3

Schedule 2 – Proposed amendments to the *Intelligence Services Act 2001*

Summary of proposed amendments

3.1 Schedule 2 of the Bill contains amendments to the *Intelligence Services Act 2001* (IS Act). The proposed amendments are directed to two key areas:

- Australian Secret Intelligence Service (ASIS) support to Australian Defence Force (ADF) military operations and cooperation with the ADF on intelligence matters, and
- emergency ministerial authorisations.

3.2 In particular, the Bill proposes to amend the IS Act to:

- explicitly provide (at the Defence Minister's written request) for ASIS assistance to the ADF in support of military operations and cooperation on intelligence matters, including:
  - ⇒ producing intelligence on one or more members of a class of Australian persons, or
  - ⇒ undertaking activities that will or are likely to have a direct effect on one or more members of a class of Australian persons.
- allow a ministerial authorisation under section 9 of the IS Act to be issued for a 'class of Australian person',
- allow agreement of the Attorney-General (where required) under paragraph 9(1A)(b) to be obtained orally,
- allow the Attorney-General to specify a class of Australian persons who are or are likely to be involved in activities that are a threat to security

and give agreement in relation to any Australian person in that specified class, and

- amend provisions relating to emergency ministerial authorisations to provide for:
  - ⇒ oral authorisations (of up to 48 hour duration) by the Minister,
  - ⇒ written authorisation by an agency head when the Prime Minister, Defence Minister, Foreign Minister and Attorney-General are not readily available or contactable, and
  - ⇒ agreement to an emergency authorisation by the Director-General of Security where required under paragraph 9(1A)(b) and the Attorney-General is not readily available or contactable.

3.3 In his second reading speech, the Attorney-General indicated that the proposed amendments to the IS Act were

> … urgent, as a result of recent developments in the security environment, primarily due to the Government's decision to authorise the ADF to undertake operations against the Islamic State terrorist organisation in Iraq.[1]

Support to ADF military operations

3.4 The proposed amendments will make it explicit in the IS Act 'that it is a statutory function of ASIS to provide assistance to the ADF in support of military operations, and to cooperate with the ADF on intelligence matters.'[2] The basis for the proposed amendments is the different circumstances in Iraq compared with Afghanistan. The Explanatory Memorandum states that

> … differences in the circumstances in Iraq mean that reliance on existing provisions of the ISA in relation to the functions of ASIS (which are not specific to the provision of assistance to the ADF) is likely to severely limit ASIS's ability to provide such assistance in a timely way.[3]

1 Senator the Hon George Brandis QC, Attorney-General, *Senate Hansard*, 29 October 2014, p. 62.

2 CTLA Bill, *Explanatory Memorandum*, p. 2.

3 CTLA Bill, *Explanatory Memorandum*, p. 2.

3.5 In particular:

> Unlike the ADF's and ASIS's operations for almost 10 years in Afghanistan, in Iraq it is known that a large number of Australian persons are actively engage with terrorist groups, including ISIL.[4]

3.6 Accordingly, ASIS's support to ADF operations are likely to require ASIS to produce intelligence on and undertake activities (subject to the limits on ASIS's functions) that may have a direct effect on Australian persons.[5]

3.7 Agencies highlighted the current constraints of the IS Act on ASIS:

> There is no provision in the ISA that would enable the ADF to solely determine the requirement for ASIS to produce intelligence on, or to undertake activities in accordance with its functions that will have a direct effect on, an Australian involved in terrorist activity without needing the prior agreement of ASIO. The ADF is, however, not itself constrained in this manner but is able to act within its authorised targeting authorities. Put simply, in a swiftly changing operational environment the ADF is able to act quickly in response to operational threats and requirements, but ASIS would be unable to act as quickly and flexibly to support the ADF.[6]

3.8 It was further argued that '[i]n time sensitive situations ASIS could be left unable to act legally even to protect life'.[7]

3.9 The Attorney-General's Department provided an additional detailed rationale for the amendments:

> While it is acknowledged that AGO and ASD are within the Defence portfolio and may therefore be said to have a greater need to perform functions in support of, or in cooperation with the ADF (or might be expected to do so with greater frequency than ASIS), these agencies do not exclusively service the Defence portfolio, and have significant involvement in broader national security activities and operations. This broader remit has been reflected in their recent, formal re-naming as part of the National Security Legislation Amendment Act (No. 1) 2014. In addition, as noted below in this submission, ASIS has played a significant role in previous military operations conducted by the ADF, including in

4 Australian Secret Intelligence Service, *Submission 17,* p. [4].
5 Australian Secret Intelligence Service, *Submission 17,* p. [4].
6 Australian Secret Intelligence Service, *Submission 17,* p. [3].
7 Australian Secret Intelligence Service, *Submission 17,* p. [5].

> Afghanistan. It would therefore be inconsistent with the contemporary security environment, and the activities of these IS Act agencies in that environment, to maintain a formal distinction between their statutory functions in this regard, on the technical basis of portfolio responsibility. It is, in AGD's view, preferable that agencies' statutory functions should explicitly reflect the circumstances in which their functions are, in practice, performed, and should be amenable to the performance of those functions in a timely and effective way, subject to necessary safeguards. On this basis, AGD considers that it is not tenable to maintain a different statutory approach to ASIS's functions concerning the provision of support to, or cooperating with, the ADF (in the form of a non-prohibition on such activities in subsection 6(7), and a general Ministerial discretion to issue directions under paragraph 6(1)(e) for other activities, which can be utilised in such cases); and the statutory functions of AGO and ASD (in the form of an express statutory function to provide support to, or cooperate with, the ADF).[8]

Emergency ministerial authorisation

3.10 The amendments also address the circumstance in which an emergency ministerial authorisation is required and neither the Prime Minister, Defence Minister, Foreign Minister or Attorney-General are available.[9] The Explanatory Memorandum states that:

