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No. 53 2003–04

Intelligence Services Amendment Bill 2003

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No. 53 2003–04

Intelligence Services Amendment Bill 2003

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Intelligence Services Amendment Bill 2003

Date Introduced: 15 October 2003

House: House of Representatives

Portfolio: Foreign Affairs

Commencement: On Royal Assent

Purpose

To amend the *Intelligence Services Act 2001* to allow the Australian Secret Intelligence Service to:

- be involved in the planning and undertaking of paramilitary or violent activities by others, and
- provide, train with, and use weapons and self-defence techniques in certain circumstances.

Background

The legislative basis for the Australian Secret Intelligence Service

According to its [website](#), the mission of the Australian Secret Intelligence Service (ASIS) is to:

protect and promote Australia's vital interests through the provision of unique foreign intelligence services as directed by Government.¹

ASIS is part of the Foreign Affairs and Trade portfolio. As its mission statement implies, ASIS's focus is on overseas operations.² This distinguishes it from the Australian Security Intelligence Organisation (ASIO).

The legislative framework within which ASIS operates is provided by the *Intelligence Services Act 2001* (the ISA). The ISA also deals with the Defence Signals Directorate (DSD), but DSD matters are not considered in this Digest as the Bill only affects ASIS.

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Amongst other matters, the ISA sets out the functions of ASIS, the role of the Minister in approving or directing various ASIS activities, ASIS cooperation with Australian and overseas agencies, and various accountability matters, including the powers of the Inspector-General of Intelligence and Security (IGIS) and the Parliamentary Joint Committee on ASIO, ASIS and DSD (Parliamentary committee). Background on the ISA, as well as a detailed historical account of the accountability issues and related matters that gave rise to the ISA can be found in the relevant [Bills Digest](#).³

ASIS and the use of force

Existing section 6 of the ISA sets out functions of ASIS. In particular, subsection 6(4) of the ISA provides that:

In performing its functions, ASIS *must not* plan for, or undertake, paramilitary activities or activities involving violence against the person or the use of weapons [emphasis added by author].

In introducing the (then) *Intelligence Services Bill 2001*, the Minister for Foreign Affairs said:

It is important to emphasise that ASIS is not a police or law enforcement agency; nor does ASIS have paramilitary responsibilities. Additionally, ASIS does not, in its planning or conduct of activities, allow for personal violence or the use of weapons. Such activities are not relevant to the role and functions of ASIS. These limitations are made explicit in the bill.⁴

There does not seem to have been any concern expressed regarding the subsection 6(4) prohibition in either the Parliamentary [committee report](#) or in the parliamentary debate. However, the Bill Digest suggested that, in practice, the prohibition might not be absolute:

...the phrase 'must not plan for, or undertake ... activities involving violence against the person or the use of weapons' may be interpreted permissively. The prohibition does not expressly forbid the use of violence or weapons. It forbids ASIS from 'planning for or undertaking activities involving violence or weapons' rather than 'performing acts involving violence or weapons' or simply 'using violence or weapons'. The Oxford Dictionary defines 'undertake' as to 'enter upon, commit oneself to, an enterprise'.

Clearly, ASIS cannot plan to perform acts of violence or use of weapons. Arguably, it might not even be able to plan for the contingency in which violence or weapons are used. Moreover, ASIS cannot enter upon or commit itself to an operation involving violence or weapons. But unforeseen circumstances may necessitate the use of violence or weapons. Intelligence gathering might rarely involve violence or the use of weapons. However, violence or weapons might be an incident of counter-intelligence or 'other' activities. A staff member might be permitted to use violence or weapons in the course of such an activity at least where the conduct was not contemplated or involved at the outset.

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Significantly, the immunity for criminal and civil acts is not limited to non-violent acts. A staff member or agent would be immunised from criminal and civil liability in respect of any act which was done in the 'proper performance of a function' of ASIS. Thus, violence or use of weapons could be immunised if done in the 'proper performance of a function'.⁵

In part, the present Bill gives an explicit legal basis for the carrying of weapons, use of force etc somewhat along the lines suggested by the Digest excerpt above. With the exception of the use of weapons or self-defence techniques for training purposes, the activities enabled by the Bill must be carried out outside Australia. The specific details, including the accountability measures incorporated into the Bill, are discussed in the Main Provisions section of this Digest.

