



Australian Government
Attorney-General's Department

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Parliamentary Joint Committee on Intelligence and Security

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

Attorney-General's Department Submission

Introduction

1. The Attorney-General's Department welcomes the opportunity to provide the Parliamentary Joint Committee on Intelligence and Security with this submission as part of the Committee's examination of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014.
2. The Bill was introduced into the Senate on 29 October 2014 by the Attorney-General, Senator the Hon George Brandis QC, and referred to the Committee on that date for reporting by 20 November 2014.

Background

Schedule 1 – Criminal Code Act 1995

3. The deteriorating security situation in Iraq and Syria poses an increasing terrorist threat to the security of all Australians both here in Australia and overseas. Around 60 Australians are participating in the conflicts in Syria and Iraq. In total, as many as 160 Australians are assessed to be involved in or supporting the Syria and Iraq conflicts both onshore and offshore, from engaging in fighting to providing support such as funding or facilitating travel to the conflict areas. Not all Australians of security concern are directly involved in doing terrorist acts or participating in foreign fighting. Some Australians have taken on the roles of supporting and facilitating Australians either to engage in terrorism offences in Australia or to travel to conflict zones and return to Australia with capabilities acquired from fighting or training with proscribed terrorist groups. These 'enablers' pose a significant risk to Australia and Australians. Advice from law enforcement is that, from an operational perspective, the threat posed by enablers is as great as the risk posed by individuals engaging in terrorist acts or foreign incursions.

4. Australia has a range of national security and counter-terrorism legislation in place, including criminal offences for engaging in terrorist acts in Australia and hostile activities overseas, as well as offences for directly supporting and facilitating those acts. However, that framework was largely established in 2002 and enhanced in 2005. During that time, operational activities in Australia by law enforcement have been primarily focused on preventing single acts or the activities of identified and structured organisations or associations. The investigation of those directly and indirectly supporting terrorism and foreign conflicts has tested the limits of the existing legislative framework.

5. The dynamic and fluid nature of the challenges Australia faces means that arrangements remain under review to ensure they are relevant and proportionate. This Bill exemplifies this

process as it proposes amendments developed in recent weeks informed by operational activity in Sydney, Melbourne and Brisbane.

6. The Australian Federal Police advise they have identified serious risks that, if expanded, the control order regime would greatly assist in mitigating. However, the control order regime—both in its current form and incorporating the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* amendments that recently received Royal Assent—is not sufficient to manage those who support or facilitate either terrorist acts or participation in foreign hostilities.

7. The amendments in Schedule 1 of the Bill respond to law enforcement advice that, in order to combat the threat posed by enablers, there is a need to expand the control order regime to allow appropriate controls to be placed on enablers. Law enforcement advice is that placing appropriate controls over enablers to prevent and disrupt the provision of support and the facilitation of terrorism and foreign fighting is as important, and will be as effective, as preventing and disrupting acts or terrorism or foreign hostilities.

8. Schedule 1 of the Bill also provides authority for the Parliamentary Joint Committee of Intelligence and Security to review each instrument made under section 102.1AA of the *Criminal Code Act 1995* (Criminal Code) listing an alias of a terrorist organisation or removing a former name of a terrorist organisation. This implements the only outstanding recommendation of the Committee's *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (recommendation 8).

Schedule 2 – Intelligence Services Act 2001

9. The proposed amendments in Schedule 2 to the Bill are directed to the *Intelligence Services Act 2001* (IS Act). The need for these measures has arisen urgently, in the context of the Government's decision to authorise the Australian Defence Force (ADF) to undertake operations against the Islamic State terrorist organisation in Iraq.

10. In particular, the proposed amendments will better facilitate the Australian Secret Intelligence Service (ASIS) providing timely assistance to the ADF in support of military operations, and its cooperation with the ADF on intelligence matters. In addition, the proposed amendments will address practical limitations identified in the arrangements for emergency Ministerial authorisations, which apply to three IS Act agencies—ASIS, the Australian Geospatial-Intelligence Organisation (AGO), and the Australian Signals Directorate (ASD). The second part of this submission provides further details of the proposed amendments, including matters of operational need and key safeguards and oversight mechanisms.

The Counter-Terrorism Legislation Amendment Bill (No. 1) 2014

11. The measures in this Bill have been developed in direct response to operational need identified by relevant agencies, and will address pressing gaps in Australia's counter-terrorism legislative framework. In addition, the Bill forms part of the Government's comprehensive reform agenda to strengthen Australia's national security and counter terrorism legislation.

12. This Bill will enhance the ability of law enforcement agencies to respond to the significant domestic security implications associated with individuals who support and facilitate terrorism and foreign fighting. It will improve the ability of law enforcement agencies to prevent and disrupt Australians from enabling others to acquire the capability and, in some cases, the intention, to engage in terrorism or foreign fighting.

13. The Bill will further make urgent amendments to the IS Act, to ensure that Australia's intelligence agencies are supported by a statutory framework that enables them to act effectively in time-critical circumstances, including the context of the Government's decision to authorise the ADF to undertake operations against the Islamic State terrorist organisation in Iraq, and in the context of Australian participation in foreign conflicts, or engagement with terrorist organisations more broadly.

Schedule 1

14. The amendments in Schedule 1 will amend the Criminal Code to enhance the ability of the Australian Federal Police (AFP) to disrupt those facilitating or supporting terrorist acts or foreign fighting, and improve the operation of the control order application process to ensure both parties have appropriate time to prepare for confirmation hearings.

15. Key measures in Schedule 1 of the Bill include:

- **enhancing safeguards for the listing of terrorist organisation aliases by**
 - **authorising the Committee to review the proposed listing of a terrorist organisation's alias or the removal of a terrorist organisation's former name during the disallowable period (Items 1 to 5)**

These amendments implement Recommendation 8 of the Committee's *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*. This recommendation was not implemented by government amendments to the

Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 introduced on 28 October 2014 as it required consultation with states and territories in accordance with the *Intergovernmental Agreement on Counter-Terrorism Laws 2004*.

- **expanding the grounds for requesting, making, confirming and varying a control order to include where the order would substantially assist in preventing**
 - **the provision of support for a terrorist act**
 - **the provision of support for the engagement in a hostile activity in a foreign country**
 - **the facilitation of a terrorist act, or**
 - **the facilitation of the engagement in a hostile activity in a foreign country (Items 7, 10, 11 and 25)**

Individuals who enable terrorist acts and foreign fighting represent a real threat to the safety and security of Australia and all Australians. Individuals who provide funding, organise travel and even facilitate access to vulnerable individuals who can be recruited and exploited, enable terrorism and foreign fighting to continue. It is vital that the AFP be able to disrupt individual enablers as well as groups or syndicates involved in enabling activities to prevent the recruitment of impressionable individuals.

- **expanding the objects of the control order regime to reflect the additional grounds of preventing**
 - **the provision of support for a terrorist act**
 - **the provision of support for the engagement in, a hostile activity in a foreign country**
 - **the facilitation of a terrorist act, and**
 - **the facilitation of the engagement in a hostile activity in a foreign country (Item 6)**

These amendments reflect the fact that, without support and facilitation, it will be difficult for intended perpetrators to undertake terrorist acts or engage in foreign fighting. It is appropriate that the objects of Division 104 cover all the grounds on which a control order can be requested, made, confirmed and varied.

