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Attorney-General's Department
Supplementary submission

Parliamentary Joint Committee on Intelligence and Security
Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill

Schedule 2 – amendments to the Intelligence Services Act 2001

Contents

Outline – responses to matters taken on notice and several issues raised in submissions

Representatives of the Attorney-General's Department (AGD) took a small number of matters on notice at the Committee's public hearing of 13 November 2014, concerning the proposed amendments to the *Intelligence Services Act 2001* (IS Act) in Schedule 2 to the Bill. In addition, AGD is aware of a number of issues raised in the evidence of submitters and witnesses participating in the Committee's inquiry.

This document sets out the Department's responses to seven broad issues either taken on notice at the hearing, or raised in evidence before the inquiry. These issues are as follows:

(1) ***ASIS assistance to the ADF – class Ministerial authorisations:*** Committee members sought further information about the limitations applying to the classes of Australian persons who may be the subject of a Ministerial authorisation under section 9 of the IS Act, to enable the Australian Secret Intelligence Service to undertake activities in relation to those persons, for the purpose of providing assistance to the Australian Defence Force (ADF) in support of military operations, in accordance with the explicit function proposed to be conferred on ASIS.

(2) ***Emergency Ministerial authorisations:*** Committee members sought further information about the meaning of the term 'responsible Minister' for the purpose of the proposed emergency authorisation provisions, particularly a suggested interpretation that the term

could include junior Ministers within the portfolios responsible for the administration of the relevant IS Act agency.

(3) ***Emergency authorisations by agency heads, where relevant Ministers are not readily available or contactable:*** Committee members sought further information about the interaction of these proposed provisions with the principle of Ministerial responsibility, including the degree of Ministerial control over these decisions (particularly time limits on the obligation on agency heads to notify the Minister).

(4) ***ASIS assistance to the ADF – need for an explicit statutory function***: Committee members sought further information about the need to confer upon ASIS an explicit function to provide assistance to the ADF in support of military operations, given that ASIS can already provide such assistance under its existing statutory functions.

(5) ***ASIS assistance to the ADF – 'targeted killings'***: AGD seeks to clarify some inaccurate commentary suggesting that the proposed amendments to ASIS's functions could enable that agency to engage in, or facilitate, the 'targeted killings' of Australian persons in relation to whom a Ministerial authorisation is issued.

(6) ***Further issues raised in the evidence of the Inspector-General of Intelligence and Security (IGIS):*** AGD provides further comments on matters raised by the IGIS in her submission to the inquiry, or canvassed with the IGIS and Assistant IGIS during their appearance before the Committee on 13 November. These relate to:

- *ASIS's statutory functions and associated measures* – namely, time limits on the duration of requests by the Defence Minister for authorisations, and the agreement of the Attorney-General to the issuing of a Ministerial authorisation in relation to a class of persons; and

- *Emergency authorisations* – namely, who may issue oral emergency authorisations, and possible additional reporting requirements on emergency authorisations made by agency heads.

(7) ***Issues raised in other submissions to the inquiry***, including clarifying a number of legal and factual misunderstandings.

In the interests of providing a timely response to the Committee, these responses are provided in advance of the publication of proof Hansard, and are based on the recollections and notes of witnesses and observers in attendance at the hearing on 13 November. AGD has prepared these responses in consultation with relevant agencies governed by the IS Act – being ASIS, the Australian Geospatial-Intelligence Organisation (AGO) and the Australian Signals Directorate (ASD) – and the Australian Security Intelligence Organisation (ASIO).

AGD notes that many of the proposed amendments relate to those parts of the IS Act that are administered by the Minister for Foreign Affairs (in relation to ASIS) and the Minister for Defence (in relation to AGO and ASD). The Committee may wish to direct any further questions of an operational nature to those agencies.

1. Class authorisations – ASIS assistance to the ADF

Issue

Amending items 1, 4 and 8-11 of Schedule 2 to the Bill would enable the Minister responsible for ASIS to authorise that agency to undertake activities for the purpose of providing assistance to the ADF in support of military operations, and to cooperate with the ADF on intelligence matters. In particular, amending items 10 and 11 would enable the Minister to issue authorisations under section 9 of the IS Act to enable ASIS to:

- produce intelligence on one or more members of a class of Australian persons; or
- undertake activities that will or are likely to have a direct effect on one or more members of a class of Australian persons.

As noted in the Explanatory Memorandum to the Bill and the submissions of relevant agencies to the Committee's inquiry, the ability to issue Ministerial authorisations is presently limited to activities in relation to individual Australian persons. The ability to issue class authorisations, in relation to activities undertaken by ASIS for the purpose of providing assistance to the ADF in support of military operations, is necessary to enable ASIS to provide such assistance in a timely way.

Committee question

Committee members sought further information from Government witnesses about how classes of persons are to be defined – and limited – under the proposed amendments.

The evidence of AGD and ASIO witnesses focussed on the limitations imposed by the authorisation criteria in paragraph 9(1A)(a) of the IS Act.

As amended by item 10 of Schedule 2 to the Bill, that paragraph 9(1A)(a) requires that, before a Minister gives an authorisation for an activity or a series of activities, the Minister must be satisfied that the Australian person, or class of Australian persons, in relation to whom the authorisation is sought is, or is likely to be, involved in one or more of the activities set out in subparagraphs 9(1A)(a)(i)-(vii).

These subparagraphs cover activities that present a significant risk to a person's safety; acting for or on behalf of a foreign power; activities that are or are likely to be a threat to 'security' as that term is defined in section 4 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act); activities related to the proliferation of weapons of mass destruction or the movement of listed goods under prohibited exports regulations; contraventions of UN sanction laws; and the commission of certain forms of serious crime (being offences punishable by a maximum sentence exceeding 12 months or more) in relation to moving persons, money or goods, using or transferring intellectual property, or transmitting data or signals by means of guided or unguided electromagnetic energy.

AGD response

Limitations on classes of Australians in relation to whom authorisations may be issued

There are four principal limitations on the classes of Australian persons in relation to whom the Minister responsible for ASIS (the Foreign Affairs Minister) may issue authorisations, enabling ASIS to undertake activities for the purpose of providing assistance to the ADF.

These limitations are detailed under the subheadings below. In short, they exist in the authorisation criteria in section 9 (as proposed to be amended by the Bill), and in the decision-making of ASIS in identifying Australian persons falling within the class specified in an authorisation, in order to undertake activities in reliance on that authorisation.

In broad terms, while the identification of the particular class of Australian persons to be the subject of a Ministerial authorisation under section 9 is a decision for the Foreign Affairs Minister in individual cases, subsections 9(1) and 9(1A) impose limitations on that discretion. These limitations are principally by prescribing specific categories or types of activities in which the class must be engaged, or likely to be engaged. In addition, the identification of the class of Australian persons is subject to scrutiny and decision-making by three Ministers in the authorisation process. These are the Foreign Minister (as the Minister issuing the authorisation under section 9), the Defence Minister (who is required to request the assistance of ASIS to the ADF, including specifying the class of Australian persons in relation to whom ASIS's assistance to the ADF is sought), and the Attorney-General (whose agreement to an authorisation must be obtained where the activities of the class of Australian persons are, or are likely to be, a threat to security as that term is defined in the ASIO Act).

(1) Defence Minister's request for ASIS assistance to the ADF

Amending item 9 inserts a new authorisation criterion in proposed new subsection 9(1)(d), that the Defence Minister must request the authorisation in writing. The Foreign Minister cannot issue an authorisation unless satisfied that the Defence Minister has made such a request for assistance to the Defence Force in support of military operations. Accordingly, the Defence Minister's request will set out the class of Australian persons in relation to whom the assistance of ASIS is sought, in relation to a specified military operation conducted by the ADF. (By reason of subsections 11(1) and (2) of the IS Act ASIS's functions only apply to the extent that the matters are affected by the capabilities, intentions or activities of people or organisations outside Australia and do not include the carrying out of police functions or any other responsibility for the enforcement of the law, which means that in practice the proposed amendments will apply only to those military operations which are conducted outside Australia.)