In terms of the rationale for the present Bill, the Minister has said that:

Since [the passing of the *Intelligence Services Act 2001*] however, the aftermath of the tragic events of 11 September 2001, and the Bali bombing on 12 October 2002, have contributed to a fundamental change in the environments in which ASIS must work. These changes could not have been predicted at the time the act was prepared. As a result, this amendment bill is now required to allow ASIS to provide more adequately for the protection of its staff members and agents, and to enable it to work more closely with other agencies. It is important to note, however, the bill retains the restraint on ASIS undertaking in its own right activities involving the use of force, including use of weapons, other than for the limited purposes of protection. ASIS will continue to conduct its activities in a non-violent way.

ASIS is presently empowered to cooperate with Commonwealth, and state authorities, and foreign authorities with my approval as responsible minister, in order to perform its functions or to facilitate the performance of its functions.

Given the requirement to have a coordinated whole-of-government, regional and global response to terrorism and other transnational crime, this cooperation is essential. Currently the act can prevent the agency from effectively cooperating with other authorities who might use force as a legitimate part of their functions. The amendment addresses this issue.⁶

Presumably for operational reasons, neither the second reading speech nor the *Explanatory Memorandum* give any information of past instances where ASIS' effectiveness has been impaired or Australia's national security compromised by the prohibition imposed by existing subsection 6(4). However, a media report foreshadowing the introduction of the Bill suggested that ASIS agents tracking Jemaah Islamiah suspects were exposed to danger in their work and also that 'ASIS agents have also been frustrated at their inability to take part in armed operations against terrorist groups'.⁷ The Minister for Foreign Affairs has been reported as saying that the idea for the need for change came from ASIS.⁸ The Opposition spokesperson for Foreign Affairs is also supportive of the ASIS being given greater powers of self-defence.⁹

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Immunity from civil and criminal law

Existing section 14 of the ISA provides domestic legal immunity to ASIS staff and agents. The provisions of section 14 that are relevant to the Bill state that:

(1) A staff member or agent of an agency is not subject to any civil or criminal liability for any act done outside Australia if the act is done in the proper performance of a function of the agency.

(2B) The Inspector-General of Intelligence and Security may give a certificate in writing certifying any fact relevant to the question of whether an act was done in the proper performance of a function of an agency.

(2C) In any proceedings, a certificate given under subsection (2B) is prima facie evidence of the facts certified.

This provision is drawn broadly enough to provide immunity for the additional activities allowed under the Bill. Thus Bill does not amend section 14, although **new clause 2 of Schedule 2** does deal with immunity from State or Territory laws on weapons or associated matters.

Outside of Australia, unless they have diplomatic immunity or they are otherwise specifically exempted under the relevant country's law, ASIS staff and agents may be liable to prosecution under the laws of the country in which they operate.¹⁰

Accountability mechanisms for ASIS

Besides the normal accountability to Parliament through the relevant Minister, the main accountability mechanisms are via the IGIS and the Parliamentary committee.

The position of the IGIS was established by the *Inspector-General of Intelligence and Security Act 1986*. The IGIS oversees and reviews the activities of ASIS amongst a number of other intelligence agencies. According to the IGIS,

The purpose of this oversight and review is to ensure that the agencies act legally and with propriety, comply with ministerial guidelines and directives and respect human rights.¹¹

In terms of specific functions and powers:

The Inspector-General can undertake an inquiry into the activities of an agency in response to a complaint or a reference from a minister. The Inspector-General can also act independently to initiate inquiries and conducts regular inspections and monitoring of agency activities.

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In conducting an inquiry, the Inspector-General has significant powers which include requiring the attendance of witnesses, taking sworn evidence, copying and retention of documents and entry into an agency's premises. The Inspector-General can also conduct preliminary inquiries into matters in order to decide whether to initiate a full inquiry.¹²

It is worth noting that should the IGIS decide to conduct an inquiry in response to a person making a complaint to them under in *Inspector-General of Intelligence and Security Act 1986*, the complainant does not in general the right of appearance before the inquiry.¹³ Also the IGIS may only accept a complaint from an Australian citizen or permanent resident,¹⁴ although he or she can conduct 'own motion' investigations.