- **improving and streamlining the process for making or varying a control order by**

- **reducing the amount of paperwork the AFP must provide to the Attorney-General when seeking consent to request an interim control order (Items 8, 9, 16, 18 and 22)**

The existing requirement for the AFP to provide all information that will be provided to the issuing court when requesting the interim control order is unnecessarily onerous and does not recognise the different roles of the Attorney-General and the issuing court.

The Attorney-General's role, a preliminary stage in the process, is to decide whether to consent to the AFP requesting an issuing court make an interim control order. That decision has some analogies to seeking the Attorney-General's consent to prosecute a person for a serious criminal offence. When considering whether to consent to a prosecution, the Attorney-General does not require the full brief of evidence, and the relevant legislation does not specify the materials, documents or information that must be provided. Similarly, it is not necessary for the Attorney-General to scrutinise all the information and documentation in support of a proposed request for the making of an interim control order, including the facts in support of each proposed obligation, prohibition and restriction.

In contrast, the issuing court's role is far more onerous because a decision to make an interim control order will directly impact on the person the subject of the control order by limiting one or more of that person's individual freedoms. For that reason, it is vital that the issuing court receive all information available, including any facts relating to why the control order should not be imposed.

The Bill retains a requirement for the AFP to provide certain documents to the Attorney-General when seeking consent, both as a safeguard and to ensure consistency across requests.

- **replacing the existing requirement for the AFP member to provide an explanation as to why 'each' obligation, prohibition and restriction should be imposed when requesting, confirming or varying a control order with a requirement to provide an explanation as to why 'the control order' should be made or varied (Items 12, 26, 27 and 28), and**
- **replacing the existing requirement for the issuing court to be satisfied on the balance of probabilities that 'each' obligation, prohibition and restriction 'is reasonably necessary, and reasonably appropriate and adapted' to achieving one of the objects of Division 104 with a requirement to be satisfied on the**

balance of probabilities that 'the control order' to be made, confirmed or varied 'is reasonably necessary, and reasonably appropriate and adapted' to achieving one of those objects (Item 12, 26, 27 and 28)

These amendments reflect the fact that, in practice, the justification for one requested obligation, prohibition or restriction is likely to be substantially similar—if not identical—to the justification for one or more of the other requested obligations, prohibitions and restrictions. These amendments would authorise the AFP to provide a consolidated document justifying and explaining several or all the requested controls where those controls share a common explanation. They would also authorise an issuing court to make a control order on the basis of a consolidated explanation for the requested controls.

For example, the AFP may propose controls on person A that he (i) not associate with person B, (ii) not associate with person C, and (iii) not attend a certain location frequented by persons B and C. The explanation of these requested controls is that persons A, B and C are believed to be involved in a recruiting syndicate. Given the connection between the explanation for the requested restrictions and the requested prohibition, it would be more practical and judicious to require the AFP to provide one set of facts in support of all three requested controls, and for the issuing court to consider them together. It also reflects the fact that the effectiveness of controls are, in many cases, interdependent on the suite of controls imposed.

- **enhancing safeguards when making, varying or confirming a control order by**
 - **providing that an issuing court must take into account that the parties may need to prepare when setting a day for the confirmation hearing (Item 14)**

This amendment affords an additional protection to a person the subject of an interim control order who may need to obtain the assistance, for example, of an interpreter to fully understand the terms of the order or a legal representative to fully understand the implications of the order. It would also allow sufficient time for both parties to contact other individuals to adduce evidence or make submissions, including where those persons might be located overseas.

- **requiring the issuing court to take into account the impact on the person order when making, confirming or varying a control order (Item 29)**

These amendments provide that, when considering whether to make, confirm or vary a control order, the court must take into account the impact of the order on the person's

circumstances, including the person's financial and personal circumstances. These amendments would authorise an issuing court, for example, to specifically consider the impact of a proposed control order that would impose a curfew and thereby impact on the person's ability to continue in their paid employment.

- **authorising an issuing court to make, confirm or vary a control order by removing one or more of the requested obligations, prohibitions or restrictions (Items 13, 23 and 24)**

These amendments would authorise an issuing court to remove one or more of those controls if doing so would mean the court was then satisfied that the amended order was reasonably necessary, and reasonably appropriate and adapted to achieving one of the objects specified in section 104.1 (as amended).

This provision is an important safeguard in light of the removal of the requirements for a senior AFP member to provide an explanation as to why 'each' obligation, prohibition or restriction should or should not be imposed and the removal of the requirement for an issuing court to be satisfied in relation to 'each' obligation, prohibition or restriction when both making the order and considering its impact on the person.

- **extending the time before the material provided to an issuing court must subsequently be provided to the Attorney-General**

- **from 4 hours to 12 hours where a request for an urgent interim control order has been made to an issuing court (Items 15, 17, 19, 20 and 21)**

These amendments provide that, where an interim control order has been requested without the Attorney-General's consent due to urgency, the AFP must seek the Attorney-General's consent within 12 hours of making the request. These amendments also provide that, if the Attorney-General refuses to consent or has not given consent within 12 hours of the AFP making the request to the issuing court, any urgent interim control that was made by the issuing court immediately ceases to be in force.

Extending the existing timeframe of 4 hours reflects the fact that it may not always be practical or even possible to seek the Attorney-General's consent within 4 hours of making a request for an urgent interim control order. For example, the Attorney-General may be in transit between the east and west coasts of Australia and unable to be contacted for a period of more than 4 hours.

Schedule 2 – Intelligence Services Act 2001

Outline

16. This part of the submission addresses four main issues with respect to the proposed amendments to the IS Act in Schedule 2 to the Bill. These issues focus on the Attorney-General's portfolio responsibilities under the IS Act, which is administered jointly by the Prime Minister, Foreign Affairs Minister, Defence Minister and the Attorney-General.¹ These matters are:

- (1) a background to the legislative framework under Part 2 of the IS Act, and an outline of the proposed amendments, including the core legal policy objectives to which they are directed;
- (2) further details of the policy justification for the proposed amendments;
- (3) an explanation of the particular role of the Attorney-General under the IS Act, and the way in which this role is recognised in the proposed amendments; and
- (4) the statutory safeguards and oversight mechanisms applying to the proposed amendments.

1. Background to the IS Act and proposed amendments in Schedule 2 to the Bill

1.1 Division of portfolio responsibilities

17. Primary responsibility for the majority of the proposed measures in Schedule 2 rests with the Foreign Affairs and Defence portfolios, which are responsible for ASIS, and AGO and ASD respectively. This relevantly includes the issuing of Ministerial authorisations to those agencies, where required under the IS Act, to undertake activities for the purpose of performing their statutory functions.

18. The Attorney-General is responsible for the administration of the IS Act to the extent that Act relates to the Australian Security Intelligence Organisation (ASIO). This relevantly includes a requirement that a Minister responsible for ASIS, AGO or ASD must, in certain cases required under the IS Act, obtain the agreement of the Attorney-General to the issuing of a Ministerial authorisation. (Namely, where the Australian person in relation to whom an authorisation is sought is, or is likely to be, engaged in, activities that are, or which are likely to be, a threat to security.)