(2) Issuing criteria – subsection 9(1) and paragraph 9(1A)(a)

In addition, the Foreign Minister must be satisfied that the other authorisation criteria in subsections 9(1) and 9(1A) are satisfied before he or she can issue a class authorisation, enabling ASIS to provide assistance to the ADF in accordance with a request made by the Defence Minister.

Under subsection 9(1), the Minister must be satisfied that any activities that may be done in reliance on the authorisation will be necessary for the proper performance by ASIS of its functions, there are satisfactory arrangements in place to ensure that nothing will be done beyond what is necessary for that purpose, and 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 that purpose. Where an authorisation is sought for ASIS to undertake an activity or activities in relation to a class of Australian persons, the Minister must specifically assess, and be satisfied of, the necessity and proportionality of the impacts of that activity or activities in relation to that class of Australian persons.

In addition, as mentioned above, paragraph 9(1A)(a) limits the classes of Australian persons in relation to whom a Ministerial authorisation may be issued. It does so by prescribing the types of activities in which Australian persons are, or are likely to be, involved. In making authorisation decisions under section 9, the Minister is required to be satisfied that the particular activities of the class of persons in relation to whom the authorisation is sought fall within one or more of the types of activities that are prescribed in paragraph 9(1)(a). Hence, the IS Act does not prescribe an exhaustive list of the exact classes of persons in relation to whom a Ministerial authorisation must be issued. Rather, the Act confers a discretion on the authorising Minister to define the class of Australian persons in relation to individual authorisation decisions, provided that the class satisfies the 'activity test' in paragraph 9(1A)(a).

In the case of activities undertaken by ASIS to assist the ADF in support of a military operation, the relevant limb of the activity test will invariably be that in subparagraph 9(1A)(a)(iii), which prescribes activities that are or are likely to be a threat to security (as that term is defined in section 4 of the ASIO Act). This connection is inherent in the nature of military operations undertaken by the ADF, which are undertaken for the purpose of the defence of Australia. The definition of 'security' under section 4 of the ASIO Act relevantly includes the protection of Australia and Australians from attacks on Australia's defence system (which include activities that are intended, or are likely to, obstruct, hinder or interfere with the performance by the ADF of its functions, or with the carrying out of other activities by or for the Commonwealth, for the purpose of the defence or safety of the Commonwealth). The term also includes protection from politically motivated violence, the promotion of communal violence and acts of foreign interference, the protection of Australia's territorial and border integrity from serious threats, and the carrying out of Australia's responsibilities to any foreign country in respect of these matters.

(3) Agreement of the Attorney-General – subsection 9(1A)(b) and proposed subsections 9(1AA), 9(1AB) and 9(1AC)

Further, where an authorisation is sought in relation to a class of Australian persons who are, or are likely to be, involved in activities that are, or are likely to be, a threat to security, the Foreign Minister may only issue an authorisation where the agreement of the Attorney-General (as Minister administering the ASIO Act) is obtained to the issuing of that authorisation.

In particular, proposed subsection 9(1AA) (in amending item 14 of Schedule 2 to the Bill) provides that the Attorney-General may, in writing:

- specify classes of Australian persons who are, or who are likely to, be involved in an activity or activities that are, or are likely to be, a threat to security; and
- give his or her agreement to the issuing of a Ministerial authorisation in relation to any Australian person in that specified class.

This means that the Attorney-General will apply his or her judgment as to whether the class of Australian persons – as defined by reference to their actual or likely engagement in a particular activity – has the requisite nexus to security. The Attorney-General has a detailed awareness and understanding of the security environment, by reason of his or her portfolio responsibility for ASIO. Paragraph 9(1A)(b) and proposed paragraphs 9(1AA)-9(1AC) ensure that Ministerial authorisation decisions have the benefit of this expertise, including in decision-making about classes of Australian persons.

The involvement of the Attorney-General in relation to decision-making about a class of Australian persons is additional to that of the Defence Minister (in requesting the authorisation) and the Foreign Minister (in making the authorisation decision). This means that the class of Australian persons is scrutinised by three Ministers.

(4) Decision-making of ASIS – identification of Australians within the class of persons

Fourthly, once the Foreign Minister has issued an authorisation for ASIS to undertake activities for the purpose of providing assistance to the ADF in support of a military operation, ASIS must then make decisions about whether a particular Australian person or persons fall within the class of persons specified in the authorisation, in order to undertake activities in reliance on the authorisation.

As the class of Australian persons is defined by reference to persons who are, or who are likely to, be engaged in the specified activity or activities, that class cannot, by definition, include anyone who is not so engaged. If ASIS purported to rely on an authorisation to undertake activities in relation to an Australian person who did not fall within the relevant class, those activities would not be lawfully authorised. (For instance, because the person is not a threat to security, and the class relates to security.)

The activities of ASIS undertaken in reliance on a class Ministerial authorisation are subject to the independent oversight of the IGIS under the *Inspector-General of Intelligence and Security Act 1986.* The IGIS may examine ASIS's decision-making in identifying individual Australian persons falling within the class. As the IGIS noted in her submission to the Committee's inquiry, it will be necessary for ASIS to implement systems to enable its staff to clearly identify individual Australian persons who are within the class of persons specified in a Ministerial authorisation.

ASIS's activities under a class authorisation are further subject to specific reporting obligations to the Foreign Minister as soon as practicable and no later than within three

months of the authorisation ceasing or being renewed. This provides the Minister with awareness of the Australian persons identified by ASIS as falling within the class specified in the authorisation.

Examples of potential class authorisations

Some members of the Committee sought examples of the classes of Australian persons in relation to whom authorisations may be sought and issued, to enable ASIS to undertake activities in relation to those persons for the purpose of providing assistance to the ADF in support of a military operation. The unclassified submission of ASIS to the Committee's inquiry provides that "An example, of such a class might be Australian persons who are or are likely to be members of IS who are fighting with IS or are otherwise supporting IS in its military operations."

Witnesses at the hearing gave an example of Australian persons who are fighting with a terrorist organisation in a specified place in which the ADF is engaged – for instance, activities in relation to the Islamic State terrorist organisation in Iraq. It was noted that such activities would be of a type which are, or are likely to be, a threat to security. As such, it would be open to an authorising Minister to be satisfied of the 'activity test' in subparagraph 9(1A)(a)(iii), and it would also be open to the Attorney-General to provide his or her agreement to the issuing of an authorisation under paragraph 9(1A)(b) in relation to that class of Australian persons, in satisfaction of proposed subsection 9(1AA).

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

The unclassified submission of ASIS to the Committee's inquiry provides a further example of the circumstances in which ASIS may rely upon a class Ministerial authorisation to identify an individual Australian person falling within that class, as follows.

> ***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.*[1]

We understand that ASIS has previously provided the Committee with classified examples of why such class authorisations are required.

Suggestions to further define or limit a 'class of Australian persons'

Some members of the Committee sought AGD and agencies' views about whether it would be desirable or possible to define the term 'class of Australian persons' in the IS Act, or otherwise impose further statutory limitations on the classes of Australian persons in relation to whom Ministerial authorisations could be issued under the proposed amendments.

For example, some Committee members queried whether it would be possible to insert an additional requirement along the lines that members of a class of Australian persons must be 'unlawful enemy combatants'.

AGD and agencies are of the view that it would not be appropriate to either define the term 'class' for the purpose of class authorisations issued under section 9, or to otherwise impose further statutory limitations on the classes of persons in relation to whom Ministerial authorisations can be issued.