Under the ISA, the Parliamentary committee has a relatively limited mandate in relation to reviewing the activities of ASIS. It may for example 'review' any matter referred to it by a resolution of either House of Parliament, but its functions do not include reviewing operational matters, including operational assistance or operational methods of the intelligence agencies or inquiring into individual complaints about ASIS activities.¹⁵ It may request briefings by the ASIS Director General and IGIS, but cannot compel disclosure of operationally sensitive information.¹⁶ The Committee has majority Government membership.¹⁷

Main Provisions

Schedule 1 – Amendment of the Intelligence Services Act 2001

Item 1 makes an editorial change by simply moving an existing explanatory note from existing section 6(4) to 6(3). The note 'draws attention' to the requirement that a copy of an existing paragraph 6(1)(e) written direction (which enables the Minister to expand ASIS's overseas activities) must be given to the IGIS as soon as practical after it is given to ASIS.

Item 2 inserts a **new subsection 6(4)** to replace the existing version. The existing version is:

In performing its functions, ASIS must not plan for, or undertake, paramilitary activities or activities involving violence against the person or the use of weapons.

The new version is:

In performing its functions, ASIS must not plan for, or undertake, activities that involve:

- (a) paramilitary activities; or
- (b) violence against the person; or

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(c) the use of weapons;

by staff members or agents of ASIS [emphasis added by author].

The new version makes a separation between activities done by ASIS staff or agents as compared to activities done by others. An explanatory note in the Bill below **new section 6(4)** confirms this is the intent of the amendment:

Note 1: This subsection does not prevent ASIS from being involved with the planning or undertaking of activities covered by paragraphs (a) to (c) by other organisations provided that staff members or agents of ASIS do not undertake those activities.

This raises the question of how ASIS might be ‘involved’ in the ‘undertaking’ of armed or paramilitary activities by others but not actually considered to undertake the activities themselves. Presumably this might occur in the case of say an overseas armed raid on terrorist suspects where it is expected that the suspects may offer violent resistance and ASIS ‘observers’ accompany armed officers of another agency on the raid.

The remainder of the Bill sets out the circumstances in which ASIS staff or agents can actually provide, train and use weapons and self-defence techniques. **New subsections 6(5)-(6)** essentially state that **new subsection 6(4)** does not prevent the provision, training with, and use of weapons or self-defence techniques in accordance with **new Schedule 2**. Self-defence techniques are not defined in the Bill and the term is not currently used in the Act.

Item 3 inserts **new schedule 2 ‘Limits on provision of weapons, training etc’**.

New subclause 1(1) deals with the *provision* of weapons and *training* in the use of weapons and self-defence techniques.

Training and provision can only be given to ASIS staff members¹⁸ or agents. ‘Agent’ is not defined in the Act or Bill. In addition to training purposes,¹⁹ weapons and training can only be given for the purposes of self-protection, protection of other ASIS staff or agents, or protection of ‘a person who is cooperating with ASIS in accordance with section 13 [of the Act]’ and must be done in accordance with a Ministerial approval under **new subclause 1(3)**. A person cooperating with ASIS under section 13 might include members of Australian or foreign law enforcement, security or intelligence agencies. Whilst the list of foreign agencies with whom Australia is cooperating under section 13 is available to the IGIS, it is not on the public record.

In giving approval for the provision of weapons and / or training under **new subclause 1(3)**, the Minister may approve this in relation to ‘the holder of a specified position in ASIS’. Importantly, the approval must set out the purpose for provision of weapons and / or training and conditions applying, although the purposes and / or conditions could in all likelihood be cast in relatively broad terms. It also seems that the approval does not have to specify the type of weapon being approved. The drafting of **new subclause 1(3)** could thus arguably allow approvals to be cast as a standing set of mandatory guidelines which

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the ASIS Director General would use when authorising the issuance of weapons and / or carrying out of training. A copy of an approval must be given by the Minister to the IGIS as soon as practical after it is given to the Director General: **new subclause 1(5)**.

New subclause 1(2) deals with the *use* of weapons or self-defence techniques. Such use is allowable if it is done for training purposes in accordance with **new subclause 1(1)** or for the purposes mentioned above, ie self-protection, protection of other ASIS staff or agents, or protection of a person who is cooperating with ASIS. Where it is for protective purposes, the weapons or techniques can only used outside of Australia. The use must also be in compliance with guidelines issued by the ASIS Director General under **new subclause 1(6)**.²⁰ **New subclause 1(6)** does not prescribe what the guidelines must contain other than they must address ‘matters related to the use of weapons and self-defence techniques.’ A copy must be given to the IGIS by the Director General as soon as practical after the Director General makes them. Interestingly, the Bill does not allow ASIS to use a weapon to defend the safety of civilian who might be inadvertently caught up in the middle of an operation where the targets put up armed resistance.