¹ *Commonwealth Administrative Arrangements Order*, 12 December 2013, pp. 6 (Attorney-General), 11 (Defence Minister), 22 (Foreign Affairs Minister) and 35 (Prime Minister).

19. Accordingly, AGD notes that the Committee may derive greatest assistance from a joint appearance from all relevant agencies at any hearings it may wish to conduct in the course of its inquiry.

1.2 Ministerial authorisation framework under the IS Act

20. The functions of ASIS, AGO and ASD are prescribed by Part 2 of the IS Act. (Sections 6, 6B and 7 set out the respective functions of each agency.) These agencies may undertake activities for the purpose of performing these functions, subject to other requirements in Part 2, and in particular those in sections 8 and 9 concerning Ministerial authorisations to undertake certain activities (as detailed under the subheadings below).

Section 8 – Ministerial directions requiring agency heads to seek Ministerial authorisations

21. Pursuant to the requirements of section 8 of the IS Act, the responsible Minister for each of those agencies (being the Foreign Affairs Minister in the case of ASIS, and the Defence Minister in the case of AGO and ASD) has issued a written direction to the relevant agency head.

22. In accordance with the requirements of paragraph 8(1)(a), the directions require the relevant agency head to obtain an authorisation from the responsible Minister under section 9 of the IS Act, before doing the following activities, as applicable to the relevant agency:

- undertaking an activity, or a series of activities, for the specific purpose, or for purposes which include the specific purpose, of producing intelligence on an Australian person; or
- in the case of ASIS, undertaking, in accordance with a Ministerial direction issued under paragraph 6(1)(e),² an activity or series of activities that will, or is likely to, have a direct effect on an Australian person.

23. In addition, paragraph 8(1)(b) provides that the directions must also specify the circumstances in which the relevant agency must, before undertaking other activities or classes of activities, obtain an authorisation under section 9 from the responsible Minister. Subsection 8(3) imposes a duty on each agency head to ensure that their agency complies with any directions issued by the responsible Minister under section 8.

Section 9 – requirements for the issuing of Ministerial authorisations

Issuing criteria

2 Paragraph 6(1)(e) pertains to the functions of ASIS, and provides that the Minister responsible for that agency (being the Foreign Affairs Minister) may issue directions to that agency to undertake such other activities as directed, relating to the capabilities, intentions or activities of people outside Australia.

24. Section 9 sets out the requirements for the issuing of Ministerial authorisations, where such authorisations are required by reason of subsection 8(1) as mentioned above.

25. The responsible Minister must be satisfied that the preconditions in subsections 9(1) and (1A) are met. In broad terms, these preconditions require the Minister to be satisfied that any activities are necessary for the proper performance of the agency's functions, that there are satisfactory arrangements to ensure that the activities will not exceed that purpose, and to ensure that the nature and consequences of the activities are reasonable having regard to that purpose.

26. The Minister must further be satisfied that the Australian person in relation to whom an authorisation is sought is involved in, or is likely to be involved in, one or more designated activities in subparagraphs 9(1A)(a)(i)-(vii). These include forms of serious crime³ or the contravention of UN sanction enforcement laws, acting for a foreign power, the proliferation of weapons of mass destruction, and activities which present a significant risk to safety or a threat to security.

Attorney-General's agreement to the issuing of certain Ministerial authorisations

27. In addition, paragraph 9(1A)(b) provides that if 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 Minister must also obtain the agreement of the Attorney-General, as the Minister responsible for ASIO, to the issuing of that authorisation.

28. The term 'security' is defined in subsection 9(1B) by reference to the meaning of that term in section 4 of the ASIO Act. Section 4 of the ASIO Act defines 'security' as:

- (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
 - (i) espionage;
 - (ii) sabotage;
 - (iii) politically motivated violence;⁴
 - (iv) promotion of communal violence;⁵

3 The term 'serious crime' is defined in section 3 of the IS Act as being conduct that would, if engaged in within, or in connection with, Australia, constitute an offence against the law of the Commonwealth, a State, or a Territory punishable by a period of imprisonment exceeding 12 months.

4 The term 'politically motivated violence' is separately defined in section 4 of the ASIO Act.

5 The term 'promotion of communal violence' is separately defined in section 4 of the ASIO Act.

(v) attacks on Australia's defence system;⁶ or

(vi) acts of foreign interference;⁷

whether directed from, or committed within, Australia or not; and

(aa) the protection of Australia's territorial and border integrity from serious threats; and

(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

Manner and form requirements

29. Subsection 9(2) provides that Ministerial authorisations may be provided in relation to:

- an activity or class of activities as specified in the authorisation; or
- acts of a staff member or agent, or a class thereof, specified (whether by name or otherwise) in the authorisation; or
- acts done for a particular purpose connected with the agency's functions.

30. Authorisations are subject to any conditions that the Minister may specify in accordance with subsection 9(3); must be in writing, and must specify their period of effect as required by subsection 9(4). The latter provision provides for a maximum period of effect of six months for authorisations for activities that are to be undertaken for the purpose of producing intelligence on an Australian person, or which will have a direct effect on an Australian person.

31. Subsection 9(5) further provides that the responsible agency head must ensure that a copy of each Ministerial authorisation is kept by the agency and is available for inspection on request by the Inspector-General of Intelligence and Security (IGIS).

Section 9A – emergency Ministerial authorisations

32. Subsection 9A makes provision for the issuing of Ministerial authorisations in circumstances of emergency. Emergency authorisations are only able to be sought and issued if there exists an emergency situation in which the relevant agency head considers it necessary or desirable to undertake an activity or series of activities that would, as a result of a direction issued under subsection 8(1) (as mentioned above), require a Ministerial authorisation under section 9.

6 The term 'attacks on Australia's defence system' is separately defined in section 4 of the ASIO Act.

7 The term 'acts of foreign interference' is separately defined in section 4 of the ASIO Act.

33. In broad terms, section 9A establishes contingency arrangements in these circumstances, if the responsible Minister for the relevant agency is not readily available or contactable. In this event, any of the Prime Minister, the Defence Minister, the Foreign Affairs Minister, or the Attorney-General can issue an authorisation. Emergency authorisations are subject to the issuing criteria in section 9, including the requirement in paragraph 9(1A)(b) to obtain the Attorney-General's consent in relevant cases concerning Australian persons and threats to security.

1.3 Outline of key measures in the Bill

34. The measures in Schedule 2 to the Bill are directed to two key reform objectives, which are:

- (1) **Agency functions**—to better facilitate the provision by ASIS of timely assistance to the ADF in support of military operations, and its cooperation with the ADF on intelligence matters; and
- (2) **Emergency authorisations**—to remedy practical limitations in the arrangements for the issuing of emergency Ministerial authorisations in relation to the activities of ASIS, ASD and AGO.

35. Further details of these measures and their policy justification are detailed below.

2. Policy justification for the proposed amendments to the IS Act

36. The basis for, and details of, these proposed measures are set out in detail at pages 28-39 of the Explanatory Memorandum to the Bill. Key matters, with respect to operational necessity and the procedural rather than substantive nature of the proposed amendments, are summarised below.

2.1 Operational necessity

37. As noted at page 2 of the Explanatory Memorandum and in the Attorney-General's second reading speech of 29 October 2014,⁸ the need for the proposed amendments has arisen urgently, in the context of the Government's decision to authorise the ADF to undertake operations against the Islamic State terrorist organisation in Iraq.