> Experience in responding to urgent requirements for ministerial authorisations has identified that the existing emergency authorisation arrangements under section 9A of the ISA do not sufficiently address the need for ASIS, ASD and AGO to be able to obtain a Ministerial authorisation in an extreme emergency.[10]

3.11 Further, existing section 9A of the IS Act does not

> … make provision for the contingency that the Attorney General may not be readily available or contactable to provide his or her agreement to the making of an authorisation, in the circumstances in which such agreement is required.[11]

---

8 Attorney-General's Department, *Submission 5,* p. 14 (footnote 9).

9 See current section 9A of the IS Act.

10 CTLA Bill, *Explanatory Memorandum*, p. 2.

11 CTLA Bill, *Explanatory Memorandum*, p. 2.

Matters raised in evidence

Oral authorisations

3.12 Under proposed amendments to section 9A of the IS Act, the Minister may issue emergency authorisations orally. While some submitters supported the proposed amendment,[12] or raised no objections,[13] other submitters opposed oral authorisations. Concerns included the time lag that may occur between issuing the oral authorisation and preparing the written record, and the perceived freedom that an oral authorisation provides.[14]

3.13 In response, the Attorney-General's Department commented:

> The ability for authorisations to be issued via oral means reflects a genuine operational need, in recognition that circumstances of emergency can arise, in which it is simply not possible in the time available to comply with written form requirements. The limited ability for a Minister to issue an oral authorisation is a form requirement only. It does not alter, in any way, the substantive issuing criteria that govern Ministerial authorisations under section 9. This is not about replacing the general rule that authorisations must be issued in writing for the purpose of convenience, but rather about making provision for cases of the most exceptional kind.[15]

3.14 A written record of the oral authorisation must be made as soon as practicable but no later than 48 hours after the authorisation is provided.[16] The Attorney-General's Department noted that 48 hours is the 'absolute latest' time that a record can be made, with agency heads obliged to do so as soon as practicable.[17]

3.15 The Law Council of Australia proposed that safeguards surrounding oral authorisations would be improved with a more prescriptive approach to the matters that must be recorded in the written record.[18]

---

12 NSW Council for Civil Liberties and Muslim Legal Network (NSW), *Submission 7,* p. 12.

13 Law Council of Australia, *Submission 16,* p. 21.

14 Mr Bruce Baer Arnold, *Submission 9,* p. 4; Australian Privacy Foundation, *Submission 13,* p. 3; Senator David Leyonhjelm, *Submission 15,* p. [4].

15 Attorney-General's Department, *Supplementary Submission 5.1,* p. 27.

16 Proposed subsection 9A(5).

17 Attorney-General's Department, *Supplementary Submission 5.1,* p. 27.

18 Law Council of Australia, *Submission 16,* pp. 22–23.

Class authorisations

3.16 The Bill amends sections 8, 9, 10 and 10A of the IS Act to enable the Minister responsible for ASIS to give authorisation to ASIS to:

- to undertake activities for the specific purpose or for purposes which include the specific purpose of producing intelligence on a specified class of Australian persons, or
- to undertake activities or a series of activities that will, or is likely to, have a direct effect on a specified class of Australian persons.

3.17 The arrangements for class authorisations will only apply to support to the ADF following a written request from the Defence Minister.[19]

3.18 According to the Explanatory Memorandum:

> In giving the authorisation relating to the specified class, the Minister responsible for ASIS must be satisfied of the preconditions set out in subsection 9(1) of the ISA. The Minister must also be satisfied that the class relates to support to the Defence Force in military operations as requested by the Defence Minister and that all persons in the class of Australian persons will or are likely to be involved in one or more of the activities set out in paragraph 9(1A)(a).[20]

3.19 The Bill will also amend subsection 9(1A) to enable the Attorney-General to specify a class of Australian persons who are, or are likely to be, involved in an activity or activities that are, or are likely to be, a threat to security, and give agreement in relation to any Australian person in that specified class.

3.20 ASIO argued that:

> The ability to provide a 'class agreement' in this manner will provide greater operational flexibility for IS Act agencies, which will also be particularly useful in time critical circumstances.[21]

3.21 For the purpose of ASIS support to the ADF, without class authorisations:

> This means that multiple, simultaneous Ministerial authorisations would need to be sought and issued on identical grounds; or that Ministerial authorisations would be unable to be issued because a

19 CTLA Bill, *Explanatory Memorandum*, p. 28.

20 CTLA Bill, *Explanatory Memorandum*, p. 28.

21 Australian Security Intelligence Organisation, *Submission 10,* p. [2].

particular Australian person fighting with that organisation was not known in advance of the commencement of the operation.[22]

Definition of a class of Australian persons

3.22 Concern was expressed by submitters as to how a class of Australian persons may be defined.[23] Dr A J Wood, for example, stated:

> While it might be convenient to leave this definition of what constitutes a 'class' open, it can in the mind of some communities raise the spectre of 'racial or religious profiling'.[24]

3.23 The Law Council of Australia similarly commented that a class of Australian persons may include all Australian persons:

- adhering to a certain religious belief;
- adhering to a certain political or ideological belief;
- who are a member of a particular association;
- who are engaging in a certain activity;
- who are present within a certain location;
- who have a certain ethnic background.[25]

3.24 The Law Council also expressed concern 'that such an overarching power as class authorisation has the potential to apply intrusive interrogation powers to a group, which do not apply to the broader community'.[26] The Law Council considered such an approach:

- is not consistent within the principle of equality before the law,
- does not sit easily with rule of law principles (such as the use of Executive powers), and
- is inconsistent with traditional rule of law and criminal justice principles by shifting the focus from a person's conduct to his or her associations.[27]

3.25 During the public hearing, the Committee sought further clarification from agencies as to how classes of Australian persons will be defined under the proposed amendments. In its supplementary submission, the

22 Attorney-General's Department, *Submission 5,* p. 16.

23 Dr Greg Carne, *Submission 4,* p. 8.

24 Dr A J Wood, *Submission 11,* p. [4]. See also, Australian Lawyers for Human Rights, *Submission 6,* p. 4; Mrs Lydia Shelly, Muslim Legal Network (NSW), *Committee Hansard,* Canberra, 13 November 2014, p. 18.

