



Inquiry into the Counter-Terrorism Legislation Amendment (No.1) Bill 2014

Submission to the Parliamentary Joint Committee on Intelligence and Security

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Introduction

Schedule 2 to the Counter-Terrorism Legislation Amendment Bill (No.1) 2014 (the Bill) proposes changes to the way authorisations are given under the *Intelligence Services Act 2001* (the IS Act).

Role of the Inspector-General of Intelligence and Security

The Inspector-General of Intelligence and Security (IGIS) is an independent statutory officer who reviews the activities of the Australian intelligence agencies:

- Australian Security Intelligence Organisation (ASIO)
- Australian Secret Intelligence Service (ASIS)
- Australian Signals Directorate (ASD)
- Australian Geospatial-Intelligence Organisation (AGO)
- Defence Intelligence Organisation (DIO)
- Office of National Assessments (ONA).

The IGIS is able to inquire into a matter relating to an intelligence or security matter relating to *any* Commonwealth agency at the request of the Prime Minister. Since it was introduced in 2010 this extended jurisdiction has been used three times. Two of those inquiries involved the AFP.

The IGIS is currently supported by 12 staff. The Office of the IGIS is an agency for the purposes of the *Public Service Act 1999* and a non-corporate Commonwealth entity for the purpose of the *Public Governance, Performance and Accountability Act 2013*. The office has recently received an increase in funding and is in the process of recruiting up to 5 more staff. The annual budget of the office is now \$3 million.

The Office of the IGIS is situated within the Prime Minister's portfolio. The IGIS is not subject to direction from the Prime Minister, or other ministers, on how responsibilities under the *Inspector-General of Intelligence and Security Act 1986* (the IGIS Act) should be carried out.

The IGIS Act provides the legal basis for the IGIS to conduct inspections of the intelligence agencies and to conduct inquiries of the Inspector-General's own motion or at the request of a Minister.

The overarching purpose of IGIS's activities is to ensure that each intelligence agency acts legally and with propriety, complies with ministerial guidelines and directives, and is consistent with human rights. A significant proportion of the resources of the office has in the past been directed towards ongoing inspection and monitoring activities, so as to identify issues, including about the governance and control frameworks within agencies, before there is a need for major remedial action. OIGIS staff have access to all documents of the intelligence agencies and the IGIS is often proactively briefed about sensitive operations.

The inspection role of the IGIS is complemented by an inquiry function. In undertaking inquiries the IGIS has strong investigative powers, including the power to require any person to answer questions and produce relevant documents. Providing false or misleading evidence is an offence under the *Criminal Code Act 1995*. IGIS inquiries are conducted in private because they almost invariably involve highly classified or sensitive information, and the methods by which it is collected. Conducting an inquiry is resource intensive but provides a rigorous way of examining a particular complaint or systemic matter within an agency.

The *Inspector-General of Intelligence and Security Act 1986* provides sufficient authority for the IGIS to oversight the actions of intelligence agencies under the proposed amendments to the IS Act.

Class authorisations

There are currently three categories of circumstances when ASIS, ASD and AGO require prior approval from their Minister before undertaking an activity:

- Undertaking an activity, or a series of activities, for the specific purpose, or purposes that include the specific purpose, of *producing intelligence on an Australian person* (this is the same for ASIS, ASD and AGO).¹
- Undertaking, in accordance with a direction under s6(1)(e), an activity, or a series of activities that will, or is likely to, have a *direct effect on an Australian person* (this applies only to ASIS as only ASIS has functions under s6(1)(e)).²
- Undertaking other activities or a class of activities specified by the Minister (the relevant Ministers have specified different activities or classes of activities for ASIS, ASD and AGO).³

Currently all authorisations to *produce intelligence on an Australian person* or to have a *direct effect on an Australian person* are given on an individual basis. That is, each Australian person who is the subject of such an authorisation is considered individually by the relevant Minister.⁴ As the maximum duration of these authorisations is six months the Minister must turn his or her mind to the circumstances of each individual and the relevant statutory criteria at least once every six months.⁵ The proposed amendments will change the requirement for individual authorisation by allowing class authorisations, but only for ASIS and only in circumstances where ASIS is providing assistance to the Australian Defence Force in support of military operations.