The intention of the proposed class authorisation amendments (in relation to ASIS assistance to the ADF) is not to expand or alter, in any way, the existing Ministerial authorisation criteria for activities undertaken in relation to individual Australian persons. Rather, the intention is simply to replicate them in relation to classes of Australian persons, so that identical requirements apply to the issuing of class authorisations as to individual authorisations. Attempting to impose further requirements for class authorisations under section 9(1) or 9(1A) carries a significant risk of either expanding or limiting the authorisation grounds, which could undermine or frustrate the policy intent.

For example, imposing a further limitation on class authorisations to Australian persons who are unlawful enemy combatants would import an assessment of a person's status under the law of armed conflict. It is highly likely that such persons (as well as those who may be engaged in hostile activities but may not necessarily satisfy the technical elements of an international law concept) would be capable of satisfying subparagraph 9(1A)(a)(iii) of the 'activity test' (being engaged in activities that are, or are likely to be, a threat to security).

The identification of classes of Australian persons is already subject to the extensive limitations identified above, including examination by three Ministers, and limitations by reference to the types or categories of activities in which all persons in the class must be engaged or likely to be engaged. AGD and agencies submit that these measures serve as

1 Australian Secret Intelligence Service, *Submission 17*, p. 3 (paragraph 14).

appropriate limitations on the exercise of Ministerial discretion to define a class of Australian persons for the purpose of issuing a Ministerial authorisation under section 9.

The ordinary meaning of the term 'class' in relation to persons denotes a number of persons who are regarded as forming one group through the possession of similar qualities.[2] The requisite quality for the purpose of class Ministerial authorisations is a person's engagement, or likely engagement, in the types of activities prescribed in paragraph 9(1A)(a).

References to classes of persons in other statutory provisions

Committee members further sought AGD and agencies' advice about whether there is precedent for the issuing of authorisations (or making similar or analogous decisions) in relation to classes of persons in other Australian legislation, particularly security or intelligence legislation.

Section 13B of the IS Act allows for persons who are in a class of persons ('senior position holders') authorised by the Director-General of Security to make a request of ASIS to undertake an activity or series of activities in support of the performance by ASIO of its statutory functions. The activity or activities which ASIS may undertake must relate to either an individual Australian person, or a class of Australian persons. Similarly, the Director-General of ASIS may authorise, in writing, a staff member of ASIS, or a class of staff members, for the purpose of undertaking these activities.

AGD further notes that the ASIO Act makes provision for decisions in relation to classes of persons. These include the ability of the Director-General of Security (or another appointee) to approve, in writing, a person or a class of persons to exercise authority under a warrant issued by the Attorney-General in accordance with Division 2 of Part III of the ASIO Act. (The qualities of the relevant class of persons are those defined by the Director-General at his or her discretion.)

AGD acknowledges that these provisions apply in a different intelligence-related context to the issuing of Ministerial authorisations for IS Act agencies to engage in activities for the purpose of performing their statutory functions. Nonetheless, these existing usages demonstrate that the concept of a class of persons (being a number of persons, defined by their possession of certain qualities, as applied to a specific case by the relevant decision maker) is used elsewhere in intelligence legislation.

2 Macquarie Dictionary, 6th Edition (October 2013).

2. Meaning of the term 'Responsible Minister' – emergency Ministerial authorisations

Outline of relevant provisions – proposed sections 9A, 9B

The emergency authorisation provisions in amending item 18 of Schedule 2 to the Bill apply the term 'responsible Minister'.

In particular, proposed new subsection 9A(2) provides that a Minister who is specified in proposed new subsection 9A(3) may, if the relevant statutory requirements in proposed new subsections 9A(1) and (2) are satisfied, orally issue an emergency authorisation.

Proposed subsection 9A(3) provides for a gradated structure of Ministers who may orally issue an emergency authorisation as follows:

(a) the responsible Minister in relation to the relevant agency; or

(b) if the agency head is satisfied that the relevant responsible Minister is not readily available or contactable—any of the following Ministers:

(i) the Prime Minister

(ii) the Defence Minister;

(iii) the Attorney-General.

Proposed section 9B enables an agency head to issue an emergency authorisation if the agency head is satisfied that none of the Ministers specified in proposed subsection 9A(3) are readily available or contactable (and the other conditions set out in proposed subsections 9B(1) and (2) are satisfied). This means that an agency head cannot proceed to the next 'tier' of Minister (or subsequently to personally issue an emergency authorisation under proposed section 9B) unless he or she has attempted to contact the relevant Minister in the previous 'tier' and is satisfied that Minister is not readily available or contactable.

This is consistent with the longstanding policy position, given effect in the IS Act, that decisions in relation to authorisations, including emergency authorisations, are of a character that is properly made by Ministers and, in particular, those Ministers who have responsibility for (and therefore a significant understanding of) security and intelligence matters.

However, the proposed amendments also seek to ensure that contingency arrangements are available for those rare and exceptional cases in which no relevant Ministers are readily available or contactable. In so doing, the amendments address a limitation in the existing emergency authorisation provisions, that there is no lawful basis upon which IS Act agencies can obtain potentially vital intelligence in circumstances of extreme urgency, in the event of Ministerial unavailability.

Issue

The evidence of the IGIS to the Committee's inquiry has suggested that the term 'responsible Minister' for the purpose of proposed paragraph 9A(3)(a) is to be read as including any of the Ministers who are appointed to administer the portfolio in which the relevant IS Act agencies are located (namely, the Ministers within the Foreign Affairs portfolio in the case of ASIS, and the Ministers within the Defence portfolio in the case of AGO and ASD).[3]

If correct, this interpretation would mean that, for the purpose of proposed paragraph 9A(3)(a), the responsible Minister would include the senior portfolio Minister, together with any junior Ministers or Parliamentary Secretaries as appointed to administer the portfolio from time-to-time. This would mean that the agency head would need to be satisfied of the following (based on current Ministerial appointments), before he or she could proceed to attempt to contact any of the Ministers in paragraph 9A(3)(b):

- *In the case of ASIS* – the agency head must be satisfied that the Foreign Minister, the Trade and Investment Minister and the Parliamentary Secretary to the Foreign Minister are not readily available or contactable.

- *In the case of AGO and ASD* – the agency head must be satisfied that the Defence Minister, the Assistant Minister for Defence and the Parliamentary Secretary to the Defence Minister are not readily available or contactable.

As the IGIS further suggested, a requirement that all such Ministers are within proposed paragraph 9A(3)(a) would mean that "a very large number of Ministers would need to be 'not readily available or contactable' before an agency head could give an emergency authorisation". Indeed, on this interpretation, the prospect that an agency head would ever have occasion to consider issuing an emergency authorisation under proposed section 9B is extremely remote.

Intended meaning of the term 'responsible Minster' in proposed paragraph 9A(3)(a)

The intended usage of the 'responsible Minister' in proposed paragraph 9A(3)(a) was to refer only to the senior portfolio Minister, who in practice has responsibility for the relevant IS Act agency (being the Foreign Affairs Minister in the case of ASIS, and the Defence Minister in the case of AGO and ASD). This is consistent with the longstanding position taken by IS Act agencies to the identification of the responsible Minister for their respective agencies under the IS Act.

Potential for competing interpretations

The basis for the interpretation suggested by the IGIS is section 19A of the *Acts Interpretation Act 1901* (AIA).[4] That provision establishes a general rule of statutory interpretation that, if a provision of an Act refers to a Minister by using the expression "the

3 IGIS, *Submission 12*, pp. 6-7.

4 IGIS, *Submission 12*, pp. 6-8.

Minister" without specifying a particular Minister, then if two or more Ministers administer the provision in respect of the relevant matters, the reference is taken to be a reference to any one of those Ministers. (The reason that the senior Minister and any junior Ministers or Parliamentary Secretaries might be taken as administering the relevant provision in this case, being proposed paragraph 9A(3)(a) of the IS Act, is because there is a practice that Ministers are appointed by the Governor-General to administer particular Departments of State. A Minister administering a Department administers the legislation listed in the Administrative Arrangements Orders for that Department.)