In his second reading speech, the Minister also said that:

Importantly, the bill provides a mechanism to allow for the protection of ASIS personnel in the conduct of their legitimate functions under the act. The bill would allow for ASIS staff members and agents to be provided with close personal protection by a cooperating agency, when conducting activities as part of their ASIS function.²¹

It is not clear what this ‘mechanism’ is. It may just be the distinction between the roles of ASIS personnel and other agency personnel implied by Note 1 to the **new subsection 6(4)** referred to earlier in this Digest: in any case it would useful if this were clarified.

New clause 2 effectively provides that, in doing anything under **new clause 1**, ASIS staff or agents are not bound by any State or Territory weapons licensing or registration laws. The *Explanatory Memorandum* comments that

this proposed clause...is particularly important to ensure that State and Territory laws do not apply so as to require inappropriate communication of information about ASIS and inappropriate publication of the identity of ASIS staff members or agents.

Concluding Comments

The Bill increases ASIS powers by allowing staff members and agents to be involved in the planning of operations that use force, and allows them to use weapons in self defence. In 2001, the use of force was not part of the role or functions of ASIS. This Bill can therefore be seen as a significant change in policy regarding the use of force by the Government in less than three years. Involving as it does both the planning and

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operational stages, it is arguably a greater symbolic shift than that inherent in the potential next step, which would be to allow ASIS to use weapons other than in self-defence or engage in paramilitary activities overseas.

In that context, it is important that parliamentarians consider the rationale for the changed policy, any accountability provisions and its possible consequences. The rationale for the Bill is set out in the second reading speech and will not be dealt with further here. Regarding accountability, the Bill requires relevant Ministerial approvals and the ASIS Director General's guidelines regarding the provision of weapons, training and the use of weapons and self-defence techniques be given to the IGIS. It appears from the latest IGIS report that the IGIS also reviews all submissions made by ASIS to the Minister requesting Ministerial approvals.²² The IGIS also reviews selected ASIS operational files on a regular basis.²³ This allows the IGIS to monitor the use of weapons etc. Should the IGIS have any concerns these are likely to be raised with the Minister. Any such concerns may or may not be reported in the IGIS annual report: possibly thought could be given to whether the *Inspector-General of Intelligence and Security Act 1986* should be amended to make in clear whether matters relating to Ministerial approvals and the ASIS Director General's guidelines should be included in the IGIS's annual report. It is also unclear to what extent the Parliamentary Committee will be able to obtain information regarding such approvals and guidelines. If they might not be able to do so, perhaps the Bill should amend the ISA to allow this to happen.

On a related matter, consideration could be given to whether the IGIS should be able to conduct inquiries in response to individual complaints by persons other than citizens or permanent residents. Now that ASIS will be able to carry weapons and conduct training exercises involving weapons within Australia as well as overseas, it is important that an appropriate range of people should be able to seek that ASIS is properly held accountable for its activities. The right to make a complaint should arguably be extended to non-citizens and non-permanent residents. This change accords with the complaints mechanism set up in relation to ASIO, the domestic intelligence agency.²⁴ In addition, where inquiries are held into weapons or related complaints, perhaps the *Inspector-General of Intelligence and Security Act 1986* could be amended to require at a minimum that the IGIS annual report note that such inquiries have occurred or are taking place.

ASIS staff and agents may operate in overseas countries either in formal cooperation with agencies of the relevant country or 'covertly', ie without the knowledge of the relevant country. In relation to the possible consequences of the Bill, arming covert staff or agents may increase the risk of prosecution on weapons or other offences in a foreign jurisdiction.

