UNCLASSIFIED

Second supplementary submission
Attorney-General's Department

Parliamentary Joint Committee on Intelligence and Security
Inquiry into the
Counter-Terrorism Legislation Amendment Bill (No 1) 2014:

Schedule 2 – Intelligence Services Act 2001

November 2014

Contents

Introduction

The Attorney-General's Department (AGD) provides this second supplementary submission to the Committee's inquiry into the provisions of Schedule 2 to the Counter-Terrorism Legislation Amendment Bill (No 1), 2014 (Bill) containing proposed amendments to the *Intelligence Services Act 2001* (IS Act).

This submission addresses comments and recommendations in the submission of the Law Council of Australia (Submission 16) on the proposed amendments in Schedule 2 to the Bill. AGD was unable to address these matters in its first supplementary submission of 14 November, due to the publication of Submission 16 after finalisation of the content in AGD's first supplementary submission. AGD has consulted with relevant intelligence agencies in the preparation of this submission, namely the Australian Secret Intelligence Service (ASIS), the Australian Geospatial-Intelligence Organisation (AGO), the Australian Signals Directorate (ASD) and the Australian Security Intelligence Organisation (ASIO).

Outline of submission

This submission is divided into two parts, summarised as follows.

Part 1 – Functions of ASIS – ADF assistance

Part 1 responds to comments on the proposed amendments to the functions of ASIS to provide assistance to the Australian Defence Force (ADF) in support of military operations. It responds, in particular to the following:

- ***Torture, cruel, inhuman or degrading treatment:*** a suggestion that the IS Act could permit ASIS to engage in or facilitate torture, cruel, inhuman or degrading treatment in the absence of an express exclusion, and a recommendation for such an express exclusion.
- ***Class authorisations:*** a suggestion that a class of Australian persons could be defined by reference to persons' religious, political or ideological beliefs, membership of an association, presence in a location or ethnicity, as well as engagement in an activity, therefore "shifting the focus from a person's conduct to his or her associations", and "disproportionately affect[ing] certain sections of the population who, simply because of their familial, community, ethnic, religious connections or geographical location, may be exposed to intrusive investigative techniques". The following recommendations were made to address this concern:
  - removal of the class authorisation scheme from the Bill; or
  - a specific definition of the classes of persons in relation to which an authorisation may be granted, and what activities can be authorised; and
  - oversight-related measures, including a dedicated statutory review function by the Independent National Security Legislation Monitor (INSLM) in relation to class authorisations, and supplementation of the annual budget of the Inspector-General of Intelligence and Security (IGIS).

Part 2 – emergency authorisations

Part 2 responds to comments on the proposed amendments to the emergency authorisation provisions in the IS Act, which apply to activities undertaken by ASIS, AGO and ASD. In particular, it addresses the following issues:

- ***Oral emergency Ministerial authorisations:*** a suggestion that oral emergency Ministerial authorisations should be subject to additional requirements, largely on the basis of a misconception that the threshold for the issuing of emergency authorisations is 'low'.
- ***Statutory thresholds for emergency Ministerial authorisations:*** a suggestion that additional requirements should apply to the issuing of emergency Ministerial authorisations, based largely around the concept of an imminent risk to safety or security.

- ***Emergency authorisations by agency heads***: a suggestion that agency heads should not have any role in issuing emergency authorisations where the relevant Ministers in subsection 9A(3) are not readily available or contactable, and the Bill should instead provide for a larger pool of senior Cabinet Ministers to issue emergency authorisations.
- ***Meaning of terms:*** a suggestion that the Bill or the Explanatory Memorandum should explain the meaning of the term 'not readily available or contactable', or outline situations in which a Minister would be considered 'not readily available or contactable'; and a suggestion that the Bill should define the types of activities that can be approved in an emergency situation.
- ***Agreement to emergency authorisations by the Director-General of Security:*** a suggestion that another senior Cabinet Minister should be called upon to provide an agreement to the issuing of an emergency authorisation involving activities that are, or are likely to be a threat to security, in the event that the Attorney-General is not readily available or contactable.