25 Law Council of Australia, *Submission 16,* p. 18.

26 Law Council of Australia, *Submission 16,* p. 19.

27 Law Council of Australia, *Submission 16,* p. 19.

Attorney-General's Department advised that there would be four principal limitations on the classes of Australian persons for whom the Foreign Minister may issue authorisations enabling ASIS to undertake activities in support of the ADF:

- First, the Defence Minister must request the authorisation in writing and will set out in this request the class of Australian persons for whom ASIS's assistance is sought in relation to a specified ADF military operation.[28]
- Secondly, the Foreign Minister must be satisfied that the other authorisation criteria in subsections 9(1) and 9(1A) are satisfied. Where authorisation is sought in relation to a class of Australian persons

  > … the Minister must specifically assess, and be satisfied of, the necessity and proportionality of the impacts of that activity or activities in relation to that class of Australian persons.

  Further, the Minister must be satisfied that the particular activities of a class of person in relation to whom the authorisation is sought fall within one or more of the activities prescribed in paragraph 9(1)(a):

  > Hence, the IS Act does not prescribe an exhaustive list of the exact classes of persons in relation to whom a Ministerial authorisation must be issued. Rather, the Act confers a discretion on the authorising Minister to define the class of Australian persons in relation to individual authorisation decisions, provided that the class satisfies the 'activity test' in paragraph 9(1A)(a).

  For ASIS assistance to ADF operations:

  > The relevant limb of the activity test will invariably be that in subparagraph 9(1A)(a)(iii), which prescribes activities that are or are likely to be a threat to security (as that term is defined in section 4 of the ASIO Act). This connection is inherent in the nature of military operations undertaken by the ADF, which are undertaken for the purpose of the defence of Australia.[29]
- Thirdly, the agreement of the Attorney-General is required in relation to a class of Australian persons before an authorisation is issued. The Attorney-General's Department argued that:

  > This means that the Attorney-General will apply his or her judgment as to whether the class of Australian persons—as

28 Attorney-General's Department, *Supplementary Submission 5.1,* p. 4.

29 Attorney-General's Department, *Supplementary Submission 5.1,* pp. 4–5.

> defined by reference to their actual or likely engagement in a particular activity—has the requisite nexus to security.

The Attorney-General's Department noted that at this point, the proposed class of Australian persons will have been scrutinised by three Ministers.[30]

- Fourthly, a class cannot include anyone who is not engaged in the specified activity or activities. Accordingly:

> Once the Foreign Minister has issued an authorisation for ASIS to undertake activities for the purpose of providing assistance to the ADF in support of a military operation, ASIS must then make decisions about whether a particular Australian person or persons fall within the class of persons specified in the authorisation, in order to undertake activities in reliance on the authorisation.
>
> If ASIS purported to rely on an authorisation to undertake activities in relation to an Australian person who did not fall within the relevant class, those activities would not be lawfully authorised.[31]

3.26 One example of a class is 'Australian persons who are or are likely to be members of IS [Islamic State] who are fighting with IS or are otherwise supporting IS in its military operations'.[32] The Attorney-General's Department went on to emphasise:

> The key point is that however the class is defined, all Australian persons who fall within that class must be or are likely to be, for the reasons explained above, involved in activities which are or are likely to be a threat to security. For this reason, it would be extremely difficult to define a class solely by reference to a geographical location because this would not necessarily be sufficient to exclude Australian persons who are not or are not likely to be involved in activities which are or are likely to be a threat to security.[33]

---

30 Attorney-General's Department, *Supplementary Submission 5.1,* pp. 5–6.

31 Attorney-General's Department, *Supplementary Submission 5.1,* p. 6.

32 Attorney-General's Department, *Supplementary Submission 5.1,* p. 7; Australian Secret Intelligence Service, *Submission 17,* p. [5].

33 Attorney-General's Department, *Supplementary Submission 5.1,* p. 7.

3.27 The Department also noted that provision for a class of persons occurs elsewhere in the IS Act and in the ASIO Act.[34]

Duration of Defence Minister's request and Attorney-General's agreement

3.28 In her submission, the Inspector-General of Intelligence and Security (IGIS) noted that there is no time limit on the duration of a request from the Defence Minister for a class authorisation which, in the event of a protracted military operation, could extend for many years.[35]

3.29 Similarly, although the Attorney-General could specify a time limit, agreement of the Attorney-General to a class authorisation may not be time limited. The IGIS expressed an expectation that both the Defence Minister and the Attorney-General would be periodically briefed, allowing Ministers the opportunity to consider the ongoing appropriateness of either the request or the agreement.[36]

3.30 The Attorney-General's Department agreed that it would be appropriate for Ministers to be periodically briefed. It noted that as a ministerial authorisation issued by the Foreign Minister for ASIS to assist the ADF in support of a military operation is limited to six months,

> [i]n practice, before such an authorisation would be renewed, there would be appropriate consultation with Defence and ASIO and consideration of whether it is appropriate to continue relying on a request that may have been made, or an agreement that may have been provided, some time ago.[37]

3.31 In evidence, it was also suggested that a Minister could make a direction under section 8(2) of the IS Act that the Minister be briefed at a particular time (such as every six months). The IGIS would then measure the agency's actions against this direction.[38]

Emergency authorisations by agency head

3.32 Proposed section 9B of the IS Act provides for circumstances in which an emergency authorisation is required and none of the Ministers specified in the IS Act, namely the Prime Minister, Defence Minister, Foreign Minister