38. While primary responsibility for these provisions of the IS Act rests with the Foreign Affairs and Defence portfolios, AGD is satisfied that the proposed reforms are necessary to address significant legislative limitations identified in the context of present operations, as articulated at pages 1-3 of the Explanatory Memorandum to the Bill.

8 *Senate Hansard*, 29 October 2014 p. 62.

39. In particular, AGD notes that the absence of an explicit statutory function conferred upon ASIS for supporting and cooperating with the ADF is anomalous to the legislative arrangements for AGO and ASD, which have express statutory functions concerning the provision of assistance to the ADF in support of military operations, and cooperation with the ADF on intelligence matters.⁹ Currently, ASIS relies on its more general functions under subsection 6(1) and the recognition in subsection 6(7) that in performing its functions ASIS is not prevented from providing assistance to the Defence Force in support of military operations.

40. Further, the Ministerial authorisation arrangements were established to operate most effectively in the usual circumstances where ASIO is the lead agency in relation to issues of security, and not the circumstances of direct support to the ADF on military operations overseas. Accordingly, sections 8 and 9 of the ISA provide that separate Ministerial authorisations must be sought to undertake activities against each Australian person. This includes a requirement to obtain the separate agreement of the Attorney-General to each authorisation for any Australian person who is, or is likely to be, involved in activities which are, or are likely to be, a threat to security.

41. AGD further notes that no legislative contingency is made for the issuing of emergency Ministerial authorisations in the event that none of the relevant Ministers are readily available or contactable to issue an emergency authorisation, with the result that there are no lawful means for an IS Act agency to undertake activities to collect potentially vital intelligence in these circumstances.

42. AGD is of the view that, if unaddressed, these limitations are likely to significantly impede the capability of agencies within the Australian Intelligence Community to provide or act upon vital intelligence on Australians who are fighting with, or otherwise supporting the hostile

9 See paragraph 6B(g) (AGO) and paragraph 7(d) (ASD). 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 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).

activities of, terrorist organisations involved in foreign conflicts. Such intelligence is needed to protect the lives and safety of civilians and ADF and other defence force personnel serving in Iraq from terrorist or other violent activity. It is also needed to help protect Australia and Australians domestically, should Australian participants return from the conflict—potentially further radicalised from their exposure—and seek to continue domestically their involvement in terrorist activities.

43. AGD is further satisfied that the particular operational circumstances which have given rise to the proposed amendments in the Bill are symptomatic of broader legislative limitations that could arise again in future operations, potentially without notice in similarly time critical circumstances.

44. The proposed amendments to the IS Act are, therefore, an important component of the Government's commitment to ensuring that Australia's intelligence agencies are supported by a sufficiently flexible legislative framework that enables them to respond effectively to current, emerging and future security threats, subject to appropriate statutory safeguards.

2.2 Streamlining procedural arrangements for the performance of IS Act agencies' functions

45. Importantly, the proposed amendments do not substantively extend the functions or powers of any IS Act agency. Rather, they streamline the procedural arrangements by which IS Act agencies may perform their functions or exercise powers, as detailed under the subheadings below.

46. In addition, the proposed amendments are subject to extensive safeguards and oversight mechanisms, which are detailed further at section (4) of this submission, as well the Explanatory Memorandum to the Bill, particularly in the Human Rights Statement of Compatibility at pages 11-15.

ASIS's functions (concerning ADF assistance and cooperation) and related measures

47. The proposed amendments will make explicit that ASIS's functions include supporting and cooperating with the ADF. As is reflected in subsection 6(7),¹⁰ ASIS is already able to undertake such activities under its existing functions, under paragraphs 6(1)(a), 6(1)(b) and 6(1)(e).¹¹ To this end, the proposed amendments in respect of ASIS's functions will correct the anomalous

10 Subsection 6(7) provides that, in performing its functions, ASIS is not prohibited from providing assistance to Commonwealth authorities, including to the defence force in support of military operations, and to State authorities.

11 Paragraphs 6(1)(a) and (b) provide for the collection and communication of foreign intelligence. Paragraph 6(1)(e) provides for a function of ASIS as "to undertake such other activities as the responsible Minister directs relating to the capabilities, intentions or activities of people or organisations outside Australia".

legislative treatment of ASIS's statutory functions in comparison with those of AGO and ASD (as noted above, in paragraphs 6B(g) and 7(d) of the IS Act).

Class Ministerial authorisations—activities for the purpose of ASIS support to the ADF

48. Further, the proposed amendments will streamline the arrangements for the issuing of authorisations in respect of Australian persons, where the relevant activities are undertaken for the purpose of ASIS providing support to, or cooperating with, the ADF. Currently, the combined effect of subsection 8(1) and paragraph 9(1A)(a) is that Ministerial authorisations must be issued in respect of an individual Australian person. There is no ability to issue an authorisation in respect of classes of Australian persons, such as Australians who are, or who are suspected of, fighting with or otherwise providing support to the Islamic State terrorist organisation in Iraq. 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 particular Australian person fighting with that organisation was not known in advance of the commencement of operations.

49. The ability to issue class authorisations would be strictly limited to activities undertaken by ASIS for the purpose of its proposed new function to support or cooperate with the ADF following a request in writing by the Defence Minister.¹² Class authorisations for the purpose of ASIS providing support to, or cooperating with the ADF, could not be issued on an emergency basis, consistent with the intention that such class authorisations would generally be provided as part of broader planning or preparations for military activities, rather than in emergency circumstances.

Attorney-General's agreement in relation to classes of persons

50. As a further, related measure, the proposed amendments would enable the Attorney-General to provide agreement to the issuing of a Ministerial authorisation, where required, in respect of a class of Australian persons.

51. As mentioned above, under paragraph 9(1A)(b), the Attorney-General is required to agree to the issuing of a Ministerial authorisation where the relevant activity relates to an Australian person who is, or who is likely to be, involved in activities that are, or are likely to be, a threat to 'security' as that term is defined in section 4 of the ASIO Act. The basis for the Attorney-General's role is discussed at section (3) of this submission.

12 Proposed paragraph 9(1)(d) (amending item 8 of Schedule 2 to the Bill). In addition, the authorisation will cease to have effect after six months: proposed subsection 9(4) (amending item 16 of Schedule 2) or if the grounds cease to exist because the ADF is no longer engaged in any military activity to which the authorisation relates, or if the Defence Minister withdraws the request for authorisation: proposed subsection 10(2B) (amending item 26 of Schedule 2).

52. In short, this involvement ensures that there is appropriate identification and consideration of matters relevant to security in the making of Ministerial authorisation decisions under section 9 of the IS Act, by reason of the Attorney-General's visibility of the security environment due to his or her portfolio responsibility for ASIO.

53. Presently, the Attorney-General may only provide his or her agreement to the issuing of an authorisation in respect of the activities of an individual Australian person.¹³ As with the issuing of Ministerial authorisations, this means that the Attorney-General would be required to provide multiple, simultaneous agreements on identical grounds. For example, as individual Australians are identified as known or suspected to be fighting with the Islamic State terrorist organisation in Iraq, agreement from the Attorney-General needs to be obtained on an individual basis to one or more authorisations for each individual even though the basis in each case is the same. This places a significant limit on the ability of the ISA agencies and in particular ASIS to be nimble in responding to ADF operational requirements in Iraq, including in time critical circumstances.