Part 1: ASIS functions, class authorisations and class agreements

Torture, cruel, inhuman or degrading treatment

Submission

The Law Council submitted that the Bill should include a provision that expressly prohibits ASIS from engaging in conduct constituting torture, or other cruel, inhuman or degrading treatment or punishment. It was said that this is necessary to address what the Law Council considers to be an ambiguity in the IS Act which may mean that, in the absence of an express prohibition, ASIS may technically be able to be authorised to engage in, or facilitate, such conduct, by reason of the immunity from legal liability in section 14 of the IS Act. It was further said that the existing requirements and limitations in the IS Act – in relation to the Ministerial authorisation of activities, and the prohibition on ASIS from engaging in paramilitary activities and the use of violence against persons – did not provide adequate assurance.[1]

AGD response

AGD and agencies do not agree that there is any such ambiguity. Nor do AGD or the agencies agree with the suggestion the absence of an express prohibition in the IS Act means that ASIS, or potentially any IS Act agency, could lawfully engage in conduct constituting torture, or other cruel, inhuman or degrading treatment or punishment in the course of performing their statutory functions.

Paragraph 6(4)(b) of the IS Act prohibits ASIS from engaging in activities involving the use of violence against persons. The concept of violence is, according to its ordinary

1 Law Council of Australia, *Submission 16*, p. 17.

meaning, not limited to physical violence or physical injury, and therefore encompasses conduct constituting torture, or other cruel, inhuman or degrading treatment or punishment.

In addition, the statutory functions of all IS Act agencies are expressly limited by section 12 of the IS Act to undertaking those activities which are necessary for the proper performance by the agency of its statutory functions, or those which are authorised or required by or under another Act.

Similarly, to issue a Ministerial authorisation under subsection 9(1), the authorising Minister must be satisfied that the activity is necessary for the proper performance by the agency of its statutory functions, that there are satisfactory arrangements in place to ensure that nothing will be done beyond this, and that acts done in reliance on the authorisation are reasonable.

Further, the immunity from legal liability in section 14 applies only to actions undertaken by an IS Act staff member or agent for the proper performance by that IS Act agency of its statutory functions (with the IGIS able to issue a prima facie evidentiary certificate as to whether an action was undertaken in the proper performance of an agency's functions).

Any suggestion that an IS Act agency could be authorised by their responsible Minister to engage in conduct constituting torture, or other cruel, inhuman or degrading treatment or punishment (and subject to immunity from legal liability) appears to assume that such conduct could reasonably be regarded as necessary (that is, essential) for an IS Act agency to perform its statutory functions, and proper for an agency to do so. AGD and agencies reject this suggestion in the strongest possible terms. No Australian official or agency is authorised to engage in conduct in contravention of Australia's international obligations. There is no sensible legal basis on which to read the functions of agencies as properly requiring them to engage in conduct constituting torture, cruel, inhuman or degrading treatment. Nor is there any sensible legal basis on which to read the provisions of the IS Act as empowering a Minister to authorise an agency to engage in such conduct, on the basis it is necessary for the proper performance of that agency's functions.

While consideration could be given to an express exclusion along the lines of the Law Council's suggestion, AGD recommends that significant caution should be applied to such a practice. In particular, an amendment to this effect could raise an undesirable precedent of writing into statute express prohibitions on conduct that violates any, or all, of Australia's international obligations, notwithstanding that there is presently no legal basis upon which such conduct could be undertaken.

In addition to being legally unnecessary, such a practice may have unintended, adverse consequences for the interpretation of all Australian legislation that confers powers, duties or obligations, and may serve to undermine, rather than enhance, the general application of the principle of legality in statutory interpretation.

Class authorisations and agreements

Need for class authorisations and agreements

Submission

The Law Council submitted that "the Explanatory Memorandum to the Bill does not appear to explain why a broad class authorisation is specifically required".[2]

AGD response

Further to the classified briefings provided to the Committee by relevant agencies, AGD refers the Committee to the commentary in its public submission to the inquiry, and that of ASIS.

