



Australian Government

Australian Secret Intelligence Service

Parliamentary Joint Committee on Intelligence and Security

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

13 November 2014

Introduction

1. In the context of the Government's decision to authorise the Australian Defence Force (ADF) to undertake operations against the Islamic State of Iraq and the Levant (ISIL) terrorist organisation in Iraq, as well as the threat posed by ISIL adherents and others motivated by the events in Iraq and Syria to attack Australians and other Western targets, there is an urgent need to make amendments to the *Intelligence Services Act 2001* (ISA).

2. The proposed amendments are directed to two key areas. First, the primary purpose of the amendments is to better facilitate the Australian Secret Intelligence Service (ASIS) providing timely assistance to the ADF in support of military operations.

3. Second, the proposed amendments also address practical limitations identified in the arrangements for emergency authorisations which apply to all three ISA agencies: ASIS, the Australian Signals Directorate (ASD) and the Australian Geospatial-Intelligence Organisation (AGO).

4. Importantly, the proposed amendments do not expand the functions of ASIS or the other ISA agencies. Nor do they change the current limitation on ASIS under subsection 6(4) of the ISA which provides that ASIS must not plan for, or undertake, activities that involve:

- a) paramilitary activities; or
- b) violence against the person; or
- c) the use of weapons;

by staff members or agents of ASIS.

5. What is changed is the means by which the Foreign Minister, as the Minister responsible for ASIS, is able to authorise ASIS to undertake activities relating to Australian persons in accordance with a direction under subsection 8(1) of the ISA to provide assistance to the ADF in support of military operations. The amendments enable the Minister to provide an authorisation in respect of a specified class of Australian persons where the other requirements of section 9 of the ISA are met, rather than being limited to providing an authorisation in respect of specified individuals. Also, changed is the means by which the Attorney-General as the Minister responsible for the Australian Security Intelligence Organisation (ASIO) can, where required to do so, provide agreement to the responsible Minister providing an authorisation to an ISA agency relating to a specified class of Australian persons.

6. Similarly, the proposed new emergency authorisation arrangements change the means for obtaining authorisation and agreement respectively in an emergency. In an extreme circumstance, they would allow an agency head in very limited circumstances to provide an authorisation (of up to 48 hours duration) which must be brought to the attention of the responsible Minister as soon as practicable so that it can be cancelled or replaced by a Ministerial authorisation.

Current ISA Requirements

7. While subsection 6(7) of the ISA recognises that in performing its functions ASIS is not prevented from providing assistance to the Defence Force in support of military operations, ASIS does not have a specific function of assistance to the Defence Force in the same way that ASD has such a function. Instead, ASIS currently relies on its general functions under paragraphs 6(1)(a), (b) and (e) of the ISA to provide this support. This,

however, creates incongruity between ASIS and ASD or AGO in providing support to military operations.

8. Under the ISA, as amended by the *National Security Legislation Amendment Act (No. 1) 2014* (2014 amendments):

- ASIS is able to produce intelligence on an Australian person or class of Australian persons by less intrusive means (i.e. tasking agents but not technical collection) at the request of ASIO, in support of an ASIO function for the purpose of providing that intelligence to ASIO. Under these arrangements ASIS could only pass to another agency (including the ADF) any intelligence collected at the request of ASIO after first passing the intelligence to and consulting with ASIO.
- In order to undertake an activity to produce intelligence on a specified Australian person for another agency such as the ADF, there is no capacity for ASIS to be authorised to produce intelligence on a specified class of Australian persons. The usual Ministerial authorisation requirements will apply, which in the situation in Iraq will require seeking Ministerial authorisation from the Foreign Minister following close coordination with ASIO to obtain the agreement of the Attorney-General prior to issuing that Ministerial authorisation (the agreement of the Attorney-General is required where the Australian person is, or is likely to be involved in activities which are, or are likely to be, a threat to security to undertake an activity to produce intelligence).
- Similarly, in order for ASIS to use technical means to collect intelligence, whether in support of ASIO or the ADF overseas (warrant requirements apply in Australia), the usual Ministerial authorisation requirements will also apply, which again requires Ministerial authorisation from the Foreign Minister following close coordination with ASIO to obtain the agreement of the Attorney-General prior to issuing that Ministerial authorisation.
- Further, in order for ASIS to undertake an activity which will have, or is likely to have, a direct effect on an Australian person in Iraq, ASIS will have to closely coordinate with ASIO to obtain the agreement of the Attorney-General prior to requesting a Ministerial authorisation from the Foreign Minister.