54. The proposed amendments will enable the Attorney-General to provide his or her agreement in relation to classes of Australian persons, provided that the Attorney-General is satisfied that the class of persons is, or is likely to be, engaged in activities that are, or that are likely to be, a threat to security. Investing the Attorney-General with discretion to provide class agreements, where considered appropriate, will ensure that the requirements with respect to the Attorney-General's agreement are sufficiently agile to operate in time critical circumstances, including in circumstances in which there is no timely means of identifying individual Australians in advance of an operation. This could include, for example, the provision of a class agreement in respect of Australian persons who are, or who are suspected of, participating in hostile activities as part of, or with, the Islamic State terrorist organisation in Iraq.

55. Class agreements must be in writing, and the Attorney-General must give consideration to specifying a period of effect (maximum duration) of his or her agreement in the circumstances of individual cases.¹⁴ The Attorney-General is not required to issue class agreements in all cases, but may choose to do so in appropriate instances.¹⁵

56. As identified at pages 29 of the Explanatory Memorandum to the Bill, the ability of the Attorney-General to provide class agreements will have a broader application than solely where ASIS is providing assistance to the ADF in support of military operations. This is in recognition

13 This is so by reason of paragraph 9(1A)(b), which applies to “the Australian person” whose activities are the subject of the application for a Ministerial authorisation (emphasis added).

14 Proposed paragraph 9(1AB)(b) (amending item 14).

15 Proposed subsection 9(1AA) (amending item 14).

that there are other situations in which there may be a legitimate reason for agreement to be provided in respect of a class of Australian persons engaged in activities that are, or are likely to, constitute a threat to security—for example, a class agreement could be provided in respect of Australian persons who are involved in a particular syndicate engaged in people smuggling activities that are a serious threat to Australia's territorial and border integrity. In these instances, it may be consistent with the particular role of the Attorney-General in being satisfied of the threat to security to provide his or her agreement in respect of a specified class of Australian persons.

57. Importantly, the ability of the Attorney-General to provide his or her agreement in respect of classes of persons will, in no way, displace the general requirement that Ministerial authorisations must be issued in respect of individual Australian persons. (The only instance in which a class Ministerial authorisation may be issued is the proposed limited ability of the Minister responsible for ASIS to issue a class authorisation in respect of ASIS's activities in support of the ADF.)

58. Further, applications for the Attorney-General's class agreement, and applications for and execution of Ministerial authorisations in reliance on a class agreement by the Attorney-General are subject to the independent oversight of the IGIS. The IGIS can conduct scrutiny of the nature and size of the particular class of persons who are the subject of an agreement, together with the basis upon which it is said that the activities of the class of persons represents a threat or likely threat to security.

Emergency authorisations

59. Similarly, the proposed emergency authorisation arrangements streamline the means through which IS Act agencies must obtain authorisation to undertake activities in extreme emergencies, as is currently provided for in section 9A. The proposed arrangements will not, in any circumstances, dispense with the longstanding requirement for agencies to obtain authorisation in advance of undertaking an activity. Rather, the proposed amendments will make provision—by way of new or more streamlined procedural arrangements—for three contingencies, which are:

- ***Where a Minister is available and contactable, but it is not practicable for an emergency authorisation to be issued in writing.*** In these cases, emergency authorisations could be issued orally, subject to appropriate record keeping and reporting requirements;
- ***Where all of the Ministers who can issue an emergency authorisation are unavailable at the time at which such an authorisation is sought in respect of a time critical activity.*** (These Ministers are the Prime Minister, Foreign Affairs Minister, Defence Minister and the

Attorney-General). In these very limited circumstances, an agency head would be permitted to issue an emergency authorisation, subject to strict safeguards; and

- ***Where the Attorney-General's agreement is required to the issuing of one of the above kinds of emergency authorisation, and the Attorney-General is not readily available or contactable.*** In these circumstances, it would be necessary to seek the consent of the Director-General of Security, unless he or she is not readily available or contactable.

Emergency Ministerial authorisations by oral means

60. The proposed amendments will provide for appropriate operational flexibility in circumstances in which a Minister is available to issue an emergency authorisation. The proposed amendments will enable Ministers to issue such authorisations orally, with a written record to be made of that authorisation.

61. Presently, section 9A does not make provision for emergency authorisations to be issued via oral means, with the result that written emergency Ministerial authorisations are mandatory. If a Minister purported to issue an emergency authorisation orally, such an authorisation would be invalid on the basis of form alone, with the result that activities done in reliance on that oral authorisation would not attract the protection from legal liability conferred by section 14 of the IS Act. This rigid form requirement in respect of an emergency authorisation stands in marked contrast to common practice in relation to several other emergency intelligence and law enforcement authorisation provisions, which allow for issuing by oral means in emergency cases.

62. These provisions include search warrants,¹⁶ telecommunication interception warrants,¹⁷ surveillance warrants,¹⁸ and Ministerial authorisations for ASIO to undertake special intelligence operations.¹⁹ The Parliament has also recently passed amendments to Division 105 of the

16 Section 3R of the *Crimes Act 1914* provides that, in urgent cases, search warrants for the investigation of offences by the Australian Federal Police (AFP) may be applied for, and issuing decisions notified, via telephone or other electronic means. This is provided that both the AFP applicant and the issuing authority are satisfied that the case is urgent, and that the delay occasioned by proceeding via the ordinary, non-emergency means (a written and sworn or affirmed application) would frustrate the effective execution of a warrant.

17 Division 4 of Part 2-5 of the *Telecommunications (Interception and Access) Act 1979* makes provision for the issuing of telecommunications interception warrants, if the issuing authority is satisfied that it is necessary to proceed in this way as a result of urgent circumstances. A signed warrant document must be provided as soon as practicable after this time.

18 Part 3 of the *Surveillance Devices Act 2004* makes provision for emergency authorisations for the use of a surveillance device by law enforcement officers, where there is an urgent or imminent, serious risk of harm to a person, or damage to property. Applications may be heard, and authorisations may be issued, orally with a written record to be made as soon as practicable after the authorisation is issued.

19 Sections 35B and 35C of the ASIO Act provide that an authority for ASIO to conduct a special intelligence operation may be sought from, and issued by, the Attorney-General via oral means, if the applicant is satisfied (and the

Criminal Code 1995 enabling urgent preventative detention orders to be sought and issued via oral means with a written record to be made thereafter.²⁰

63. It is appropriate, in AGD's view, that the legislative framework for the issuing of emergency Ministerial authorisations under the IS Act should accommodate the possibility that it may not always be possible or practicable to obtain written authorisation from one of the relevant Ministers. AGD notes advice from IS Act agencies that this may arise if, for example, the relevant Minister is only contactable by telephone or videoconference by reason of his or her remote location. This possibility might also arise if the relevant Minister is satisfied that the circumstances of a particular case are of such urgency that the time required for a written authorisation to be drafted and signed may mean that the opportunity to conduct the relevant activity is lost or compromised.