AGD submission (submission 5) at pp. 16 and 17:

> Further, the proposed amendments will streamline the arrangements for the issuing of authorisations in respect of Australian persons, where the relevant activities are undertaken for the purpose of ASIS providing support to, or cooperating with, the ADF. Currently, the combined effect of subsection 8(1) and paragraph 9(1A)(a) is that Ministerial authorisations must be issued in respect of an individual Australian person. There is no ability to issue an authorisation in respect of classes of Australian persons, such as Australians who are, or who are suspected of, fighting with or otherwise providing support to the Islamic State terrorist organisation in Iraq. This means that multiple, simultaneous Ministerial authorisations would need to be sought and issued on identical grounds; or that Ministerial authorisations would be unable to be issued because a particular Australian person fighting with that organisation was not known in advance of the commencement of operations. [At p. 16.]
>
> ***
>
> Presently, the Attorney-General may only provide his or her agreement to the issuing of an authorisation in respect of the activities of an individual Australian person.13 As with the issuing of Ministerial authorisations, this means that the Attorney-General would be required to provide multiple, simultaneous agreements on identical grounds. For example, as individual Australians are identified as known or suspected to be fighting with the Islamic State terrorist organisation in Iraq, agreement from the Attorney-General needs to be obtained on an individual basis to one or more authorisations for each individual even though the basis in each case is the same.
>
> This places a significant limit on the ability of the ISA agencies and in particular ASIS to be nimble in responding to ADF operational requirements in Iraq, including in time critical circumstances. [At p. 17.]

ASIS submission (submission 17) at p. 3:

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

2 Law Council of Australia, *Submission 16*, p. 18.

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

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

Definition of classes of persons who may be the subject of an authorisation

Submission

The Law Council submitted that there are insufficient limitations on the exercise of the proposed class authorisation power, on the basis that a class of Australian persons could potentially include all persons:

- adhering to a certain religious belief;
- adhering to a certain political or ideological belief;
- who are a member of a particular organisation;
- who are engaging in a certain activity;
- who are present within a certain location; or
- who have a certain ethnic background.

The Law Council acknowledged the limitations imposed by proposed paragraph 9(1)(d) (Defence Minister's request for ASIS to provide assistance to the ADF in support of a military operation) and paragraph 9(1A)(a) (limitation on authorisations to Australian persons engaged in, or likely to be engaged in, specified types of activities). However, it suggested that the class authorisation provisions may nonetheless result in "shifting the focus from a person's conduct to his or her associations". The Law Council also suggested that the rule of law (including natural justice obligations) requires Ministerial authorisations to be based on the threat posed by an individual, rather than a class of individuals.[3]

AGD response

As noted in AGD's first supplementary submission, and in the evidence of witnesses attending the public hearing on 13 November, the authorisation provisions in the IS Act are not capable of allowing ASIS to undertake activities in relation to Australian persons

3 Law Council of Australia, *Submission 16*, pp. 19-20.

solely on the basis of their membership of a group, or their personal attributes such as religion, political or ideological persuasion, race or ethnicity, or their mere presence in a particular location. Rather, a class of persons is defined solely by reference to a person's engagement in, or likely engagement in, a specified activity of a type listed in paragraph 9(1A)(a). The Foreign Minister can only issue an authorisation if satisfied that the activity in which the class of persons is engaged is of a type specified in paragraph 9(1A)(a). The personal characteristics or persuasions of an individual or a group of individuals possessing those characteristics could not satisfy the requirements of paragraph 9(1A)(a) because they are not activities, let alone activities of a kind required by the provision. Further, to the extent that a person's physical presence in an overseas location might be said to be an 'activity', it would not be capable of being characterised as an activity of a type in paragraph 9(1A)(a), since a person's mere presence does not constitute a threat to safety or security, nor constitute any of the contraventions or types of serious crimes specified in the provision.[4]

Further, in order to undertake activities in reliance on a class authorisation, ASIS must be satisfied that each individual in relation to whom activities are to be undertaken is a member of the class specified in the authorisation. ASIS's decision-making is subject to the independent oversight of the IGIS, who has conveyed an expectation that ASIS will have appropriate systems and record-keeping arrangements in relation to such decision-making.[5] ASIS must similarly provide reports to the Foreign Minister on activities undertaken in reliance on a class authorisation as soon as practicable within three months of the authorisation ceasing to have effect, or being renewed, beyond the six-month period of effect. If the Foreign Minister were to disagree with ASIS's decision about a person's inclusion within a class (potentially on any findings or recommendations of the IGIS) he or she could issue directions to ASIS in relation to the use and retention of any intelligence collected (for example, to destroy it). AGD and agencies concur with the remarks of the IGIS in her submission to the Committee that the proposed reporting requirement "is consistent with the current regime and will provide the Foreign Minister with a regular opportunity to consider the effect and appropriateness of any class authorisations".[6]