However, the assumed application of the rule of interpretation in section 19A of the AIA to proposed section 9A(3)(a) is not beyond doubt. Section 19A is a general rule of statutory interpretation that is taken to apply to all provisions of Commonwealth legislation, unless particular provisions evince a contrary intention. (That is, an intention that the general rule of interpretation should not apply to that provision.) There are, in AGD and agencies' views, a number of characteristics of both the text and wider context of the relevant emergency authorisation provisions that could be taken to – and were intended to – evince a contrary intention. (That is, an intention to limit the responsible Minister to the single, senior portfolio Minister who in practice is responsible for the relevant agency – being the Foreign Affairs Minister in the case of ASIS, and the Defence Minister in the case of AGO and ASD.)

The very fact there have arisen, in the course of this inquiry, competing interpretations of the term suggests that the provision could benefit from clarification, in order to provide certainty as to which Ministers are within proposed paragraph 9A(3)(a). Such certainty will be critical to the effective operation of the emergency authorisation provisions, and their oversight by the IGIS. It would also remove any risk that a court, if ever called upon to construe the provision if enacted, could favour an interpretation contrary to the underlying policy intent.

Committee comments

Some Committee members remarked at the hearing on 13 November that the Government may wish to consider moving amendments to make clear which Ministers are within proposed paragraph 9A(3)(a). AGD witnesses noted that the Government's decision on this matter may usefully be informed by any views the Committee may wish to express in its report on the Bill.

In particular, given that a number of submissions to the inquiry and comments of some Committee members have commented extensively on principles of Ministerial responsibility and accountability in relation to authorisation decisions, the Committee's inquiry may provide an opportunity for the Government and the Parliament to consider whether a broader meaning of the term 'responsible Minister' should now be favoured, so as to include junior Ministers (contrary to the original intention to limit this term to senior portfolio Ministers).

AGD comments

As an aid to the Committee's consideration of the appropriate scope of the term 'responsible Minister', AGD provides the following information about the implications of each of the possible interpretations.

Implications of a broad interpretation (including all junior Ministers in the relevant portfolios)

The broader interpretation of the term 'responsible Minister' as suggested by the IGIS might be said to give strongest effect to a policy preference that authorisation decisions should, almost invariably if not exclusively, be made by Ministers. It would do so by enlarging the 'pool' of Ministers who are able to give an emergency authorisation under the IS Act.

However, such an interpretation would also raise policy and practical issues. From a policy perspective, the inclusion of junior portfolio Ministers in paragraph 9A(3)(a) would mean that an agency head could not approach any of the Prime Minister, the Defence Minister (in the case of authorisations sought in relation to ASIS), the Foreign Minister (in the case of authorisations sought in relation to AGO and ASD), or the Attorney-General, unless satisfied that neither the senior Minister nor any of the junior Ministers within the portfolio are readily available or contactable.

In effect, this would increase the possibility that a junior Minister – who may not necessarily have day-to-day responsibility for, or significant background in, national security or intelligence-related matters within the portfolio – could be called upon to make an emergency authorisation decision in priority to the Prime Minister and other senior Ministers who have extensive involvement in, and responsibility for, national security and intelligence matters.

In addition, from a practical perspective, increasing the pool of Ministers able to issue emergency authorisations further increases the number of Ministers that an agency head must attempt to contact in order to make a request for an emergency authorisation. This increases the risk that an agency head may spend his or her time, in circumstances of emergency, trying to find a Minister to issue an emergency authorisation, potentially at the expense of that authorisation being considered and issued in the limited time available.

Implications of a narrow interpretation (limited to the senior Minister in the relevant portfolios)

A narrower interpretation, which limits the term 'responsible Minister' to the senior Minister in the relevant portfolios (being the Foreign Minister in the case of ASIS, and the Defence Minister in the case of AGO) might be said to strike a balance between the interests in:

- placing primacy on the Ministerial character of authorisation decisions (by requiring an agency head to first attempt to contact the senior portfolio Minister, and then any of the Prime Minister, Defence Minister, Foreign Minister or Attorney-General); and

- limiting the risk that the limited time available in circumstances of emergency might be consumed by the process of an agency head attempting to find a Minister, rather than the consideration and – if appropriate – issuing of authorisations; and

- ensuring that Ministerial decision makers have seniority and extensive engagement in intelligence and security matters, by reason of their portfolio responsibilities.

Conversely, it might be said that, in favouring a smaller pool of Ministers, a narrower interpretation might result in greater reliance being placed on emergency authorisations issued by agency heads under proposed section 9B, which may undermine interests in ensuring Ministerial responsibility for authorisation decisions. However, such concerns would need to be balanced against the fact that an agency head would be required, under proposed subsection 9A(3), to attempt to contact at least four Ministers to issue an emergency authorisation before considering applying proposed section 9B.

That is, the agency head would need to attempt to contact the responsible Minister for the agency, and if satisfied that Minister is not readily available or contactable, the Prime Minister, Attorney-General and whichever of the Defence Minister and the Foreign Minister who is not responsible for the agency in respect of which the authorisation is sought. Only if satisfied that none of these Ministers are readily available or contactable could the agency head consider issuing an authorisation under proposed subsection 9B, subject to satisfaction of the applicable authorisation criteria. There will also be additional requirements to seek the agreement of the Attorney-General to the issuing of an emergency authorisation, if the activities in the proposed authorisation relate to Australian persons who are engaged in, or are likely to engage in, activities that are, or are likely to be, a threat to security.[5]

On this view, it could reasonably be concluded that a narrower interpretation of the term 'responsible Minister', combined with the limitations applying to proposed section 9B, would ensure that recourse to agency head authorisations would be extraordinary and would occur very rarely.

3. Emergency authorisations by agency heads

Issue and committee comments

Proposed section 9B enables an agency head to issue an emergency authorisation in very limited and extraordinary circumstances, subject to rigorous statutory issuing criteria, and Ministerial and independent oversight.

A number of submissions to the Committee's inquiry, and some members of the Committee, have commented on the importance of ensuring appropriate Ministerial responsibility and accountability for the issuing of authorisations, including emergency authorisations. In particular, some Committee members commented that the arrangements in proposed section 9B are of an extraordinary, and potentially unprecedented, nature.

5 As further noted below, emergency authorisations issued by agency heads are subject to a close degree of Ministerial oversight and control by the responsible Minister for the agency. Under proposed subsections 9B(5)-(8), the agency head must notify and provide certain documentation to the responsible Minister as soon as practicable and no later than 48 hours after the issuing of an emergency authorisation under proposed section 9B. The responsible Minister is under a positive obligation to consider whether to exercise his or her power to cancel the emergency authorisation, or to replace it with a Ministerial authorisation under proposed new section 9A or section 9.

Some Committee members also indicated a preference to strengthen the degree of Ministerial control over emergency authorisation decisions made under section 9B, via the requirements in proposed subsections 9B(5) and (6) that the agency head must notify and give certain documents to the responsible Minister as soon as practicable and no later than 48 hours after giving the authorisation. In particular, some Committee members expressed concern that the 48-hour time period may be too long, noting that this is the maximum duration for emergency authorisations. Therefore, if notification is given towards the end of the 48-hour period, the responsible Minister may not be afforded a meaningful opportunity to exercise his or her power to cancel an emergency authorisation, or to replace it with a Ministerial authorisation.

AGD comments

Extraordinary nature of emergency authorisations by agency heads

The intention of proposed section 9B is not to undermine or depart from general principles of Ministerial responsibility and accountability for authorisation decisions under the IS Act, or the importance of ensuring that practical arrangements are in place to facilitate Ministerial availability, to the greatest possible extent.