34 Attorney-General's Department, *Supplementary Submission 5.1,* p. 9.

35 Inspector-General of Intelligence and Security, *Submission 12,* p. 5.

36 Inspector-General of Intelligence and Security, *Submission 12,* p. 5.

37 Attorney-General's Department, *Supplementary Submission 5.1,* p. 22.

38 Mr Jake Blight, Assistant Inspector-General of Intelligence and Security, *Committee Hansard,* Canberra, 13 November 2014, p. 2.

or Attorney-General, are available. In this case, the agency head may give a written[39] authorisation for an activity or series of activities.[40] An authorisation given by an agency head would have effect for a maximum period of 48 hours.[41] The agency head would be required to inform the relevant responsible Minister of the authorisation as soon as practicable, within 48 hours of giving the authorisation, and the IGIS within 3 days.[42]

3.33 According to the Attorney-General's Department,

> … statutory limitations ensure that emergency authorisations by agency heads can only be issued where necessary, and in cases of extreme urgency, where failure to undertake the relevant activities is likely to yield adverse consequences of the most serious kind with respect to security and the lives or safety of other persons.[43]

3.34 Proposed section 9C provides for the unavailability of the Attorney-General. In this circumstance, the Director-General of Security (unless not readily available or contactable) could provide agreement to the authorisation. The Attorney-General's Department indicated that, as the proposed amendments recognise the Attorney-General's particular role in providing agreement to ministerial authorisations and

> … extensive visibility of the security environment and detailed awareness and understanding of any relevant security operations …
>
> it is appropriate that this specialised role is performed by the Director-General of Security (in favour of delegating responsibility to another Minister).[44]

3.35 In support of the proposed amendments, ASIS commented that under the current IS Act

> … the requirement that that the agreement of the Attorney-General must have been obtained where the Australian person is, or is likely to be, involved in activities which are, or are likely to be, a threat to security means that in practice if the Attorney-

---

39 Any emergency authorisation issued by an agency head under this proposed section must be in writing. Attorney-General's Department, *Supplementary Submission 5.1,* p. 22.

40 Proposed subsection 9B(2).

41 Proposed subsection 9B(4).

42 Proposed subsections 9B(5) and 9B(6).

43 Attorney-General's Department, *Submission 5,* p. 27.

44 Attorney-General's Department, *Submission 5,* pp. 22–23.

> General is not available an authorisation cannot be provided at all.[45]

3.36 In addition, ASIO highlighted that:

> While previously the deficiencies in emergency provisions were not as stark because of the typical length of time it took for threats to security to develop, in the current operational environment, notice of activities that involve a threat to security can, and do, arise in very short time frames. Current limitations may mean time critical opportunities to collect vital intelligence and indeed, protect human life, are lost or compromised. If, for example, ASIO had some intelligence indicating an imminent terrorist attack by an Australian person, it is vital that IS Act agencies can be authorised to respond quickly and in accordance with their functions.[46]

3.37 Several submitters opposed the delegation of powers to agency heads.[47] Senator David Leyonhjelm raised concerns that the delegation of powers to agency heads contradicts 'fundamental common law principles that a delegate cannot authorise someone else to exercise all his powers'.[48] Senator Leyonhjelm argued that

> … the Intelligence Services Act in its unamended form seems to have been drafted with the intent that the Minister's decision is to be a personal one. The traditional common law caution regarding authorisations where significant individual rights and liberties (in this case – life, movement, association) would be affected is important here, and suggests that a regime whereby at least one relevant minister is always contactable should be instituted.[49]

3.38 The Law Council of Australia also opposed delegation to an agency head, suggesting that another senior cabinet Minister, such as the Deputy Prime Minister, be included in the list of responsible ministers.[50]

3.39 The NSW Council for Civil Liberties and Muslim Legal Network (NSW) considered that

---

45 Australian Secret Intelligence Service, *Submission 17,* p. [3].

46 Australian Security Intelligence Organisation, *Submission 10,* p. [2].

47 Mr Bruce Baer Arnold, *Submission 9,* p. 5; Law Council of Australia, *Submission 16,* p. 24.

48 Senator David Leyonhjelm, *Submission 15,* p. [3].

49 Senator David Leyonhjelm, *Submission 15,* p. [4].

50 Law Council of Australia, *Submission 16,* p. 25.

> … expanding this power to heads of agencies when the Ministers are unavailable does not take into account the appropriateness and need for reserving this power for those at the most senior level.[51]

3.40 Dr A J Wood, although accepting the proposed delegation to agency heads, expressed concern at the possible lack of availability of all four Ministers. Further,

> … in the absence of a definition for the meaning of 'readily available or contactable' it should be mandated that all steps taken to contact the relevant person is documented in a manner that would enable a reasonable person to concur that the steps taken were apt.[52]

3.41 The NSW Council for Civil Liberties and Muslim Legal Network (NSW) argued that extension of the power to agency heads does not provide adequate safeguards and protection of human rights. Further, with regard to the requirement to report to the Minister:

> Although, 48 hours is preferable to a longer period of time, it is nevertheless still ample time to breach the privacy of an Australian person without the appropriate safeguards in place. Despite the time limit, intelligence activity would still be undertaken against the relevant Australian person. Whilst it is acknowledged that the ISA agencies are subject to the oversight of IGIS, the IGIS will only become aware of any misuse of this provision after the intelligence activity is undertaken and does not provide any safeguards to prevent misuse at the time such emergency authorisations are made.[53]

3.42 The Attorney-General's Department argued in response that privacy impacts are relevant considerations in the assessments made under subsection 9(1) and that agencies are required to comply with Privacy Rules made under section 15 of the IS Act in relation to the communication and retention of intelligence gathering information concerning Australian persons.[54]