---

4 Committee members asked AGD and ASIO witnesses to comment on the interaction of the 'security' ground of the activity test in subparagraph 9(1A)(iii) with the new 'declared area' offence in new Part 5.5 of the Criminal Code 1995 (namely, whether a person's presence in a declared area could satisfy the security ground, with the result that a class authorisation could be issued in relation to Australian persons present in a declared area). As witnesses at the hearing indicated, mere presence would not satisfy the definition of 'security' for the purpose of subsection 9(1A) of the IS Act (which is defined by reference to the meaning of that term in section 4 of the ASIO Act). This is because the elements of the declared area offence require significantly more than a person's mere presence in a location. Further, while the concept of 'security' under the ASIO Act covers offences against the new Part 5.5 of the Criminal Code (as part of the concept of 'politically motivated violence'), the term applies to activities that give rise to a need to protect the Commonwealth, States and Territories and their people from such activities. Mere presence in a location does not satisfy this requirement.

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

6 IGIS, *Submission 12*, pp. 4-5.

A person who is not engaged in the activity or activities specified by the Minister in a class authorisation issued under section 9 is not, by definition, in the class of persons authorised by the Minister. If ASIS attempted to undertake an activity in relation to such a person, in purported reliance on a class authorisation, it would have no legal basis on which to do so, with the result that its activities may be subject to legal liability as well as administrative accountability. Similarly, if a Minister purported to issue an authorisation that applied to persons engaged in activities that are not of the kind listed in paragraph 9(1A)(a), that authorisation would be invalid, and any activities undertaken by ASIS in reliance upon it would be subject to legal liability.

A further, important safeguard to the proposed class authorisation amendments is the involvement of the Defence Minister (in requesting the authorisation, including the class of persons to which it relates) and the Attorney-General (in providing agreement to the authorisation, which in the context of providing support to the ADF in military operations, will invariably enliven the requirements in paragraph 9(1A)(b) that the Attorney-General's agreement be sought and obtained). This means that three Ministers will scrutinise and make decisions in relation to the class of persons who are the subject of a proposed authorisation.

As further noted in AGD's first supplementary submission, the intention of the proposed amendments in relation to class authorisations is to apply identical requirements to the issuing of authorisations in relation to individual persons. Just as an authorisation cannot be issued in relation to an individual person in relation to his or her personal characteristics or attributes (such as religion or race), nor will a class authorisation be able to be issued on these grounds.

The inclusion of additional requirements in relation to the authorisation of classes of persons – such as specific activities in which persons in the class must be engaged, or membership of a particular entity, or a specific legal status (such as unlawful enemy combatants) – would have significant, adverse consequences. Specifying limited activities in which a class must be engaged (thereby narrowing the application of the types of activities in paragraph 9(1A)(a) in relation to classes of persons) would produce an arbitrary distinction between activities that could be the subject of multiple, simultaneous authorisations for individuals, and a single authorisation for a class of persons. Further, defining a class by reference to membership of, or involvement with, particular entities or types of entities would unacceptably compromise the covert nature of ASIS's covert operations. It would place these organisations on notice that they may be the target of such activities. As mentioned in AGD's first supplementary submission, requiring a class of persons to be defined by reference to the legal status of individuals would mean that authorisations turn on a technical, legal assessment, rather than the threat presented by the class of persons.

Similarly, AGD and agencies do not support the Law Council's suggestion that subsection 9(1A) be amended to explicitly limit the activities ASIS may undertake under a class authorisation. Such activities are appropriately specified by the authorising Minister in individual authorisations, within the limits of ASIS's statutory functions. In

addition to ensuring appropriate operational flexibility, it also preserves the necessarily covert nature of ASIS's activities and capabilities, which are the subject of oversight by the IGIS.