Rather, proposed section 9B is designed to make provision for contingency arrangements, in the event that the worst case scenario eventuates – despite best endeavours to prevent it – in which none of the relevant Ministers are readily available or contactable, and there arises an urgent need to collect intelligence. (For example, if there is only a very limited window of opportunity to collect the intelligence, such as a matter of hours, and none of the relevant Ministers are readily available or contactable in that limited window of time.) Under the current emergency authorisation provisions in section 9A, there is no lawful basis for agencies to collect intelligence in these circumstances.

Proposed section 9B seeks to ameliorate the potentially significant, adverse impacts of this outcome, by enabling IS Act agencies to undertake activities in reliance on a strictly limited emergency authorisation provided by the relevant agency head, provided that rigorous statutory thresholds are satisfied. This includes a requirement that the agency head must be satisfied that none of the Ministers specified in proposed subsection 9A(3) are readily available or contactable. These cases are likely to be very rare. Their exceptional nature is made clear via the extensive limitations and safeguards applying to agency heads' decisions, including:

- a strictly limited maximum duration of 48 hours, without any capacity for renewal;
- a close degree of Ministerial control by the responsible Minister for the agency, including a requirement that the responsible Minister must be notified as soon as practicable within 48 hours of the issuing by an agency head of an emergency authorisation;
- the responsible Minister is under a positive obligation to consider whether to terminate the emergency authorisation, including by replacing it with a Ministerial authorisation under section 9 or 9A;

- the independent oversight of the IGIS, who must be provided with notification as soon as practicable, and no later than three days after an emergency authorisation is issued by an agency head under section 9B; and

- the authorisation criteria, which require the agency head to be satisfied that:

    - It would be open to the responsible Minister to make the authorisation, and also that the responsible Minister would have made the authorisation decision. (This requires the agency head to consider and assess the weight that the Minister himself or herself would have been likely to place on particular considerations – including considering whether there are any matters that the Minister would have regarded as determinative of a decision not to issue an emergency authorisation, even though it would have been reasonably open to him or her to issue the authorisation.)

    - If the activity or series of activities is not undertaken before a Ministerial authorisation is given under section 9 or 9A, security would or is likely to be seriously prejudiced, or there will be or is likely to be a serious risk to a person's safety.

Time limits for the notification of the responsible Minister

The time limit applying to the notification requirement in proposed subsection 9B(6) is not at any time within 48 hours of issuing, at the agency head's discretion. Rather, the requirement is to provide notification as soon practicable and no later than 48 hours.

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

As noted in the Explanatory Memorandum to the Bill, the phrase 'as soon as practicable' denotes an intention that notification must be provided to the responsible Minister as soon as possible after an agency head issues an emergency authorisation, unless the first (or subsequent) available opportunity is not feasible or viable in the circumstances of the particular case. (For example, if it would have required the diversion of the agency's resources away from other, critical activities including undertaking activities in accordance with the emergency authorisation.)

The absolute latest time of 48 hours after the emergency authorisation is issued is aligned with the maximum duration of these authorisations. This accommodates the 'worst case' scenario, in which it may not be practicable to provide notification to the relevant Minister. However, this would be extremely rare. The longer the delay between issuing and Ministerial notification, the more compelling evidence would be needed to show that it would not have

been practicable to have notified the Minister earlier. The time at which a Minister is notified is subject to the independent oversight of the IGIS, who may form a view on whether the notification was made as soon as practicable.

Consideration could be given to specifying a lower maximum limit than as soon as practicable within 48 hours (for example, 24 hours). However, some agencies have expressed concern that this could potentially result in too short a maximum period within which notification must be provided, such that compliance may be impossible in some cases. While such cases are likely to be very rare, imposing a rigid statutory rule would mean that agencies have no alternative but to breach the provision should this eventuate. The requirement to provide notification and relevant documentation as soon as practicable within an upper limit of 48 hours is considered to provide an appropriate outer limit for the assessment of what is practicable.

4. Need for an explicit function for ASIS to provide assistance to the ADF

Issue and committee comments

The proposed amendments will make explicit that it is a statutory function of ASIS to provide assistance to the Defence Force in support of military operations and to cooperate with the Defence Force on intelligence matters. Some members of the Committee sought a further explanation to that set out in the Explanatory Memorandum to the Bill.[6]

AGD response

ASIS's existing functions and transparency

As noted in the submissions of AGD and ASIS to the inquiry,[7] the proposed amendments will not expand ASIS's capability. They are directed to ensuring transparency on the face of the legislation, and about ASIS's capacity to provide assistance to the ADF in a timely and effective way, subject to necessary safeguards.

ASIS is already able to undertake such activities under its existing functions in paragraphs 6(1)(a), (b) and (e) of the ISA[8]. This is recognised in subsection 6(7), which provides that, in performing its functions, ASIS is not prevented from providing assistance to Commonwealth authorities, including the defence force in support of military operations. It is, in the Department's view, preferable that agencies' statutory functions should explicitly reflect the activities they can, and do, undertake, and the purposes for which they are undertaken. Accordingly, the amendment will insert an express statutory function, in the same terms as

6 See for, example, p. 2.

7 Attorney-General's Department, *Submission 5*, Page 15. See further, ASIS, *Submission 17*, pp. 1 and 3-5.

8 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.

functions AGO and ASD already have specified under paragraphs 6B(g) and 7(d) of the IS Act.

AGD acknowledges that AGO and ASD are within the Defence portfolio and might potentially 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).[9] However, as noted in AGD's submission, ASIS has played a significant role in previous military operations conducted by the ADF, including in Afghanistan, and ASIS will be undertaking activities in support of the ADF's operations in Iraq against the Islamic State terrorist organisation. In addition, AGO and ASD do not exclusively service the Defence portfolio, and play a significant role in the broader Australian Intelligence Community and the national security community (as reflected by their recent name changes, enacted by the *National Security Legislation Amendment Act (No 1) 2014*, to replace the word 'Defence' in their former titles with 'Australian').

On this basis, AGD considers that it is not necessary 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 general functions under paragraphs 6(1)(a), (b) and (e) of the IS Act), as compared to the the statutory functions of AGO and ASD (in the form of an express statutory function to provide support to, or cooperate with, the ADF).

Timely assistance in military operations – class authorisations and agreements

Other amendments to support the explicit function proposed to be conferred upon ASIS will enable assistance to be provided in a more timely way in military operations. As noted in ASIS's submission to this inquiry, the ADF itself is not constrained by the need to get individual authorisations and agreements in the same way that ASIS is.[10] As a result, 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.

As noted in the Explanatory Memorandum to the Bill, advice from relevant intelligence agencies is that the operational circumstances in relation to the ADF's previous operations in Afghanistan were significantly different to those presently arising in relation to its operations in Iraq. It is known that there are large numbers of Australian persons actively engaged with terrorist groups engaged in hostilities in Iraq, including the Islamic State terrorist organisation. (In contrast, this relatively broad degree of Australian participation was not known in relation to the Taliban and other groups operating in Afghanistan.)

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9 This point was made in some submissions to the inquiry. See, for example, Greg Carne, *Submission 4*, p. 6. (This submission appeared to suggest that a different approach should be taken to defining ASIS's functions, to reflect "ministerial separation and longstanding conventions based on democratic traditions and civilian control of the military, that military force, including that informed by civilian agency intelligence gathering, is not deployed against the civilian population, except in the more prescribed circumstances of Part IIIAAA of the *Defence Act 1903* [Defence call-out power].")

10 Australian Secret Intelligence Service, *Submission 17*, paragraph 9.

Under the current provisions, the Minister for Foreign Affairs can issue Ministerial authorisations to ASIS to provide support to the ADF, generally where there is a particular Ministerial direction in place under paragraph 6(1)(e). However, these authorisations can only be given in relation to individual Australian persons. There is no ability to issue an authorisation in respect of classes of Australian persons, such as those fighting with the Islamic State terrorist organisation in Iraq.

This means that multiple, simultaneous authorisations would need to be sought and issued in relation to each individual, on identical grounds. More problematically, it may mean that authorisations are unable to be given in an operationally necessary timeframe, for example, in cases where a particular Australian person fighting with that organisation was not known in advance of the commencement of operations.