The consequences of an exposure of a covert operation involving weapons or violence may reach beyond the consequences for the individual. Most countries are very sensitive about foreign officials carrying and potentially using firearms within their borders and usually require notification and authorisation for any carriage of weapons by foreign officials, even by personal bodyguards of visiting heads of state and the like. For example, the extension of the Australian Air Security Officer ('sky/air marshals')

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programme to international flights has been delayed for over a year because other countries (including the US) apparently have concerns about Australian security officials operating within their borders whilst armed. The Australian Government also forbade foreign security officials accompanying athletes to the 2000 Olympics from importing or possessing weapons whilst in Australia.²⁵ Any exposure of a covert operation involving the use of force would as a minimum be a sensitive diplomatic incident. In extreme cases, depending on the nature of the operation and the approach of the foreign country, it is possible the foreign country might argue that the operation was a hostile act requiring a response against Australia. In view of the possible diplomatic consequences, it is noteworthy that the Bill does not require Ministerial approval for ASIS' involvement in specific operations where force is contemplated.

As previously mentioned, the Bill does not allow ASIS to use a weapon to defend the safety of civilian who might be inadvertently caught up in the middle of operation where the targets put up armed resistance. This raises the question whether the use of a weapon under these circumstances would be in 'the proper performance of a function of the agency' within the meaning of section 14 of the IAS. If not, an ASIS staff member or agent could be liable for prosecution under Australian law. The Parliamentary committee may wish to seek clarification on this point.

As also mentioned earlier in this Digest, **new subsection 6(4)** makes a distinction between ASIS being 'involved' in the 'undertaking' of armed activities by others but not actually considered to undertake the activities themselves. Whilst presumably this might occur in the case of say an overseas armed raid on terrorist suspects where it is expected that the suspects may offer violent resistance and ASIS 'observers' accompany armed officers of another agency on the raid, the Parliamentary committee may wish to seek more guidance on this matter.

Finally, for the sake of clarity, the term 'self-defence techniques' should be defined in the Bill.

Endnotes

- 1 See: <http://www.asis.gov.au/mission.html>.
- 2 This is also reflected in the *Intelligence Services Act 2001*, eg in subsection 11(1): 'the functions of [ASIS and DSD] are to be performed only in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being and only to the extent that those matters are affected by the capabilities, intentions or activities of people or organisations *outside Australia*.' [Emphasis added].
- 3 Bills Digest No. 11, 2001–02.
See: <http://www.aph.gov.au/library/pubs/bd/2001-02/02bd011.pdf>.

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- 4 The Hon Alexander Downer MP, House of Representatives, *Debates*, 27 June 2001 p. 28635.
- 5 P. 23.
- 6 The Hon Alexander Downer MP, House of Representatives, *Debates*, 15 October 2003 p. 21145.
- 7 T. Allard, 'Spies to be given guns, but not a licence to kill', *Sydney Morning Herald*, 13 October 2003.
- 8 'Government to arm anti-terrorism spies', *ABC Online*, 12 October 2003
- 9 'Powers of self-defence for ASIS officers' *Media release*, Kevin Rudd MP, 12 October 2003.
- 10 Assuming the action of the ASIS staff member or agent falls within section 14, it is extremely unlikely they could be extradited from Australia back to the country in which the action occurred: see p. 24 of the Bills Digest to the Intelligence Services Bill 2001.
- 11 P. 1, 2001-2002 *Annual Report*. See: http://www.igis.gov.au/fs_annual.html.
- 12 *ibid.*
- 13 Section 17, *Inspector-General of Intelligence and Security Act 1986*.
- 14 Subsection 8(2), *Inspector-General of Intelligence and Security Act 1986*.
- 15 Section 29, ISA.
- 16 Section 30 and clause 1, Schedule 1, ISA.
- 17 Section 28, ISA.
- 18 Staff members include consultants to ASIS or persons made available by another Commonwealth or State authority or other person to perform services for ASIS: section 3 ISA.
- 19 New sub-paragraph 1(1)(b)(iv).
- 20 Obviously if no guidelines have been issued or are in force, the weapons and / or self-defence techniques cannot be used.
- 21 The Hon Alexander Downer MP, House of Representatives, *Debates*, 15 October 2003, p. 21145.
- 22 *op. cit.*, p. 39.
- 23 *op. cit.*, p. 40.
- 24 See section 8(1) of the *Inspector-General of Intelligence and Security Act 1986*.
- 25 'Carriage of Firearms at Sydney 2000 Games', *Press release*, Attorney-General, 20 July 2000, <http://www.ag.gov.au/www/attorneygeneralHome.nsf/Web+Pages/DABDCD45CCFC384BCA256B65007EFF42?OpenDocument>

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