The proposed changes will enable the Foreign Minister to authorise ASIS to undertake activity to produce intelligence on one or more members of a *class* of Australian persons or to undertake activity that is likely to have a direct effect on one or more members of a *class* of Australian person. The scope of a class authorisation is limited by a number of factors: the authorisation must be in response to a request from the Defence Minister for assistance to the Defence Force in support of military operations; the Minister must be satisfied that the class of persons is involved in one or more of the activities listed in s9(1A) of the IS Act; and, the Minister must be satisfied of the matters in s9(1) of the IS Act. Additionally, if the class of persons is, or is likely to be, involved in activity that is, or is likely to be, a threat to security the Attorney-General must agree to the giving of the authorisation.

From an oversight perspective the role of the IGIS is to look at whether the actions of ASIS conform with the Minister's decision. That is, whether the particular Australian was, at the relevant time, within the class of persons authorised by the Minister. If the Minister imposes any conditions on an authorisation, IGIS inspections will also look at whether those conditions were complied with.

The proposed class authorisations for ASIS will have a maximum duration of six months.⁶ This is consistent with the current regime and will provide the Foreign Minister with a regular opportunity

¹ See s8(1)(a)(i) of the IS Act

² See s8(1)(a)(ii). Directions under s6(1)(e) are classified.

³ See s8(1)(b) of the IS Act. These directions are classified.

⁴ Where the Australian person is, or is likely to be, involved in an activity or activities that are, or are likely to be, a threat to security the Attorney-General must also agree to the granting of the Authorisation – s9(1A)(b).

⁵ See s10(1A)

⁶ See item 22 of Schedule 2

to consider the effect and appropriateness of any class authorisations. As noted below requests from the Defence Minister do not have a six month time limit and any class or 'standing agreement' from the Attorney-General will not necessarily have a time limit.

No time limit on duration of request from Defence Minister for class authorisation

Under the proposed changes to the IS Act the Foreign Minister may authorise ASIS to produce intelligence on a class of Australian persons or to undertake activity that will, or is likely to, have a direct effect on a class of Australian person in response to a specific request for such an authorisation from the Defence Minister. The grounds for these authorisations are taken to cease if the Defence Minister withdraws the request or if the ADF is no longer engaged in any military operations to which the request for authorisation related.⁷ It follows that the length of a request could, if the military operations are protracted, extend for many years. It is my expectation that, even in the absence of any legal requirement to do so, the Defence Minister should be periodically briefed on operations conducted in reliance on such a request. This would provide the Defence Minister with a regular opportunity to consider the ongoing appropriateness of the request.

No time limit on agreement of Attorney-General for individual or class authorisations

Currently the *agreement* of the Attorney-General is required for each ministerial authorisation on an individual Australian. In practice the agreement of the Attorney is usually given days or weeks before the ministerial authorisation is signed and the Attorney-General currently considers each proposed authorisation for an Australian person individually.

The proposed change in item 14 of Schedule 2 to the Bill will enable the Attorney-General to specify classes 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. The Attorney-General can give his or her agreement in relation to any Australian person in a specified class. My understanding of the practical effect of this provision is that it would be possible for the Attorney to specify and agree to classes and that this agreement is not limited by time (though the Attorney-General could specify an upper time limit). In such cases there would be no requirement to seek the Attorney-General's agreement before the relevant Minister gives an authorisation in relation to any person or class of persons within the scope of the 'standing agreement'.

It is my view is that, even in the absence of any legal requirement to do so, the Attorney-General should be periodically briefed on operations conducted in reliance on such a 'standing agreement'. This would provide the Attorney with a regular opportunity to consider the ongoing appropriateness of the agreement.

Records relating to Australian persons

In my experience ASIS records relating to ministerial authorisations to produce intelligence on, or to have a direct effect on, an individual Australian person are generally of a good quality and I have had not experienced any difficulty with accessing these documents. I do not anticipate any difficulty in

⁷ See item 26 of Schedule 2

accessing copies of any future class authorisations and associated ministerial requests or agreements and I note the Bill would require ASIS to keep copies for inspection by my staff.⁸

Because authorisations are currently done on an individual basis it is relatively straightforward from both an oversight and an operational perspective to identify which Australian persons ASIS is authorise to conduct activities in relation to. From an oversight perspective this assists in the targeting of inspection activity and in assessing the application of the Privacy Rules.⁹

ASIS will need to develop systems to enable its staff to clearly identify which individual Australian persons it has conducted activities in relation to in reliance on any class authorisations. This will be necessary for proper reporting to Ministers about activities conducted in reliance on the authorisations and also to enable proper application of the Privacy Rules.