Similar issues arise in relation to the Attorney-General's agreement to the issuing of authorisations by the responsible Minister, where that is required under the IS Act. The Attorney's agreement is needed where the Australian person in relation to whom the authorisation is sought is, or is likely to engage in, activities that are, or are likely to be, a threat to security (as defined in section 4 of the ASIO Act).

Currently, the Attorney-General can only provide agreement in relation to an individual Australian person, and not classes of persons. This means that the Attorney may be required to issue multiple, simultaneous agreements on identical grounds. (For example, a separate agreement in relation to each individual who is known or suspected to be fighting with the Islamic State terrorist organisation.) This places a significant limit on the ability of intelligence agencies to respond quickly to ADF operational requirements.

The proposed amendments will address these issues, by enabling the Attorney-General to provide agreements, and the Foreign Minister to issue authorisations, in relation to classes of Australian persons. The intention is these would be done in advance of military deployments as part of the planning for those military operations.

Importantly, the ability to provide class authorisations (but not agreements) would be limited to ASIS's proposed new explicit function to support the ADF, and not for any other statutory functions. The class would need to be clearly specified by the Minister, and would need to satisfy all of the usual authorisation criteria. In addition, the Defence Minister would be required to make a written request for ASIS's support, before ASIS could undertake activities under this explicit function.

5. Response to commentary on 'targeted killings'

Issue / Committee's examination of evidence

Some submitters and witnesses to the inquiry[11] have raised concerns, which have also been expressed in recent media and editorial commentary,[12] that the amendments 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". Committee members sought to explore this issue with some non-Government witnesses appearing at its public hearing on 13 November.

AGD comments

The Department notes that ASIS has addressed these issues in its unclassified submission to the inquiry.[13] As noted by ASIS, such assertions are incorrect. The proposed amendments will not change the role of ASIS in a way that may enable ASIS to kill or use violence against people, or to facilitate so-called 'targeted killings'.[14]

As noted above, the proposed amendments do not confer upon ASIS any new capability. ASIS can, and already does, provide assistance to and cooperates with the ADF. The proposed amendments simply make this explicit in ASIS's functions. 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. The proposed amendments will allow the Foreign Minister to provide such authorisations in relation to a class of Australian persons, where there is a request from the Defence Minister for ASIS assistance to the ADF in support of military operations.

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

Further, all of the existing limitations and safeguards under the IS Act apply to ASIS's activities, where authorised for the purpose of providing support to the ADF. Relevantly, these include:

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11 Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 1; Associate Professor Greg Carne, *Submission 4*, p. 7; NSW Council for Civil Liberties & the Muslim Legal Network (NSW), *Submission 7*, pp. 14-15.

12 See, for example, 'Target: Government wants to pinpoint radicals fighting abroad', *West Australian*, 29 October 2014, p. 1. See further 'Security Bill opens door to targeted killings and broader control orders', *The Conversation*, 6 November 2014 (http://theconversation.com/security-bill-opens-door-to-targeted-killings-and-broader-control-orders-33631).

13 Australian Secret Intelligence Service, *Submission 17*, paragraphs 21- 28.

14 The Australian Government does not use the term 'targeted killings'.

- *The limitations on ASIS's activities in subsection 6(4)* – under that provision, ASIS must not plan for, or undertake, activities that involve paramilitary activities, violence against the person, or the use of weapons (other than for limited self-defence or training by staff members or agents of ASIS).

- *The requirement in section 9 that the Minister must be satisfied of the authorisation criteria* – these include a requirement for the Minister to be satisfied there are satisfactory arrangements in place to ensure that the activities are necessary for the proper performance by ASIS of its statutory functions; nothing is done beyond what is necessary to perform that function, and that the nature and consequences of that activity are reasonable.

- *The requirement for the Minister to be satisfied that the Australian person or class of Australian persons is, or is likely to be, involved in one or more of the activities set out in subsection 9(1A)* – for example, a significant risk to a person's safety, and activities that are or are likely to be a threat to security.

- *Independent oversight* by the Inspector-General of Intelligence and Security of the legality and propriety of ASIS's activities.

6. Further matters in the evidence of the Inspector-General of Intelligence of Security

The IGIS gave evidence on a number of additional matters in her submission to, and appearance before, the Committee. AGD provides the following comments on key issues.

Duration of Defence Minister's request for, and Attorney-General's agreement to, Ministerial authorisations – absence of fixed maximum period

IGIS evidence

As the IGIS noted, the Defence Minister must specifically request an authorisation from the Foreign Minister for ASIS to undertake activities to support the ADF in a military operation. There is no fixed time limit on the duration of such a request made by the Defence Minister, but the grounds for authorisation are taken to cease if the Defence Minister withdraws the request, or if the ADF is no longer engaged in any military operations to which the request for authorisation related.

The IGIS suggested that the length of a request could potentially extend for many years, and has indicated she would expect agencies to brief the Defence Minister periodically about such operations, so as to provide him or her with a regular opportunity to consider whether the request should be withdrawn.[15]

Similarly, the IGIS noted that there is no fixed maximum period of duration applying to the Attorney-General's class agreements issued in accordance with paragraph 9(1A)(b). The IGIS noted that it will be important for the Attorney-General to be periodically briefed on

15 IGIS, *Submission 12*, p. 5.

operations conducted in reliance on a class agreement, to ensure that the Attorney-General is in a position to consider the ongoing appropriateness of the agreement, including consideration of whether it should be terminated.[16]

AGD comments

AGD agrees that it would be appropriate, in the administration of the provisions, for the Defence Minister to be periodically briefed and be provided with an opportunity to consider whether the request should remain in force.

Identical comments apply to the Attorney-General's class agreements under paragraph 9(1A)(b) (as proposed to be amended) and proposed subsections 9(1AA)-9(1AC). In addition, it is open to the Attorney-General to impose a maximum duration on individual class agreements, if desired under proposed paragraph 9(1AB)(b). Any advice that ASIO may provide to the Attorney about whether a class agreement should be time limited would be subject to the oversight of the IGIS.

Further, a Ministerial authorisation issued by the Foreign Minister for ASIS to assist the ADF in support of a military operation is limited to six months. In practice, before such an authorisation would be renewed, there would be appropriate consultation with Defence and ASIO and consideration of whether it is appropriate to continue relying on a request that may have been made, or an agreement that may have been provided, some time ago. We understand that the current ASIS practice when renewing a 'threat to security' Ministerial authorisation in respect of an individual Australian person is to also seek the further agreement of the Attorney-General prior to the renewal.

Emergency authorisations by oral means – limited to Ministerial authorisations

IGIS evidence

The IGIS gave evidence at the Committee's hearing of her understanding that the proposed ability to issue emergency oral authorisations is limited to emergency Ministerial authorisations. Some Committee members expressed concern that this may not be evident on the face of the proposed provisions.

AGD comments

AGD confirms that the ability to issue emergency authorisations via oral means (with a requirement to make a written record of that decision) is limited to emergency Ministerial authorisations issued under proposed new section 9A. Any emergency authorisations issued by agency heads under proposed section 9B must be in writing.

This is given effect by proposed subsection 9A(2) (which specifically provides that a Minister specified in proposed subsection 9A(3) may issue an emergency authorisation orally), and proposed subsection 9B(3)(b) (which relevantly provides that an emergency

16 IGIS, *Submission 12*, p. 5.

authorisation given by an agency head is subject to the requirements of proposed subsection 9(4A), which provides that an authorisation must be issued in writing).

Possible reporting function – issuing of emergency authorisations by agency heads

IGIS evidence

In the course of the IGIS's evidence to the Committee at the hearing on 13 November, some Committee members commented on the possible inclusion of a specific reporting requirement (potentially via public, annual reports) in relation to emergency authorisations issued by agency heads under section 9B.