64. As is contemplated by emergency provisions with respect to law enforcement warrants and ASIO's special intelligence operations, such circumstances may arise despite the availability of instantaneous (or close to instantaneous) means of electronic communication through which an authorisation could be issued, such as email or SMS. While such means of communication might usefully limit the circumstances in which oral authorisations may be required, they do not remove the possibility that compliance with a rigid rule in favour of written applications may be impossible or impracticable in some cases.

65. Having regard to existing practice in relation to the verbal issuing of emergency authorisations, and the requirement for appropriate written record keeping, AGD submits that the proposed amendments balance the need for rigorous documentation of authorisation decisions with the need for operational flexibility to avoid the potentially serious, adverse consequences that may arise if an IS Act agency misses an opportunity to collect vital intelligence as a result of a delay occasioned by a form requirement.

Emergency authorisations where no relevant Ministers are available

66. It is expected that it would be a very rare occurrence that none of the relevant Ministers (the Prime Minister, Defence Minister, Foreign Affairs Minister and Attorney-General) are readily available or contactable. However, as noted above, there could be potentially serious, adverse consequences should this possibility arise, in that agencies may miss opportunities to collect

Attorney-General is satisfied that there are reasonable grounds on which to believe) that the delay caused by the making of a written application or the giving of a written authority may be prejudicial to security.

20 *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (which received the Royal Assent on 3 November 2014), per Schedule 1. This legislation also makes provision for the application and issuing of delayed notification search warrants under the *Crimes Act 1914* via oral (telephone) means in urgent cases, analogous to the arrangements applying to search warrants under section 3R, as noted above.

potentially vital intelligence, or such intelligence collection opportunities may be severely compromised.

67. Accordingly, the proposed amendments in Schedule 2 to the Bill will ensure that contingency arrangements are available in in these very limited circumstances, should they ever eventuate. In such instances, proposed subsection 9B would enable the head of the relevant IS Act agency to issue an emergency authorisation, provided that strict legislative criteria are satisfied. (These include satisfaction that the circumstances are of an emergency character, that the issuing criteria for a Ministerial authorisation in subsections 9(1) and 9(1A) are satisfied, and that the responsible Minister would, in the opinion of the agency head, have issued the emergency authorisation.)

68. Such authorisations would be strictly limited to a maximum duration of 48 hours, without any ability to renew them. In addition, the responsible Minister must be advised of the issuing of an emergency authorisation by the agency head as soon as practicable within that 48 hour period, and that Minister is under a positive obligation to consider whether to terminate the emergency authorisation, or to replace it with an ordinary Ministerial authorisation under section 9, or an emergency Ministerial authorisation under section 9A.

69. The IGIS must also be notified of the authorisation as soon as practicable within three days of issuing. The IGIS can also conduct oversight of emergency issuing decisions by agency heads, as well as the undertaking of activities in reliance upon an emergency authorisation.

70. The ability for an emergency authorisation to be issued by an agency head, in very limited circumstances, is broadly consistent with the provisions in section 29 of the ASIO Act, under which the Director-General of Security may issue emergency warrants under Division 2 of Part III of the ASIO Act, if the Attorney-General is unavailable.

Emergency agreement to the issuing of authorisations where the Attorney-General is not readily available or contactable

71. Presently, the emergency authorisation requirements in section 9A do not accommodate the possibility that the Attorney-General may not be readily available or contactable to provide his or her agreement to the issuing of an emergency Ministerial authorisation, where such agreement is required. (That is, the agreement of the Attorney-General is required under paragraph 9(1AB)(b) if the proposed Ministerial authorisation relates to an Australian person who is, or who is likely to be involved in, activities that are, or are likely to be, a threat to security.) In such cases, unless the Attorney-General had recently provided agreement that covers the Minister's authorisation of relevant activities relating to the particular Australian person, there would be no lawful means by which the authorisation could be issued in the absence of the

Attorney-General's agreement. This may mean that opportunities to collect vital intelligence are lost or compromised.

72. Accordingly, the proposed amendments in Schedule 2 to the Bill make provision for contingency arrangements, which would apply in the event that the Attorney-General is not readily available or contactable to provide his or her agreement to the issuing of an emergency authorisation. In these limited circumstances, the agreement of the Director-General of Security must be sought, unless the Director-General is not readily available or contactable. The Attorney-General must be notified as soon as practicable within 48 hours of any such agreement being provided, and the IGIS must be notified as soon as practicable within three days of the agreement being provided.²¹

73. The requirement that the agreement of the Director-General of Security must be sought, if the Attorney-General is not readily available or contactable, will ensure that the decision-maker in relation to an emergency authorisation application is provided with all relevant information in relation to Australian persons and security, including information of which the decision maker may not otherwise have been aware. This requirement will further ensure that all authorisation decisions take account of, and place appropriate weight upon, such information.

74. The proposed arrangements balance the imperative for such input in the decision-making process with the legitimate need for operational flexibility, by making provision for the circumstances in which the Attorney-General (and the Director-General of Security) may be unavailable.

3. Special role of the Attorney-General under the IS Act

75. The Ministerial authorisation scheme presently in the IS Act, and as proposed to be amended by Schedule 2 to the Bill, recognises the special role of the Attorney-General in providing his or her agreement to the issuing of Ministerial authorisations in the circumstances set out in paragraph 9(1A)(b) and noted above. (Namely, where the Australian person to whom the proposed Ministerial authorisation relates is, or is likely to be, involved in activities that are, or that are likely to be, a threat to security as that term is defined in section 4 of the ASIO Act.)

76. The involvement of the Attorney-General, as the Minister responsible for ASIO, ensures that information relevant to security is considered in determining whether there is a threat to security—and an assessment of the impacts of the proposed activity on security intelligence operations is undertaken—by a Minister with extensive visibility of the security environment and

21 Proposed subsections 9B and 9B (amending item 18 of Schedule 2).

a detailed awareness and understanding of any relevant security intelligence operations. The special role of the Attorney-General in security matters, by reason of his or her portfolio responsibility for ASIO, has been acknowledged in various independent inquiries and reviews,²² and has been observed in practice by successive Australian Governments and Parliaments.

77. Accordingly, in AGD's view, it is appropriate that this specialised role is performed by the Director-General of Security (in favour of delegating responsibility to another Minister) in emergency circumstances in which the Attorney-General is not readily available or contactable. This role is consistent with the Director-General's statutory responsibility for the control of ASIO, and its proper and impartial performance of its functions.²³ It ensures that the necessary situational awareness and technical expertise is made available to Ministers responsible for the issuing of emergency authorisations under the IS Act, and that consideration is given to these matters where possible.

4. Safeguards and oversight mechanisms applying to the proposed reforms

78. The measures in Schedule 2 to the Bill are subject to rigorous and extensive safeguards and oversight mechanisms, which will ensure that they are proportionate to the legitimate objectives to which they are directed. (In the case of the proposed amendments to the statutory functions of ASIS and related measures, the legitimate objective is to ensure that ASIS is able to provide critical support to, and cooperation with the ADF in a timely way—including in circumstances that may enable ASIS to assist in saving the lives of Australian soldiers, other persons deployed to conflict zones or civilians present in such areas. In the case of the proposed amendments to emergency authorisation provisions, the legitimate objective is to ensure that IS Act agencies can act quickly, as supported by an agile emergency authorisation process, to collect vital intelligence in circumstances of extreme emergency, where to follow the ordinary process governing Ministerial authorisations would preclude agencies from obtaining such intelligence, or would otherwise compromise their ability to do so.)

