6) has been amended to require ASIO to obtain expert advice (rather than 'may' obtain). This addresses a recommendation from the Review and is intended to ensure the best interests of a minor are met in all circumstances that the minor's particular needs and special conditions are supported.

Other vulnerable persons

77. Subsection 13(7) provides that the subject of a questioning warrant may only be apprehended or questioned under conditions that take into account any known vulnerabilities or sensitivities in relation to the subject.

78. Subsection 13(7) has been amended to provide that ASIO may seek expert advice to assess the particular needs and requirements of a vulnerable person. This amendment addresses a recommendation from the Review which is intended to ensure that the broad scope, nature and level of vulnerabilities that may become known to ASIO are appropriately considered.

Section 14 – Video recordings

Facilities for recording

79. Subsection 14(1) provides that ASIO is responsible for ensuring that there are facilities available for the making of video recordings in accordance with subsection 34DP(1) of the ASIO Act.

80. Subsection 14(2) provides that ASIO must ensure that video recording facilities (a) make a clear visual recording of the subject's appearance before a prescribed authority for the duration of questioning, and (b) make a clear audio recording of all questions, answers, and statements made during questioning, including statements made by the prescribed authority in accordance with section 34DC of the ASIO Act.

81. Subsection 14(2) has been amended to address a recommendation from the Review to ensure consistency with subsection 34DP(1) of the ASIO Act.

82. Subsection 14(3) provides that the prescribed authority must be notified if the video recording facilities fail to record as intended, or if the recording has to be suspended for whatever reason, to enable the prescribed authority to direct that questioning be deferred until recording can resume. The effect of subsection 14(3) is that:

    a. if ASIO or another person exercising authority under a questioning warrant become aware that the video recording facilities have failed or are failing to record as intended, during a questioning period—the prescribed authority must be notified immediately, to enable the prescribed authority to direct that questioning be deferred, and
    b. if ASIO or another person exercising authority under a questioning warrant become aware that the video recording facilities have failed or are failing to record as intended, during a break—the prescribed authority must be notified before or at the time that questioning resumes, to enable the prescribed authority to enable that questioning be deferred.

Notification of subject

83. Subsection 14(4) is unchanged from the 2020 Statement of Procedures.

84. Subsection 14(4) provides that, upon the commencement or resumption of any video recording of questioning in accordance with subsection 34DP(1) of the ASIO Act, the prescribed authority must inform the subject that the questioning is being recorded, and must state the time and day of the questioning.

Security of recordings

85. Subsections 14(5), 14(6), 14(7), 14(8), 14(9) and 14(10) are unchanged from the 2020 Statement of Procedures.

86. Subsection 14(5) provides that ASIO must ensure that a master version is retained of any video recording of the subject's appearance before a prescribed authority for questioning. The term 'master version' is defined in section 4 of the Instrument.

87. Subsection 14(6) provides that the master version must be kept in a secure system where the content cannot be subject to modification. Subsection 14(6) does not prohibit the appending of information to the master version as a necessary incident of entering the master version into a secure system (such as metadata necessary to enable the master version to be retrieved from the secure system), provided that in doing so the content of the master version is not modified.

88. Subsection 14(7) provides that a record must be kept of any persons that access the master version.

89. Subsection 14(8) provides that the master version must be made available to the IGIS and Security on request.

90. Subsection 14(9) provides that ASIO is responsible for ensuring that any copies of master versions held by ASIO are kept in a secure system and a record is kept of any persons that access such copies.

91. Subsection 14(10) provides that, if the Director-General is satisfied that any video recordings of a subject's appearance before a prescribed authority are not required for the purposes of the performance of functions or exercise of powers under the ASIO Act, the recordings must be destroyed.

Section 15 – Complaints made by the subject while appearing for questioning

92. Subsection 15(1) provides that section 15 applies if (a) the subject is appearing before a prescribed authority for questioning under a questioning warrant, (b) the subject, or where the subject is a minor, the minor's representative, informs the prescribed authority that they want to make a complaint of the kind referred to in paragraph 34DC(1)(i) of the ASIO Act or give information of the kind referred to in paragraph 34DC(1)(j) of the ASIO Act, and (c) the prescribed authority gives a direction deferring questioning for the purpose of allowing the subject, or the minor's representative, to make the complaint or give the information.

93. Subsection 15(2) provides that the subject, and where applicable the minor's representative, must be provided with such facilities as are, in the view of the prescribed authority appropriate to make the complaint or give the information.

94. Subsection 15(3) provides that the subject, and where applicable the minor's representative, must be permitted to make the complaint or give the information outside the hearing of persons present for the purposes of executing or supervising the execution of the warrant. Subsection 15(3) does not preclude other persons from being present, including for example a staff member of the Office of the IGIS, or a police officer who is not present for the purposes of executing or supervising the execution of the warrant.

95. Subsection 15(1), 15(2) and 15(3) have been amended to include a reference to 'the minor's representative'. This addresses a recommendation from the Review and is intended to reflect more fully the role of a minor's representative at the questioning of a minor.

Section 16 – Review

96. Section 16 is unchanged from the 2020 Statement of Procedures.

97. Section 16 provides that the operation and continued suitability of the Instrument will be reviewed on a recurring basis to coincide with the review of the Guidelines made under section 8A of the ASIO Act. Paragraph 1.14 of the Guidelines provides that:

    a. the first review will commence within 18 months of the commencement of the Guidelines, and be completed within 3 years after the commencement of the Guidelines, and
    b. a further review must be completed by every third anniversary of the Guidelines thereafter.