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

10. Currently section 9A of the ISA enables an emergency Ministerial Authorisation to be provided by one of the Prime Minister, the Defence Minister, the Foreign Minister or the Attorney-General, where the Minister referred to in the subsection 8(1) direction for the particular ISA agency is not available. Section 9A does not provide for the contingency that none of these Ministers are available.

11. Further, even if one of the Prime Minister, the Defence Minister or the Foreign Minister is available, the requirement that the agreement of the Attorney-General must have been obtained where the Australian person is, or is likely to be, involved in activities which are, or are likely to be, a threat to security means that in practice if the Attorney-General is not available an authorisation cannot be provided at all.

12. Finally, section 9A requires emergency authorisations to be issued in writing and specify a period of effect, and does not accommodate the necessity for such authorisations to be issued orally and subsequently documented in written record.

Why is this a problem?

Support to the ADF

13. Unlike the ADF's and ASIS's operations for almost 10 years in Afghanistan, in Iraq it is known that a large number of Australian persons are actively engaged with terrorist groups, including ISIL. As such, it is likely that ASIS's support to ADF operations would require ASIS to produce intelligence on and undertake activities, subject to the limits on ASIS's functions, which may have a direct effect on these Australian persons. ASIS considers that under such circumstances the current provisions in the ISA enabling ASIS to undertake activities to produce intelligence or have a direct effect on an Australian person engaged in terrorist activity could severely limit ASIS's ability to contribute to the force protection of ADF personnel and the conduct of ADF operations. In a swiftly changing operational environment the ADF can act immediately, but ASIS is unable to act as nimbly to support the ADF.

14. The following scenario illustrates the constraints on ASIS and the potential impacts on ADF operations.

Scenario – Intelligence is received that a previously unidentified Australian member of ISIL plans to imminently undertake a suicide terrorist attack against ADF and other partner elements providing 'advise and assist' support to Iraqi security forces at an Iraqi base. The ADF requests ASIS to urgently produce intelligence on the Australian person and that ASIS liaise with approved partner agencies it has responsibility for in order to alert them to the planned attack, noting that this may have a direct effect on the Australian person. Depending on the circumstances, ASIS may be able to immediately undertake some activity to collect intelligence (with agreement from ASIO received in due course) on the Australian person. However, before ASIS could do anything further to alert the approved partner agencies of the planned attack, ASIS would first have to consult with ASIO in order to obtain the agreement of the Attorney-General and then seek a Ministerial Authorisation from the Foreign Minister to produce intelligence and to undertake activities likely to have a direct effect on the Australian person. Even if the Ministers and relevant ASIO staff were readily available, this process would take considerable time when there is an operational need to act quickly to prevent loss of life.

Ability to act in an emergency

15. Recent terrorist-related threats involving Australian persons intending to undertake terrorist attacks have shown that Australian agencies will potentially have very little time to act or respond, including to attempt to prevent the activities and intentions of the Australian person who seeks to harm other Australians or our foreign partners. ASIS will usually do this by alerting its foreign partners of the threat of a possible attack on them so that they can take appropriate steps to protect themselves from the attack, including by potentially intercepting the individual and seeking to arrest them. However, as alerting a foreign partner to the threat with the intention or reasonable expectation that it will, or is likely to, undertake activities that will have a direct effect on the Australian person (ie. the

person is arrested or otherwise prevented from carrying out the attack) a Ministerial Authorisation is required.

16. In time sensitive situations ASIS could be left unable to act legally even to protect life. Alternatively, in order to protect life, ASIS or a Minister may choose to take action and face the legal risk that their actions were in breach of the ISA because, for example, ASIS was unable to locate the Attorney-General in time to obtain the Attorney-General's agreement to the authorisation. In such circumstances, the individuals involved in taking such action may either choose to delay, with the risk that the opportunity to alert others to the danger would be lost, or face the potential risk that such individuals would not be able to rely upon the protection against any criminal or civil liability for their actions afforded by section 14 of the ISA as arguably the action would not have been done in the proper performance of an ASIS function.