3.43 Additionally, the NSW Council for Civil Liberties and Muslim Legal Network (NSW) argued that:

---

51 NSW Council for Civil Liberties and Muslim Legal Network (NSW), *Submission 7,* p. 12.

52 Dr A J Wood, *Submission 11,* p. [3].

53 NSW Council for Civil Liberties and Muslim Legal Network (NSW), *Submission 7,* pp. 12–13.

54 Attorney-General's Department, *Supplementary Submission 5.1,* p. 30.

> The Explanatory Memoranda also states that other safeguards include the requirement of the relevant head of agency submitting a report to the relevant Minister and on receipt of such a report, the Minister has the option to cancel the authorisation. However, this report is required to be completed within 48 hours of the authorisation and the maximum period of that authorisation is 48 hours. If the report is submitted towards the end of that period, there is little utility in the Minister cancelling the authorisation as by that time, intelligence activity would have already been undertaken and collected against an Australian person. Consequently, this is not an effective safeguard. Furthermore, the question arises that if these provisions are put in place to respond to extreme emergencies where relevant Ministers are not available within a 48 hour period, it will not be effective to give the power of a Minister to cancel that authorisation within 48 hours and presumably, they would be unavailable for that whole period. If they are not unavailable for that period, we respectfully submit that the need will not arise to defer such power to the heads of agencies.[55]

3.44 As noted above, an agency head is required to notify the responsible Minister as soon as practicable and within 48 hours of the issuing of an authorisation. The Committee questioned agencies about the adequacy of these time limits. In response, the Attorney-General's Department advised:

> The reference to 48 hours in this provision is the upper limit of the time period within which notification must be made as soon as practicable. The effect of the upper limit of 48 hours is that any notification provided after this maximum period is deemed not to have been made as soon as practicable. This is a safeguard which removes any possibility for a suggestion that the provision of a notification after the expiry of an emergency authorisation could have been the first practicable opportunity to do so.[56]

3.45 Further:

> The longer the delay between issuing and Ministerial notification, the more compelling evidence would be needed to show that it

55 NSW Council for Civil Liberties and Muslim Legal Network (NSW), *Submission 7,* p. 13.

56 Attorney-General's Department, *Supplementary Submission 5.1,* p. 16.

> would not have been practicable to have notified the Minister earlier.[57]

3.46 The Department indicated that, based on discussions with agencies, '48 hours is considered to provide an appropriate outer limit'.[58]

Definitional clarity

3.47 Some submitters raised concerns about the lack of clarity around several terms in the Bill, including 'not readily available'[59] and 'emergency'.[60]

3.48 The Attorney-General's Department responded to these concerns, noting that:

> An assessment by an agency head of the availability and contactability of a Minister is intended to be a matter of judgement by the agency head in the circumstances of individual cases, having regard to the nature of the relevant activity and the degree of urgency in respect of the particular matter.[61]

3.49 In addition, the Department indicated that the term 'emergency'

> … is not specifically defined in the Bill because it is capable of bearing its ordinary meaning, having regard to the context in which it is used in particular provisions. In particular, there are different considerations depending upon whether the relevant decision is an emergency Ministerial authorisation (under proposed section 9A) or an emergency authorisation issued by an agency head, if the agency head is satisfied that no relevant Ministers are readily available or contactable (under proposed section 9B).[62]

3.50 In his submission, Dr Greg Carne also raised concerns about the scope of military operations that are captured by the proposed amendments.[63] Dr Carne argued that military operations could 'conceivably include all forms of military operations, both external to, and internal to the

---

57 Attorney-General's Department, *Supplementary Submission 5.1,* pp. 16–17.

58 Attorney-General's Department, *Supplementary Submission 5.1,* p. 17.

59 Mr Bruce Baer Arnold, *Submission 9,* p. 3; Australian Privacy Foundation, *Submission 13,* p. 2.

60 Dr A J Wood, *Submission 11,* p. [3]; Dr Greg Carne, *Submission 4,* pp. 10–11.

61 Attorney-General's Department, *Submission 5,* p. 27. See also, Attorney-General's Department, *Supplementary Submission 5.1,* p. 25.

62 Attorney-General's Department, *Supplementary Submission 5.1,* p. 24.

63 Dr Greg Carne, *Submission 4,* p. 7.

Commonwealth of Australia, and those which both do, and do not, involve the direct or indirect application of the use of force'.[64]

3.51 Responding to this matter in its supplementary submission, the Attorney-General's Department noted that the scope of military operations are limited by several requirements of the IS Act, including section 9 and subsections 11(1) and 11(2).[65]

'Targeted killings'

3.52 Drawing on media reporting, several submitters raised the issue of 'targeted killings' being authorised by the IS Act.[66] For example, while the Gilbert + Tobin Centre for Public Law accepted that there are reasons to improve cooperation between ASIS and the ADF, the Centre raised concerns about the possibility that increased cooperation could lead to the targeted killings of Australian citizens fighting in Iraq and Syria:

> Such killings raise significant and difficult questions of domestic policy, human rights and international law, and in the absence of greater parliamentary and public debate about these matters, this should not be facilitated by this Bill.[67]

3.53 The NSW Council for Civil Liberties and Muslim Legal Network (NSW) also expressed concern that the amendments would allow ASIS to be complicit 'in the targeted killings of Australian citizens who have not been charged or convicted of a criminal offence', and called for clarity on the need for this provision.[68]

3.54 Both ASIS and the Attorney-General's Department commented on this issue. ASIS told the Committee:

> Importantly, the proposed amendments do not expand the functions of ASIS or the other ISA agencies. Nor do they change the current limitation on ASIS under subsection 6(4) of the ISA …
>
> What is changed is the means by which the Foreign Minister, as the Minister responsible for ASIS, is able to authorise ASIS to undertake activities relating to Australian persons in accordance

64 Dr Greg Carne, *Submission 4,* p. 7.

65 Attorney-General's Department, *Supplementary Submission 5.1,* pp. 28–29.

66 Dr A J Wood, *Submission 11,* p. [3]; Senator David Leyonhjelm, *Submission 15,* p. [3]; Mrs Shelly, *Committee Hansard,* Canberra, 13 November 2014, pp. 18–19.