22 See, for example, the Hope Royal Commission on Australia's Security and Intelligence Agencies, *Report on ASIO* (December 1984), pp. 309, 313-314, 320-321, 325, 328.

23 See sections 8 and 20 of the ASIO Act. Under section 8, control of the Organisation is invested in the Director-General of Security. Under section 20, the Director-General is under a positive obligation to take all reasonable steps to ensure that the work of the Organisation is limited to what is necessary for the purpose of the discharge of its functions. The Director-General is further required to keep the Organisation free from any influences or considerations not relevant to its functions, and that nothing is done that might lend colour to any suggestion that it is concerned to further or protect the interests of any particular section of the community, or with any matters other than the discharge of its functions.

79. Key safeguards and oversight mechanisms are outlined below, and are further summarised in the Explanatory Memorandum (especially in the Human Rights Statement of Compatibility at pages 11-15).

4.1 Safeguards in relation to ASIS's functions and related measures

Prohibition on violence against the person and paramilitary activities, and limitations on the permissible use of weapons for self-defence related purposes

80. Contrary to some inaccurate media reports and public commentary about the provisions, the proposed amendments will not authorise ASIS to engage in violence against persons (including the exercise of lethal force).

81. The proposed amendments do not limit or amend in any way the existing prohibition in subsection 6(4) of the IS Act, which precludes ASIS from planning for or undertaking activities that involve paramilitary activities, violence against the person, or the use of weapons by staff members or agents. The only situations in which ASIS staff or agents are authorised to use weapons or self-defence techniques are for the purpose of self-defence, or in the course of training in the use of weapons or self-defence techniques for that purpose, or in a controlled environment, provided that such use is in accordance with the requirements set out in Schedule 2 to the IS Act (which include a requirement to adhere to guidelines issued by the Director-General in relation to the use of weapons or self-defence techniques in a controlled environment).

82. ASIS's use of weapons and self-defence techniques is subject to the independent oversight of the IGIS. In addition, any possession or use of weapons, or use of self-defence techniques, outside the limits of a person's authority in accordance with the requirements of Schedule 2 may not be covered by the legal protections against criminal prosecution or civil proceedings in section 14 of the IS Act (on the basis it would not be for the proper performance of ASIS's functions).

Limitations imposed by the statutory authorisation criteria

83. In addition, activities undertaken by ASIS in relation to a specified class of Australian persons, following a request from the Minister for Defence, are subject to the extensive safeguards applied to the Ministerial authorisation process, and activities undertaken in accordance with Ministerial authorisations. These include the statutory criteria in subsections 9(1) and 9(1A), which require the authorising Minister to be satisfied of a number of preconditions before an authorisation may lawfully be issued.

84. These preconditions include that the Minister must be satisfied that any activities which may be done in reliance on the authorisation will be necessary for the proper performance of a function by an agency;²⁴ that there are satisfactory arrangements in place to ensure that nothing will be done in reliance on the authorisation beyond what is necessary for the proper performance of a function of the agency;²⁵ and that there are satisfactory arrangements in place to ensure that the nature and consequences of acts done in reliance on the authorisation will be reasonable, having regard to the purpose for which they are carried out.²⁶

General statutory limitations on IS Act agencies' activities and functions

85. The activities which may be authorised under section 9 (including activities for the purpose of ASIS's performance of the proposed new statutory functions) are further subject to the general limitations on agencies' functions under section 11, and limitations on agencies' activities under section 12 of the ISA.

86. Limitations under sections 11 and 12 of the IS Act include:

- an express restriction on the performance of agencies' functions for the sole purpose of Australia's national security interests, foreign relations or national economic well-being and only to the extent that these matters are affected by the capabilities, intentions or activities of people or organisations outside Australia;²⁷
- an express exclusion on agencies carrying out police or other law enforcement functions (although agencies may cooperate or provide support to law enforcement agencies where authorised, primarily under sections 13 or 13A);²⁸
- limitations on the communication of incidentally obtained intelligence;²⁹
- the prohibition on agencies undertaking any activity for the purpose of furthering the interests of an Australian political party or another Australian political organisation;³⁰ and
- a prohibition on agencies undertaking any activity unless it is necessary for the proper performance of its functions, or authorised or required by or under another Act.³¹

24 Paragraph 9(1)(a).

25 Paragraph 9(1)(b).

26 Paragraph 9(1)(c).

27 Subsection 11(1).

28 Subsection 11(2).

29 Subsection 11(2AA).

30 Subsection 11(2A).

87. If there is any doubt as to whether an activity was undertaken in the proper performance of an IS Act agency's functions, and legal proceedings arise involving the application or asserted application of the protection from legal liability in section 14 of the IS Act, subsections 14(2B) and (2C) provide that the IGIS may issue a certificate in relation to the question of whether a particular act was done in the proper performance of an agency's functions. Such a certificate is prima facie evidence of the facts certified therein.

Privacy rules

88. Further, any intelligence produced can only be retained and communicated in accordance with the rules to protect the privacy of Australians, made in accordance with section 15 of the IS Act. IS Act agencies cannot communicate intelligence except in accordance with these rules.³² The IGIS is required to brief the PJCIS on the content and effect of the rules if requested, or if the rules change.³³

IGIS oversight

89. Further, the proposed amendments to ASIS's functions, and related measures, are also subject to the general oversight of the IGIS, as well as a number of specific reporting and notification requirements, summarised at subsection 4.3 of this submission below.

4.2 Safeguards in relation to emergency authorisations

90. The proposed amendments to the emergency authorisation provisions are subject to a number of statutory safeguards of both general and specific application. These include limitations in the issuing criteria and criteria for the Attorney-General's agreement (or that of the Director-General of Security), the special responsibilities of IS Act agency heads, Ministerial oversight and control, and the independent oversight jurisdiction of the IGIS.

Issuing criteria and process

91. The statutory issuing criteria for emergency Ministerial authorisations require the relevant agency head to first attempt to contact the responsible Minister for his or her agency, and only if satisfied that the responsible Minister is not readily available or contactable can the agency head seek an authorisation from any of the Prime Minister, Defence Minister, Foreign Affairs Minister or the Attorney-General. In addition, the relevant Minister must, in making an issuing decision

31 Section 12.

32 Subsection 15(5).

33 Subsection 15(6).

under section 9A, apply the issuing criteria in subsections 9(1) and 9(1A). The relevant Minister must further be satisfied that it is appropriate to proceed by way of an emergency authorisation.

92. An agency head may only issue an emergency authorisation if satisfied none of the relevant Ministers are readily available or contactable. This requires the agency head to make an attempt to contact the responsible Minister for his or her agency in the first instance, followed by the Prime Minister, Defence Minister, Foreign Affairs Minister and the Attorney-General. This ensures that issuing decisions are not devolved to an agency head unless necessary, in that a Ministerial authorisation could not be obtained in the circumstances. An assessment by an agency head of the availability and contactability of a Minister is intended to be a matter of judgment 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. Such judgment is subject to both Ministerial oversight and control, and the independent oversight of the IGIS (detailed below).