17. While timely action in such a situation in Iraq would be possible if the ADF-related amendments are passed by the Parliament, recent events highlight that terrorist activity is not confined to Iraq and Syria and that there is an increased risk of terrorist activity in locations where ASIS would not be able to rely upon provisions related to supporting the ADF. As such, ASIS considers amendments are needed to ensure agencies can take timely and legal action in extremely urgent situations where Australians are intending to undertake acts of terrorism.

Proposed Legislative Changes

Support to the ADF

18. The following changes to the ISA are proposed.

- a) To insert a new function in subsection 6(1) modelled on the existing ASD function in section 7(d): "to provide assistance to the Defence Force in support of military operations and to cooperate with the Defence Force on intelligence matters".
- b) Where the Minister for Defence has requested the assistance of ASIS to the Defence Force in support of military operations as an alternative to the usual section 8(1) requirement to obtain a Ministerial Authorisation to undertake an activity to produce intelligence on an Australian person or to have a direct effect – the Minister may authorise ASIS to undertake activities to produce intelligence or have a direct effect on a specified class of Australian persons for the purpose of supporting the Defence Force. An example of such a class might be Australian persons who are or are likely to be members of ISIL who are fighting with ISIL or are otherwise supporting ISIL in its military operations.
- c) As a related matter, section 9(1A)(b) would be amended to make clear that the requirement for the agreement of the Attorney-General where an 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 does not need to be provided in respect of each individual Australian person – but could, at the discretion of the Attorney-General, also be a class agreement. This would mean that the Attorney-General could, in appropriate circumstances, provide a "class agreement" to Ministerial Authorisations issued by ISA Ministers to produce intelligence on Australian persons – such as a class of Australian persons present in Iraq who are, or are likely to be, members of ISIL. This proposed amendment has more general application and could also enable a

class agreement, for example, in relation to a class of Australian persons who are or are likely to be members of a specified people smuggling syndicate.

- d) Safeguards include:
- a. a requirement that the Minister be satisfied of the factors in paragraph 9(1)(a) to (c) in relation to the class of Australian persons (i.e. activities necessary for the proper performance of a function, nothing done beyond what is necessary and the nature and consequences of the activity are reasonable);
 - b. a requirement that the Minister must be satisfied that one of the grounds in paragraph 9(1A)(a) applies to all members of the specified class;
 - c. a requirement that the period of an authorisation be no more than six months, but be capable of renewal and a process for it to cease when the grounds for the authorisation have ceased to exist;
 - d. a requirement to report to the Minister on activities undertaken in support of the ADF;
 - e. a requirement that the revised arrangements only apply in relation to support to the ADF. Any support to foreign authorities could only arise in the context of support to the ADF;
 - f. the remaining limitations in the ISA, including under s.6(4), are unchanged; and
 - g. ASIS activities are subject to the oversight of. and be fully auditable by. the IGIS.

Ability to act in an emergency

19. The following changes to the emergency authorisation arrangements in section 9A of the ISA are proposed.

- a) To enable one of the applicable Ministers to issue an emergency authorisation orally, to be followed with a written record of the authorisation as soon as practicable, but no later than 48 hours after the authorisation was issued, and a copy of the record to be given to the IGIS within three days.
- b) To insert a new section 9B which provides that, if none of the senior Ministers under section 9A are readily available or contactable, the head of the ISA agency may issue an emergency authorisation. Such an authorisation could only occur in exceptional circumstances where the agency head is satisfied that:
 - a. the facts of the case would justify the responsible Minister giving an authorisation;
 - b. the responsible Minister would have given that authorisation; and
 - c. if the activity or series of activities is not undertaken, security will be, or is likely to be, seriously prejudiced or there will be, or is likely to be, a serious risk to a person's safety.
- c) To insert a new section 9C which provides that where the Attorney-General's agreement is required for the issuing of an emergency authorisation, and the Attorney-General is not readily available or contactable, the Director-General of Security (if readily available or contactable) can provide his or her agreement to the issuing of the emergency authorisation.
- d) These changes would remain subject to the existing rigorous safeguards and limits on agencies within the ISA. Additional requirements include:

- a. that the agency head must as soon as practicable advise the responsible Minister who has a positive obligation to consider whether to cancel the authorisation or grant an authorisation in accordance with the ISA;
- b. while in practice, given the requirement to contact the Minister, the duration of an emergency authorisation will be much shorter, the maximum duration of an emergency authorisation cannot exceed 48 hours;
- c. also, where the Attorney-General is not available to provide his or her agreement to an authorisation, to advise the Attorney-General as soon as practicable; and
- d. notification and reporting requirements to the IGIS.