AGD comments

A number of reporting requirements already apply to emergency authorisations. These include notification requirements to the responsible Minister and the IGIS in relation to the issuing of emergency authorisations. They also include agencies' annual reporting requirements, which must include details of agencies' activities in the reporting period. The IGIS's inspection activities are also subject to reporting requirements under the *Inspector-General of Intelligence and Security Act 1986*.

Consistent with the established practice taken to the tabling in Parliament of agencies' unclassified annual reports, a public reporting function about the number or other details of emergency authorisations issued under proposed section 9B would not be consistent with security requirements. Such information could enable the existence of certain operations or activities to be deduced.

7. Response to additional issues in submissions to the Inquiry

The submissions received by the Committee raised a number of issues, some of which indicated misunderstandings of provisions of the IS Act. To assist the Committee in its consideration of these matters, AGD provides the comments below on key issues including:

- ***Emergency Ministerial authorisations*** – suggestions to define certain terms; criticism of the ability of Ministers to issue emergency authorisations via oral means; and criticisms of the maximum time limit within which written records must be made of such authorisations; and

- ***ASIS's functions and related measures***: incorrect suggestions that the proposed amendments could enable ASIS to assist the ADF in domestic activities; commentary on intelligence-sharing arrangements with foreign partners; and the way in which privacy impacts are taken into account in Ministerial authorisation decisions.

Emergency Ministerial authorisations

Possible additional definitions – emergency authorisations

Submissions

Some submitters to the inquiry have expressed concern about a perceived lack of precision in certain terms (namely 'emergency' and 'readily available or contactable'), and suggested that the Bill should define them.[17]

AGD response

'Emergency'

Some submitters noted that the term 'emergency' is not defined or subject to specific statutory criteria, and expressed concern that it may involve a purely subjective assessment and could be 'self-defined' by an agency head.[18]

This term is not specifically defined in the Bill because it is capable of bearing its ordinary meaning,[19] having regard to the context in which it is used in particular provisions. In particular, there are different considerations depending upon whether the relevant decision is an emergency Ministerial authorisation (under proposed section 9A) or an emergency authorisation issued by an agency head, if the agency head is satisfied that no relevant Ministers are readily available or contactable (under proposed section 9B).

Where a Minister is called upon to make an emergency Ministerial authorisation under section 9A, the Minister must be independently satisfied it is appropriate to proceed on an emergency basis. This is an appropriate judgment for a Minister to make, in the circumstances of a particular case. The Minister can have regard to, but is not bound to accept, the assessment of an agency head, in requesting an emergency authorisation, that there is an emergency situation in which the agency head considers it necessary or desirable to undertake an activity or activities that require Ministerial authorisation.

In the case of emergency agency head authorisations (where all relevant Ministers are not readily available or contactable), there are additional requirements which limit the type of emergency for which such an authorisation can be provided by requiring that the agency head must be satisfied that none of the Ministers specified in subsection 9A(3) are readily available or contactable, and of the matters set out in subsection 9A(2). The matters in subsection 9A(1) are that:

- the facts of the case would justify the relevant responsible Minister issuing an authorisation, because the conditions in subsections 9(1) and 9(1A) are met;

17 Greg Carne, *Submission 4*, p. 9, 10-11; Bruce Baer Arnold, *Submission 9*, p. 3; Dr AJ Wood, *Submission 11*, p. 2.

18 Greg Carne, *Submission 4*, p. 9, 10-11; Dr AJ Wood, *Submission 11*, p. 2.

19 For example, the Macquarie Dictionary (6th Edition, October 2013) defines 'emergency' as an unforeseen occurrence; a sudden and urgent occasion for action.

- the responsible Minister would have given the authorisation; and
- if the activity or series of activities is not undertaken before an authorisation is given under section 9 or 9A, 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.

These requirements, particularly the limitation of section 9B to cases involving a risk of serious prejudice to security or risk to a person's safety, mean that the legislation has already made a policy judgment about what constitutes an emergency. The agency head is required to apply the relevant criteria in subsection 9B(2) to particular cases. If the criteria are satisfied, there is deemed to exist an emergency, as a matter of law, for the purpose of proposed section 9B.

'Not readily available or contactable'

One submitter commented that the term 'not readily available or contactable' should be defined.[20]

However, whether or not a Minister is readily available or contactable is a question of fact, to be ascertained in the circumstances of individual cases. This will allow agency heads to have regard to all relevant considerations in particular cases, including the urgency of the relevant matter. (For example, the estimated window of time in which the relevant activities must be carried out, in order for intelligence to be collected.)

In cases of extreme urgency, it may be that one phone call is a sufficient basis on which an agency head is satisfied a Minister is not readily available or contactable. (Or potentially no phone calls if the location of the Minister, and the fact he or she cannot be contacted, is already known with certainty – for instance, the Minister is on a plane and as a result will not be readily contactable for the duration of the flight, which may be known to be four hours.) By contrast where there is more time further efforts might need to be demonstrated.

The actions of an agency head to arrive at this conclusion are subject to the independent oversight of the IGIS. The responsible Minister must also be informed of the issuing of an emergency authorisation by an agency head, as soon as practicable, and no later than 48 hours after issuing. The responsible Minister is under a positive obligation to consider whether to terminate the authorisation, and could choose to do so if he or she is of the view that the agency head did not have a reasonable basis on which to be satisfied that none of the relevant Ministers were readily available or contactable, with the result that the decision should have been made Ministerially. The responsible Minister could, if desired, make a Ministerial authorisation under section 9 or 9A. In the event that a Minister decided to cancel an authorisation, the Minister could also direct that any intelligence collected in reliance on the authorisation is not to be communicated outside the agency or retained by the agency.

20 Bruce Baer Arnold, *Submission 9*, p. 3.

Oral emergency Ministerial authorisations

Submissions

Some submitters to the inquiry queried the need for oral authorisation provisions[21] and expressed concern about the time limits for making written records of those authorisations.[22]

AGD response

Need for the ability to issue emergency authorisations by oral means

As noted in AGD's submission to the inquiry,[23] the proposed amendments to enable oral emergency Ministerial authorisations would provide for appropriate operational flexibility in the circumstances in which a Minister is called upon to make an emergency authorisation. (As noted above, oral authorisations would not be available in the rare case of agency head authorisations – by virtue of proposed paragraph 9B(3)(b) and proposed new subsection 9(4A) to be inserted by amending Item 17 of Schedule 2 to the Bill.)

Despite the availability of instantaneous, or close to instantaneous, forms of written communication by electronic means, circumstances may still arise in which it is not possible or practicable for a Minister to issue an emergency authorisation by those means. This may occur, for example, if the authorising Minister is only contactable by telephone or videoconference by reason of his or her remote location. It might also occur if the circumstances are of such urgency that the time required for an authorisation to be drafted may mean that the opportunity to conduct the relevant activity is lost or compromised.

In AGD's view, it is appropriate that the legislative framework for the issuing of emergency authorisations should accommodate this possibility, given the potentially serious, adverse consequences that may arise if an IS Act agency misses an opportunity to collect vital intelligence as a result of the delay occasioned by a form requirement.

While oral authorisations would be new for the Ministerial authorisation scheme in the IS Act, there is precedent for emergency authorisations to be issued via oral means in a number of other provisions authorising the issuing of warrants and authorisations for security and law enforcement purposes (including search, telecommunications interception and surveillance warrants, and for authorisations issued by the Attorney-General enabling ASIO to conduct special intelligence operations under the ASIO Act).[24]

AGD notes that one submitter suggested that references to the existence of these other emergency issuing or authorisation provisions elsewhere in Commonwealth legislation is "disingenuous". It was commented that it does not make oral authorisations good policy, but rather represents a problematic trend that unduly prioritises administrative convenience.[25]

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21 Bruce Baer Arnold, *Submission 9,* pp. 3-5.