67 Gilbert + Tobin Centre for Public Law, *Submission 1,* p. 1.

68 NSW Council for Civil Liberties and Muslim Legal Network (NSW), *Submission 7,* pp. 14–15.

> with a direction under subsection 8(1) of the ISA to provide assistance to the ADF in support of military operations.[69]

3.55 Similarly:

> The proposed amendments will not change the role of ASIS in a way that may enable ASIS to kill or use violence against people, or to facilitate so-called 'targeted killings'.[70]

3.56 Both ASIS and the Attorney-General's Department went on to note that:

> What the ADF can do with intelligence provided by ASIS, including the legality of any use of force exercised in reliance on intelligence provided by ASIS, is governed by the ADF's Rules of Engagement. These rules are developed in consultation with the Office of International Law within the Attorney-General's Department, to ensure their consistency with international law, including international humanitarian law.[71]

3.57 In issuing an authorisation, the Minister must be satisfied of a number of criteria under subsections 9(1) and 9(1A) as well as the limitations on agencies functions and activities outlined in sections 11 and 12 of the IS Act.[72]

3.58 While it raised no concerns about making it an explicit statutory function of ASIS to provide assistance to ADF in support of military operations, the Law Council of Australia argued that there is currently an ambiguity under the IS Act, 'which requires an amendment to make it clear that nothing in the Act permits torture in any form.'[73]

3.59 The NSW Council for Civil Liberties and Muslim Legal Network (NSW) expressed further concerns about the sharing of intelligence with 'friendly foreign states' and the use of that information in their military operations.[74] In response, the Attorney-General's Department highlighted that the sharing of intelligence is governed and limited by section 13 of the

---

69 Australian Secret Intelligence Service, *Submission 17,* p. [2]. Specifically, the Minister would be able to provide an authorisation in respect of a class of Australian persons rather than being limited to providing an authorisation for specified individuals.

70 Attorney-General's Department, *Supplementary Submission 5.1,* p. 20. The Department noted that the Australian Government does not use the term 'targeted killings'. See also Australian Secret Intelligence Service, *Submission 17,* p. [7].

71 Attorney-General's Department, *Supplementary Submission 5.1,* p. 20; Australian Secret Intelligence Service, *Submission 17,* p. [7].

72 Attorney-General's Department, *Submission 5,* p. 25.

73 Law Council of Australia, *Submission 16*, p. 17.

74 NSW Council for Civil Liberties and Muslim Legal Network (NSW), *Submission 7,* pp. 14–15.

IS Act and that the communication of information concerning an Australian person can only be done in accordance with Privacy Rules made by the Minister under section 15. The Department considered that existing provisions under section 13 make it unnecessary to place further limitations on the circumstances in which intelligence can be shared.[75]

Acts Interpretation Act 1901

3.60 It became apparent during the inquiry that the number of Ministers that may issue an emergency authorisation is larger than originally envisaged. Evidence provided by the IGIS suggested that, consistent with the *Acts Interpretation Act 1901,* the term 'responsible minister' could include any of the Ministers within the portfolio in which an IS Act agency is located; that is, the senior portfolio minister and any junior ministers or parliamentary secretaries. The IGIS indicated her understanding that this arrangement would apply to sections 9A, 9B and 9C.[76] This was corroborated during the hearing by departmental representatives.[77]

3.61 However while acknowledging this interpretation, the Attorney-General's Department also stated that:

> There are, in AGD and agencies' views, a number of characteristics of both the text and wider context of the relevant emergency authorisation provisions that could be taken to—and were intended to—evince a contrary intention. (That is, an intention to limit the responsible Minister to the single, senior portfolio Minister who in practice is responsible for the relevant agency—being the Foreign Affairs Minister in the case of ASIS, and the Defence Minister in the case of AGO and ASD.)[78]

3.62 The Australian Secret Intelligence Service also commented that, consistent with existing practice, 'the intention is that emergency authorisations would be sought from the senior Ministers.'[79]

75 Attorney-General's Department, *Supplementary Submission 5.1,* p. 29.

76 Inspector-General of Intelligence and Security, *Submission 12,* p. 7.

77 Ms Jamie Lowe, Attorney-General's Department, *Committee Hansard,* Canberra, 13 November 2014, pp. 37–38.

78 Attorney-General's Department, *Supplementary Submission 5.1,* p. 12.

79 Australian Secret Intelligence Service, *Submission 17,* p. [7].

Committee comment

3.63 The Committee notes that the proposed amendments to the IS Act were not identified in time to be included with the amendments in the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.[80] The amendments have also been proposed in response to recent operational issues. The relevant IS Act agencies briefed the Committee on these matters.

3.64 The Committee also notes that the IGIS has indicated that the *Inspector-General of Intelligence and Security Act 1986* provides her with sufficient authority to oversight the intelligence agencies under the proposed amendments to the IS Act.[81]

3.65 The Committee supports the proposed amendments to the IS Act to explicitly provide for ASIS support to ADF military operations and to enable ASIS to support these operations with greater agility. The Committee recognises that the situation in Iraq, where it is known that there are a large number of Australians either fighting for or providing support to terrorist organisations, has significant implications for the ADF.

3.66 The Committee acknowledges the concerns raised by some submitters that the proposed amendments will facilitate so-called 'targeted killings'. The Committee does not accept this evidence, noting that the proposed amendments do not change the role of ASIS in any way that would enable ASIS to kill, use violence against people, or participate in so-called 'targeted killings'. The Committee also notes that the ADF must abide by its Rules of Engagement at all times during its overseas engagements.

3.67 The Committee also received evidence that suggested an ambiguity exists in the IS Act that may permit torture.[82] While the Committee does not accept this evidence, the Committee considers the Explanatory Memorandum should be amended to make it explicit that the *Intelligence Services Act 2001* does not in any way permit torture.