Authorisations in an emergency – Ministers unavailable

Currently the IS Act allows a range of Ministers to given an authorisation in an emergency situation. There are a small number of cases where this provision has been relied on.

The proposed changes maintain the ability of non-portfolio ministers to given an authorisation in an emergency and will also create a mechanism to address circumstances where the Attorney-General is not available to agree to a security related authorisation.¹⁰ I note that the proposal to allow the Attorney-General to give ‘standing agreement’ to authorisations in respect of any Australian person in specified classes will likely limit the cases in which such an individual agreement is required.¹¹

The proposed s9B will enable agency heads to give a short term authorisation to conduct activity that would have otherwise required ministerial authorisation. This will cover activity for the purpose of producing intelligence on an Australian person, activity that will or is likely to have a direct effect on an Australian person and undertaking other activities that the Minister has specified require authorisation.

I expect that the circumstances which would require an agency head to consider exercising the power in proposed s9B will be extremely rare. This is particularly so when the list of Ministers that must be not readily contactable is read with the *Acts Interpretation Act 1901* so that each minister appointed to administer each of the portfolios mentioned must be unavailable (see below). Decisions made by agency heads are subject to IGIS oversight and I expect that any authorisation given under s9B will scrutinised by my office.

I have no concerns about the proposed requirement to provide relevant documents to my office within three days of an emergency authorisation being given.¹²

⁸ See item 17 of Schedule 2 to the Bill

⁹ The Privacy Rules are made under s15 of the IS Act and apply to the retention and communication of intelligence information about Australian persons.

¹⁰ See proposed s9C in item 18 of Schedule 2 to the Bill

¹¹ See proposed s9(1AA) in item 14 of Schedule 2 to the Bill

¹² See proposed s9B(6) in item 18 of Schedule 2 to the Bill

Application of the Acts Interpretation Act

In accordance with the *Acts Interpretation Act 1901* a reference to a Minister includes acting Ministers.¹³ My understanding is that this means that, for example, if the Attorney-General is acting Defence Minister then he or she can give an authorisation to ASD or AGO as the Defence Minister and not in reliance on the 'emergency authorisation' provisions. I am aware of authorisations that have been given on this basis and I have no reason to doubt their validity.

The Acts Interpretation Act also provides that where more than one Minister is appointed to administer a provision then any of those Ministers can exercise the power of 'the Minister' (regardless of whether the provision uses the expressions 'the Minister' or refers to a particular Minister).¹⁴ My understanding is that this provision will apply to the proposed ss9A, 9B and 9C. This means that references to Ministers should be read as being to any of the Ministers (including Parliamentary Secretaries)¹⁵ appointed to the relevant portfolio. This would mean that a large number of Ministers would need to be 'not readily available or contactable' before an agency head could give an emergency authorisation.

¹³ See s19 of the Acts Interpretation Act (copy attached to this submission)

¹⁴ See s19A of the Acts Interpretation Act (copy attached to this submission).

¹⁵ See the *Ministers of State Act 1952*

Attachment to IGIS submission – extracts from the *Acts Interpretation Act 1901*

19 Mention of Minister

Where in an Act any Minister is referred to, such reference shall be deemed to include any Minister or member of the Executive Council for the time being acting for or on behalf of such Minister.

19A References to Ministers and Departments

- (1) If a provision of an Act:
 - (aa) refers to a Minister by using the expression “the Minister” without specifying which Minister is referred to; or
 - (ab) refers to a particular Minister (including where there is no longer any such Minister);then the reference is a reference to:
 - (a) if, for the time being, different Ministers administer the provision in respect of different matters:
 - (i) if 2 or more Ministers administer the provision in respect of the relevant matter—any one of those Ministers; or
 - (ii) if only one Minister administers the provision in respect of the relevant matter—that Minister;
 - (b) if paragraph (a) does not apply and, for the time being, 2 or more Ministers administer the provision—any one of those Ministers; or
 - (c) if paragraphs (a) and (b) do not apply—the Minister for the time being administering the provision.
- (2) Where an Act refers to a Minister, specifying the Minister merely by reference to the fact that the Minister administers a specified Act or enactment, subsection (1) applies as if references in paragraphs (1)(a), (b) and (c) to the provision were references to the specified Act or enactment.

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