Other portfolio Ministers

20. In response to a query raised by the IGIS, the Attorney-General's Department has considered whether the "Ministers" for the purposes of the emergency authorisation arrangements would be the senior Ministers as intended or could also include any other Minister (including Parliamentary Secretaries) appointed to administer the relevant Department. The Attorney-General's Department has concluded that the safest interpretation is that it would also include other portfolio Ministers. This means for ASIS the "responsible Minister" would also include the Minister for Trade and Investment and the Parliamentary Secretary to the Minister for Foreign Affairs. For ASD and AGO the "responsible Minister" would also include the Assistant Minister for Defence and the Parliamentary Secretary to the Minister for Defence. Further, it means that the "Attorney-General" also includes the Minister for Justice. This was not the intention. Consistent with existing practice the intention is that emergency authorisations would be sought from the senior Ministers.

Recent Media

21. ASIS is aware of concerns raised in the media in response to the proposed amendments. In particular, that they could enable ASIS to "kill Australian jihadists fighting overseas with radical groups like Islamic State" or that they change the role of ASIS "in a way that may facilitate targeted killings". These concerns reflect a misunderstanding of the purpose and effect of the amendments.

22. The amendments will not enable ASIS to kill Australians or others. There is no change to the existing limitation under subsection 6(4) of the ISA which states that ASIS must not plan for, or undertake, activities that involve paramilitary activities or violence against the person or the use of weapons (other than for limited self defence or training) by staff members or agents of ASIS.

23. The amendments will not change the role of ASIS in a way that may facilitate targeted killings.

24. The inclusion of an explicit function "to provide assistance to the Defence Force in support of military operations and to cooperate with the Defence Force on intelligence matters" does not provide ASIS with a new capability. ASIS can and already does provide such assistance and cooperation to the Defence Force under its subsection 6(1)(a), (b) and (e) functions. The capability of ASIS to support the Defence Force is recognised by the current wording of subsection 6(7).

25. Similarly, ASIS can already seek an authorisation from the Foreign Minister to undertake an activity or a series of activities to produce intelligence on an Australian person or which will, or is likely to have, a direct effect on an Australian person. Relevantly, the amendments will enable the Foreign Minister, where there is a request from the Defence Minister for ASIS assistance to the Defence Force in support of military operations, to also provide an authorisation to undertake an activity or a series of activities to:

- produce intelligence on a class of Australian persons; or
- which will or is likely to have a direct effect on a class of Australian persons.

26. The requirement to obtain Ministerial Authorisation to have a “direct effect”, whether in respect of an Australian person or a class of Australian persons, in no way changes the other limitations on ASIS under the ISA. This includes the limits under subsection 6(4) regarding violence against the person, paramilitary activities and the use of weapons discussed above, as well as the requirement that the Minister must be satisfied of the factors in section 9. That is:

- there are satisfactory arrangements in place to ensure that:
 - the activities are necessary for the proper performance of a function;
 - nothing is done beyond what is necessary; and
 - the nature and consequences of the activity are reasonable; and
- the Australian person or the class of Australian persons are, or are likely to be, involved in one or more of the activities set out in subsection 9(1A).

27. Further, ASIS activities remain subject to the oversight of the IGIS, who not only judges the legality of the actions of ASIS and its compliance with its own policy and procedures, but also the propriety of its actions.

28. In relation to ASIS assistance to the Defence Force under the ISA, ASIS notes that the use of force is a matter for the Australian Defence Force under its rules of engagement. These are developed in consultation with the Office of International Law in the Attorney-General’s Department and Legal Division in the Department of Foreign Affairs and Trade to ensure consistency with international law including International Humanitarian Law.

Conclusion

29. In light of the rapidly changing and dangerous environment faced by the ADF in undertaking operations against the ISIL terrorist organisation in Iraq, as well as the wider threat posed by organisations such as ISIL, the proposed changes would position ASIS well to provide timely assistance to the ADF, minimise loss of life and to assist others in responding to the threat. ASIS would be pleased to assist the Committee further or provide clarification on any of the above. Thank you for the opportunity to comment on these amendments.