Class of Australian persons

3.68 During the hearing, the Committee sought additional clarification as to how the term 'class of Australian persons' would be defined. The Committee acknowledges the information provided by the Attorney-

80 CTLA Bill, *Explanatory Memorandum*, p. 2.

81 Inspector-General of Intelligence and Security, *Submission 12,* p. 3.

82 Law Council of Australia, *Submission 16,* p. 17.

General's Department and ASIO to clarify this matter, including the Department's comment that:

> AGD and agencies are of the view that it would not be appropriate to either define the term 'class' for the purpose of class authorisations issued under section 9, or to otherwise impose further statutory limitations on the classes of persons in relation to whom Ministerial authorisations can be issued.
>
> The intention of the proposed class authorisation amendments (in relation to ASIS assistance to the ADF) is not to expand or alter, in any way, the existing Ministerial authorisation criteria for activities undertaken in relation to individual Australian persons. Rather, the intention is simply to replicate them in relation to classes of Australian persons, so that identical requirements apply to the issuing of class authorisations as to individual authorisations. Attempting to impose further requirements for class authorisations under section 9(1) or 9(1A) carries a significant risk of either expanding or limiting the authorisation grounds, which could undermine or frustrate the policy intent.[83]

3.69 The Committee recognises that the power to issue ministerial authorisations in relation to a class of Australian persons will provide operational benefits to ASIS and enable it to provide more effective assistance to the ADF in support of military operations. Similarly, there are operational benefits to the Attorney-General being empowered to provide agreement in relation to a class of Australian persons.

3.70 The limitations upon classes of Australian persons to whom the minister may issue authorisations—outlined in detail earlier—and particularly the requirement that a class be linked to the 'activity test' in subparagraph 9(1A)(a) of the IS Act, should ensure that a class cannot be defined on the basis of racial or religious features, or geographical location.

3.71 The Committee considers, however, that to provide more guidance to the public, the Explanatory Memorandum should be amended to include further information about how a class of Australian persons may be defined, and importantly, how it will not be defined.

3.72 The Explanatory Memorandum should also make it clear that any Australian person included in a specified class of Australian persons agreed to by the Attorney-General must pose a threat to security as defined by the *Australian Security Intelligence Organisation Act 1979*.

83 Attorney-General's Department, *Supplementary Submission 5.1,* p. 8.

Recommendation 7

The Committee recommends that the Explanatory Memorandum to the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 be amended to provide further information about how a class of Australian persons will be defined.

The Committee further recommends that the Explanatory Memorandum be amended to make it clearer that any Australian person included in a specified class of Australian persons agreed to by the Attorney-General, must be involved in an activity or activities that pose a threat to security as defined by the *Australian Security Intelligence Organisation Act 1979*.

Oral authorisations

3.73 The Committee accepts the rationale for providing Ministers the ability to issue oral authorisations. The Committee considers, however, that the power for Ministers to issue an oral authorisation represents a substantial change to the ministerial authorisations regime, and that all oral authorisations should be subject to close oversight by the Inspector-General of Intelligence and Security.

Recommendation 8

The Committee recommends that, subject to passage of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014, the Inspector-General of Intelligence and Security provide close oversight of:

- **all ministerial authorisations given orally under proposed subsection 9A(2) of the *Intelligence Services Act 2001*, and**
- **all oral agreements provided by the Attorney-General under the proposed amendments to paragraph 9(1A)(b) of the *Intelligence Services Act 2001*.**

Emergency authorisations by agency head

3.74 The Committee accepts that authorisation by agency heads under proposed section 9B is likely to occur only in exceptional circumstances, and notes the IGIS's statement that there are only a small number of cases where the existing provisions for Ministers to give an emergency

declaration have been relied upon.[84] Further, in relation to the Attorney-General's agreement, the Committee accepts that situations could arise where an authorisation could not proceed because the Attorney-General's agreement was unable to be obtained.

3.75 The Committee is of the view, however, that the principle of Ministerial responsibility and accountability is an important principle that should not be discarded. That said, the Committee received evidence in private briefings of situations, albeit rare, where agencies may be unable to contact Ministers. In such circumstances, the Committee considers it is preferable that the responsibility for issuing an authorisation be delegated to an agency head with the relevant operational knowledge and expertise, than to a junior minister or parliamentary secretary who may not have day-to-day responsibility for, or background in, national security or intelligence-related matters.

3.76 Notwithstanding this, the Committee remains firmly of the view that there is a responsibility on the government to ensure that appropriate practical arrangements are in place to facilitate Ministerial availability wherever possible.

3.77 While noting that agency heads have an obligation to inform the Minister as soon as practicable, and not later than 48 hours, of the issuing of an authorisation by an agency head, and acknowledging that this is subject to IGIS oversight, the Committee is concerned about the possible circumstances in which a Minister may be unaware for as long as 48 hours that an authorisation has been issued. The Committee considers that this is an unacceptable timeframe. The Committee accepts that it may not be immediately practicable to provide the Minister with the documentation required by paragraph 9B(5). However, given that this is a significant extension of an agency head's powers, the Committee believes that it is imperative that the relevant Minister be notified of the authorisation in a shorter timeframe. Consistent with arrangements proposed in the Bill, complete documentation required for the notification process should then be provided as soon as practicable and within 48 hours.

84 Inspector-General of Intelligence and Security, *Submission 12,* p. 6.

Recommendation 9

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 be amended to require an agency head to notify the relevant responsible Minister of an authorisation given by the agency head under proposed section 9B of the *Intelligence Services Act 2001* within eight hours.

Copies of the authorisation and other documents should then be provided to the Minister and the Inspector-General of Intelligence and Security as outlined in proposed subsections 9B(5) and 9B(6) of the *Intelligence Services Act 2001*.