93. In making a decision on an emergency authorisation, where permitted to do so, an agency head must be satisfied not only that the facts of the case would justify the responsible Minister issuing an emergency authorisation under subsections 9(1) and (1A), but also that the responsible Minister would have given the authorisation.³⁴ Further, an agency head can only give an emergency authorisation if satisfied that, if the relevant activity or activities proposed to be undertaken were not so undertaken, there would be (or there would likely to be) serious prejudice to security (as defined in section 4 of the ASIO Act), or there will be (or there would likely to be) serious risk to a person's safety.³⁵ Consistent with the intent that the new functions conferred upon ASIS for the explicit purpose of supporting or cooperating with the ADF are intended to be exercised as part of preparations and planning for operations, such activities are expressly excluded from being the subject of an emergency authorisation.³⁶ In combination, these 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.

94. In addition, in making decisions about the application for, and in limited circumstances the issuing of, emergency authorisations, the heads of IS Act agencies are subject to the special responsibilities in section 12A. Section 12A requires agency heads to take all reasonable steps

34 Proposed paragraphs 9B(2)(a) and (b) (amending item 18 of Schedule 2).

35 Proposed paragraph 9B(2)(c) (amending item 18 of Schedule 2).

36 Proposed paragraph 9B(1)(b) and proposed paragraph 9A(1)(a) (amending item 18 of Schedule 2).

to ensure that their agencies are kept free from any influences or considerations not relevant to the undertaking of activities relevant to their agencies' functions or as authorised or required by or under another Act. Agency heads must also take all reasonable steps to ensure that nothing is done that might lend colour to any suggestion that his or her agency is concerned to further or protect the interests of any particular section of the community, or with undertaking any activities other than those for the proper performance of the agency's functions, or as authorised by or required under another Act.

Agreement of the Attorney-General (or the Director-General of Security) to the issuing of emergency authorisations

95. The amendments pertaining to the agreement of the Attorney-General (or the Director-General of Security) to emergency authorisations are subject to similar and extensive safeguards. Key safeguards include a requirement that the relevant agency head must first attempt to contact the Attorney-General, and only if satisfied that he or she is not readily available or contactable can the agency head approach the Director-General of Security to seek his or her agreement.³⁷

96. The requirement that such agreement must be sought and obtained can be dispensed with only if the relevant agency head is satisfied that the Director-General of Security is not readily available or contactable.³⁸ Like assessments about the availability or contactability of the relevant Minister issuing an emergency authorisation, an assessment of the availability or contactability of the Attorney-General and Director-General of Security is a matter for the relevant agency head, in the circumstances of the particular case before him or her, including an assessment of the degree of urgency involved. Such decisions are subject to Ministerial oversight and control, as well as the independent oversight of the IGIS (detailed below).

97. In this way, the proposed amendments balance the important need to ensure that relevant security considerations are identified and taken into account in all cases, while accommodating the legitimate need for operational flexibility and agility in time critical circumstances of emergency.

Ministerial oversight and control—emergency authorisations

98. Emergency Ministerial authorisations issued by an agency head are further subject to extensive Ministerial oversight and control. In addition to a requirement that the relevant agency head must notify the responsible Minister as soon as practicable within 48 hours of the issuing of

37 Proposed paragraph 9C(1)(c) and proposed subsection 9C(2) (amending item 18 of Schedule 2).

38 Proposed subsection 9C(3) (amending item 18 of Schedule 2).

an emergency authorisation, the responsible Minister is under a positive obligation to consider whether or not to exercise his or her power to terminate the authorisation, or to make a new authorisation under either section 9A (emergency authorisation) or section 9 (non-emergency authorisation).³⁹

99. In addition, the relevant agency must provide a report to the responsible Minister on the undertaking of activities in reliance on an emergency authorisation as soon as practicable, but no later than one month after the date on which the emergency authorisation ceased to have effect.⁴⁰

IGIS oversight—emergency authorisations

100. The proposed amendments to the emergency authorisation scheme are also subject to the general oversight of the IGIS, as well as a number of specific reporting and notification requirements, which are summarised below in subsection 4.3 of this submission.

4.3 Independent oversight—Inspector-General of Intelligence and Security

101. All of the proposed measures in Schedule 2 to the Bill (concerning ASIS's functions and emergency authorisations) will be subject to oversight of the IGIS under the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act).

General oversight jurisdiction under the IGIS Act

102. The IGIS may undertake, of his or her own initiative or on a Ministerial referral, an inquiry into the legality and propriety of an IS Act agency's activities under the IS Act, which would include the proposed new provisions if enacted.⁴¹

103. The IGIS may also conduct inspections, at his or her discretion, of agencies' records,⁴² including those in relation to the proposed new provisions if enacted. When conducting an inquiry, the IGIS has powers to require the provision of information and production of documents.⁴³

39 Proposed paragraph 9B(4)(b) and subsections 9B(7) and (8) (amending item 18 of Schedule 2)

40 Proposed subsection 10A(4) (amending item 31 of Schedule 2).

41 IGIS Act, subsection 8(2). See further section 9 (inquiries at the request of the Prime Minister).

42 IGIS Act section 9A (inspection function) and section 25A (reporting on inspections).

43 IGIS Act, Part II, Division 3 (inquiries).

Specific, additional reporting and notification requirements to the IGIS in the proposed amendments

104. A number of specific reporting and notification requirements will also apply to the proposed measures, some of which have been mentioned above. These are:

- a requirement that the relevant agency head must ensure that copies of the relevant agreement from the Attorney-General to the issuing of an authorisation, in respect of a class of Australian persons, is kept and is available for inspection by the IGIS on his or her request;⁴⁴
- a requirement that the relevant agency head must ensure that copies of the request from the Defence Minister and any subsequent authorisation in respect of a class of Australian persons is kept and is available for inspection by the IGIS on his or her request;⁴⁵
- a requirement that reports are provided to the IGIS on activities carried out in reliance on an authorisation, for the purpose of ASIS supporting or cooperating with the ADF, as soon as practicable within three months of the authorisation ceasing to have effect (or being renewed);⁴⁶
- requirements the IGIS is notified in relation to the issuing of an emergency Ministerial authorisation, including specific requirements applying to:
 - the notification of the IGIS as soon as practicable within three days of an emergency authorisation being issued by an agency head (in the event that none of the authorising Ministers are readily available or contactable);⁴⁷ and
 - the notification of the IGIS as soon as practicable within three days when the Director-General of Security provides agreement to the issuing of an emergency authorisation, if the Attorney-General is not readily available or contactable.⁴⁸

105. The department and relevant agencies have consulted with the IGIS and her Office in the development of the proposed amendments in Schedule 2 to the Bill, and have worked with the IGIS and her Office to address some technical matters of drafting in early drafts of provisions.

44 Proposed subsection 9(5), paragraph (b).

45 Proposed subsection 9(5), paragraph (c).

46 Proposed subsection 10A(3) (amending item 31 of Schedule 2).

47 Proposed subsections 9A(5) and 9B(6) (amending item 18 of Schedule 2).

48 Proposed subsection 9C(5) (amending item 18 of Schedule 2).

Conclusion

106. The department trusts that this information is of assistance to the Committee. The department is willing to provide any other assistance to the Committee in undertaking this inquiry.