22 Senator David Leyonhjelm, *Submission 15,* p. 4.

23 Attorney-General's Department, *Submission 5*, pp. 19-20.

24 Further detail is provided in AGD's submission, *Submission 5*, p. 19.

25 Bruce Baer Arnold, *Submission 9,* pp. 4-5.

However, the material point is that these examples indicate a recognition, in the security context, that urgent circumstances can arise which necessitate oral authorisations, notwithstanding the availability of instantaneous forms of written communication.

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

Time limits for making written records of oral authorisation decisions

One submitter[26] commented on the time limits for making written records of oral authorisation decisions, and suggested that the requirement that a written record must be made no later than 48 hours is too great of a "lag" and could allow for the "fudging" of records.

It is not correct to suggest that agency heads can make a written record at any time within 48 hours of an oral emergency authorisation being issued. Rather, they must do so as soon as practicable after issuing, and no later than 48 hours. As such, 48 hours is the absolute latest.

As noted in the Explanatory Memorandum to the Bill, the phrase 'as soon as practicable' denotes an intention that records must be made as soon as possible, unless the first (or subsequent) available opportunity is not feasible or viable in the circumstances of the particular case. (For example, if making a written record at a particular point in time would involve a significant opportunity cost – such as diverting operational resources from undertaking the relevant activities in accordance with the emergency authorisation.)

The absolute latest time of 48 hours after the emergency authorisation is issued orally is deliberately aligned with the maximum duration of these authorisations. This accommodates the 'worst case' scenario, in which it may not be practicable to record the authorisation while the relevant activity is being undertaken – for example, because it would require the diversion of resources from undertaking that activity.

However, this would be extremely rare. The longer the delay, the more compelling evidence would be needed to show that the record was made as soon as practicable, and evidence of steps taken to ensure that the record was accurate. These matters would be subject to oversight by the IGIS.

26 Senator David Leyonhjelm, *Submission 15*, p. 4.

ASIS's functions and related measures

Scope of 'military operations' and whether it applies to domestic ADF activities

Submissions

One submitter to the inquiry expressed concern about the term 'military operations' not being defined, and suggested that it could extend to domestic activities of the ADF, noting the examples of Defence call-out and training activities.[27]

AGD response

The term 'military operations' does not need to be specifically defined for the purpose of the IS Act because it is capable of taking its ordinary meaning (namely, the conduct of a campaign by the armed forces of a State).

Importantly, it is further limited by several requirements in the IS Act. In particular, the military operations to which ASIS can provide support under the IS Act are limited by the requirement that the Defence Minister must request the assistance of ASIS, in writing, in relation to a particular military operation.

The Foreign Minister must consider making (and if appropriate make) an authorisation in respect of the particular military operation specified in the Defence Minister's request. This means that the Foreign Minister must be satisfied that all of the issuing criteria in section 9 are met, in relation to the particular military operation identified by the Defence Minister. These include:

- under subsection 9(1), that the Foreign Minister is satisfied that 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
- under subsection 9(1A), that the Foreign Minister is satisfied that the Australian or class of Australians in relation to whom the authorisation is sought are engaged in or are likely to engage in certain activities – including threats to security, certain kinds of serious crime, activities that present a significant risk to a person's safety, or acting for or on behalf of a foreign power.

In addition, the Attorney-General would need to agree to the authorisation on the basis that the Australian person or class of persons is, or are, involved in, or likely to be involved in, activities which are or are likely to be a threat to security.

These requirements – which mean that up to three Ministers are needed to obtain the necessary class authorisations – place appropriately significant limitations on the operation of the amendments.

27 Greg Carne, *Submission 4*, p. 7.

Further, as mentioned above, the proposed amendments need to be read subject to existing limitations in the IS Act. These include subsection 11(1), which provides that the "functions of the agencies 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." Subsection 11(2) further provides that IS Act agencies' functions do not include the carrying out of police functions, or any other responsibility for the enforcement of the law. Accordingly, in practice, these limitations would operate to exclude domestic operations undertaken by the ADF that pertain to domestic security issues (in the nature of Defence call-out or training exercises).

Intelligence-sharing by ASIS with foreign partners

Submissions

One submitter suggested the amendments could enable the sharing of intelligence with "friendly foreign states", including for the purposes of targeted killings. It was suggested there should be express limitations on the sharing of intelligence collected in the performance of the new function (namely, to locating Australians participating in foreign conflicts, with a view to charging them with terrorism or other serious offences).[28]

AGD response

The Department has addressed the 'targeted killings' issue above. The proposed new function only applies to support to the ADF following a request from the Defence Minister. Any support to foreign authorities could only arise in the context of support to the ADF.

In relation to other sharing of intelligence, it is important to note that cooperation with other agencies, including through the sharing of intelligence, is governed and limited by section 13 of the IS Act. Section 13 requires that the agency must have been approved by the Minister as capable of assisting the agency in the performance of its functions. In addition, an IS Act agency may only cooperate so far as is necessary to perform its functions, or so far as facilitates the performance by the agency of its functions.

Further, the communication of information concerning an Australian person can only be done in accordance with Privacy Rules made by the Minister under section 15. In making these rules, the Minister is required to have regard to the need to ensure that the privacy of Australian persons is preserved as far as is consistent with the proper performance by the agencies of their functions.

It would not be necessary or appropriate to place further limitations on the circumstances in which intelligence can be shared, to the existing requirements under section 13 of the IS Act. This is because section 13 deals comprehensively with intelligence-sharing arrangements. In particular, section 13 provides that an IS Act agency can, subject to any arrangements or directions given by the responsible Minister, cooperate with foreign authorities as approved

28 NSW Council for Civil Liberties & the Muslim Legal Network (NSW), *Submission 7*, pp. 15-16

in writing by the responsible Minister, so far as is necessary for the agency to perform its functions, or as facilitates the performance by the agency of its functions.

In addition, ASIS cannot cooperate with an authority of another country in planning or undertaking activities that involve paramilitary activities, violence against the person, or the use of weapons[29], unless the Minister consults with the Prime Minister and the Attorney-General.

Consideration of privacy impacts in Ministerial authorisation decisions

Submissions

One submitter commented that the emergency authorisation requirements fail to make adequate provision for privacy protections. It was suggested this was because there is no express requirement to have regard to the privacy impact of a proposed activity, and because agency head authorisation is inconsistent with the principle that the higher the impact on privacy, the higher the level of officer who should be required to make a decision.[30]

AGD response

In the Department's view, it is incorrect to suggest that the emergency authorisation provisions pay no regard, or insufficient regard, to the consideration of privacy impacts. They import the authorisation criteria in subsection 9(1), which require satisfaction that activities done in reliance on the authorisation will be necessary for the agency's proper performance of its functions; that nothing will be done beyond what is necessary for that purpose; and that the nature and consequences of the activities will be reasonable. Privacy impacts are a relevant consideration in this assessment.

In addition, agencies are required to comply with Privacy Rules made under section 15 in relation to the communication and retention of intelligence information concerning Australian persons .In relation to the level of decision-maker, the emergency agency head authorisation provisions in proposed section 9B are designed to be contingency arrangements in those rare and exceptional cases in which no relevant Ministers are available or contactable, and there is a pressing need to collect intelligence. They are not designed to abrogate the general rule that authorisation decisions should be made, in the vast majority of cases, by Ministers. In addition, an agency head is still a very senior official, and therefore not inconsistent with the need to ensure that activities which can potentially impact significantly on privacy must be authorised at a senior level.

29 As noted above, ASIS is prohibited in planning or undertaking these activities themselves under subsection 6(4) of the IS Act. However, as indicated in Note 1 to subsection 6(4), this does not preclude those agencies which ASIS is supporting from engaging in such activities, if permitted. (For example, the ADF, in accordance with international law.)

30 NSW Council for Civil Liberties & the Muslim Legal Network (NSW), *Submission 7*, p. 13.