3.78 Further, the Committee considers that all authorisations that are issued by an agency head should be subject to close oversight by the IGIS and that this Committee should be informed by the IGIS in each circumstance. In this regard, the Committee is reassured by the IGIS's statement that she would review the authorisations in those cases.[85] The Committee notes the IGIS's comment that:

> It is my experience that, when circumstances occur very rarely or are very uncommon or are an emergency or are exceptional circumstances, agencies pay particular attention to do everything correctly. I would expect these would be extraordinarily rare. I would pay very close attention, but, notwithstanding that, they would in any event make sure that they satisfied all the tests correctly. As long as it were extremely rare, I would not have concerns. If it became commonplace, obviously that would be a problem.[86]

3.79 The Committee will report on this matter in its annual review of administration and expenditure of the Australian intelligence agencies.

85 Dr Vivienne Thom, Inspector-General of Intelligence and Security, *Committee Hansard,* Canberra, 13 November 2014, p. 6; See also Inspector-General of Intelligence and Security, *Submission 12,* p. 6.

86 Dr Thom, *Committee Hansard,* 13 November 2014, p. 7.

Recommendation 10

The Committee recommends that, subject to passage of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014, the Inspector-General of Intelligence and Security be required to oversight within 30 days all emergency authorisations given by agency heads under proposed section 9B of the *Intelligence Services Act 2001.*

Recommendation 11

The Committee recommends that the Inspector-General of Intelligence and Security be required to notify the Parliamentary Joint Committee on Intelligence and Security within 30 days of all emergency authorisations issued under proposed section 9B and inform the Committee whether the *Intelligence Services Act 2001* was fully complied with in the issuing of the authorisation.

Agreement of Attorney-General or Director-General of Security

3.80 Section 9C of the Bill provides that in circumstances where the Attorney-General is not readily available or contactable, then an agency head must obtain the agreement of the Director-General of Security *'unless the agency head is satisfied that the Director-General of Security is not readily available or contactable'*. It is the Committee's strong view that the presumption should be against proceeding with an authorisation without the agreement of either the Attorney-General or the Director-General of Security in any but the most extreme circumstances—for example, when immediate action is necessary for the protection of lives.

3.81 Given the extraordinary nature of this power, the Committee considers that the Attorney-General should be informed within eight hours of any emergency authorisation that is issued without either his or her agreement or that of the Director-General of Security. The Committee also considers that the Attorney-General should be informed in any circumstance where the Director-General of Security has provided agreement.

Recommendation 12

The Committee recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 be amended to require an agency head to notify the Attorney-General within eight hours of an emergency authorisation given:

- **with the agreement of the Director-General of Security, or**
- **without the agreement of either the Attorney-General or the Director-General of Security.**

Written advice should then be provided to the Attorney-General as soon as practicable and within 48 hours as outlined in proposed subsection 9C(5) of the *Intelligence Services Act 2001*.

3.82 The Committee considers that the IGIS should be required to examine and inform the Committee of every instance in which the agreement of the Director-General of Security was provided.

3.83 Further, the IGIS should be required to examine and inform the Committee of any instance in which the agreement of the Attorney-General or Director-General of Security was required but not obtainable, and authorisation was given by either a Minister or agency head. The Committee understands the circumstances in which this power may be exercised will be extremely rare. If the Committee were to observe this power being used more than in only the most extreme circumstances, then its strong view would be that the power should be removed.

3.84 The Committee will also report on this matter in its review of administration and expenditure of the Australian intelligence agencies.

Recommendation 13

The Committee recommends that, subject to passage of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014, the Inspector-General of Intelligence and Security be required to oversight within 30 days, all instances in which agreement to an emergency authorisation from the Attorney-General was required and not obtainable, and instead:

- **authorisation was given with the agreement of the Director-General of Security, or**
- **authorisation was given without the agreement of either the Attorney-General or the Director-General of Security.**

Recommendation 14

The Committee recommends that the Inspector-General of Intelligence and Security be required to notify the Parliamentary Joint Committee on Intelligence and Security within 30 days of all instances in which agreement to an emergency authorisation from the Attorney-General was required and not obtainable, and instead:

- **authorisation was given with the agreement of the Director-General of Security, or**
- **authorisation was given without the agreement of either the Attorney-General or the Director-General of Security**

and inform the Committee whether the *Intelligence Services Act 2001* was fully complied with in the issuing of the authorisation.

Unintended consequences

3.85 The Committee notes the unintended consequences that have been identified in consideration of provisions of the IS Act when read with the *Acts Interpretation Act 1901*. The Committee agrees that the IS Act should be amended as necessary to provide clarity on this point. While the Committee sees benefit in having a larger pool of Ministers who can provide authorisations, as it would 'give strongest effect to a policy preference that authorisation decisions should, almost invariably, if not

exclusively, be made by Ministers',[87] the Committee also take the view that such authorisations should be issued at the most senior level.

3.86 As stated above, the Committee does not consider it appropriate that junior ministers and parliamentary secretaries without day-to-day responsibility for, or background in, national security or intelligence-related matters be called upon to make an emergency authorisation decision. The Committee also notes the potential operational implications that may arise in a time critical circumstance while an agency head attempts to contact a large number of ministers.

Recommendation 15

The Committee recommends that the *Intelligence Services Act 2001* be amended to clarify that 'responsible minister' refers only to the Prime Minister, Defence Minister, Foreign Minister, and Attorney-General, or those acting in those positions.

87 Attorney-General's Department, *Supplementary Submission 5.1,* p. 13.

Concluding comment

3.87 The recommendations the Committee has made in its report are intended to further strengthen the provisions of the Bill, including its safeguards, transparency and oversight mechanisms. The Committee commends its recommendations to the Parliament and recommends the Bill be passed.

Recommendation 16

The Committee commends its recommendations to the Parliament and recommends that the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 be passed.

Dan Tehan MP
Chair

November 2014