Oversight

Submission

The Law Council has submitted that the proposed class authorisation amendments should be brought within the mandate of the Independent National Security Legislation Monitor (INSLM), under the *Independent National Security Legislation Monitor Act 2010* (INSLM Act). The Law Council has also suggested that the IGIS's annual budget may require supplementation as a result of an increased workload in conducting oversight of class authorisations.[7]

AGD response

The 'counter-terrorism and national security legislation' within the statutory remit of the INSLM (as that term is defined in section 4 of the INSLM Act) does not include the IS Act. This reflects that the IS Act is not concerned solely with matters of counter-terrorism and national security. It would, however, be open to an INSLM to examine provisions of the IS Act – including the proposed amendments (if enacted) to the extent that they relate to Australia's counter-terrorism and national security legislation – in accordance with subparagraph 6(1)(a)(ii) of the INSLM Act. It would also be open to the Prime Minister, if considered appropriate in the future, to refer the provisions to the INSLM for inquiry and report.

AGD further notes that it is for the IGIS, under the *Inspector-General of Intelligence and Security Act 1986*, rather than the INSLM, to conduct oversight of the legality and propriety of agencies' activities undertaken in reliance on the proposed amendments, if enacted. AGD is satisfied that the proposed amendments will, if enacted, be subject to an appropriate degree of oversight without conferring upon the INSLM an additional statutory inquiry or oversight function.

AGD further notes that the Government has recently announced an increase to the IGIS's annual budget, and that it will continue to work with the IGIS to monitor the resourcing of her Office. The IGIS has not, to AGD's knowledge, identified a need for additional resources to conduct oversight of the proposed amendments, if enacted.

7 Law Council of Australia, *Submission 16*, pp. 20-21.

Part 2: emergency authorisations

Oral emergency Ministerial authorisations

Submission

The Law Council submitted that the oral emergency authorisation provisions in proposed new section 9A should be subject to additional requirements, in the nature of those applying to oral authorisations for controlled operations by law enforcement agencies in Part 1AB of the *Crimes Act 1914*. The following requirements were suggested:

- name of the relevant Minister who granted the authority;
- principal ISA agency officer who will be responsible for the activity or series of activities to be undertaken;
- identity of the person/s authorised to engage in the activity/activities;
- nature and purpose of the activity/activities to be undertaken (including any relevant suspected offences) that those participants may engage in;
- name of the person or persons targeted;
- conditions to which the conduct of the operation is subject; and
- date and time when the authority was granted.[8]

AGD response

While the IS Act does not expressly mandate such requirements in relation to ordinary or emergency authorisations, subject to some differences given the different nature of an authorisation to a controlled operation, to be effective most of these sorts of matters, in practice, need to be included in authorisations issued in writing. As such, they would also need to be included in written records of emergency Ministerial authorisations to demonstrate that the oral authorisation was validly issued under proposed new section 9A. An amendment expressly requiring these matters to be addressed would therefore not add anything to existing practice, and would be unnecessary, noting that the IGIS has commented that, in her experience, ASIS's records relating to Ministerial authorisations are of a good quality and she has not experienced any difficulty in accessing them.[9]

Statutory thresholds for emergency authorisations

Submission

The Law Council further submitted that emergency authorisations should be subject to higher statutory thresholds, in particular that emergency authorisations should be limited to those cases in which the authorising Minister is satisfied there is an imminent threat to safety or security, and that undertaking the relevant activities is immediately necessary for

8 Law Council of Australia, *Submission 16*, p. 23.

9 IGIS, *Submission 12*, pp. 5-6.

the purpose of dealing with that risk. It was argued that the existing emergency Ministerial authorisation requirements in section 9A import "a low threshold, which could potentially apply to almost all of ASIS's activities conducted overseas". It was said that this "does not accord with the characterisation of this power in the Explanatory Memorandum as reserved for 'extreme emergencies'."[10]

The requirements in existing section 9A, which are maintained in proposed new section 9A, are that:

(a) an emergency situation arises in which an agency head considers it necessary or desirable to undertake an activity or a series of activities; and

(b) a direction under subsection 8(1) requires the agency to obtain an authorisation under section 9 before undertaking that activity or series of activities; and

(c) the Minister referred to in the direction is not readily available or contactable.

If these requirements are satisfied, subsection 9A provides that any of the Prime Minister, the Defence Minister, the Foreign Affairs Minister or the Attorney-General may, subject to the requirements of section 9, issue an authorisation under that section in respect of that activity or series of activities.

AGD response

AGD and agencies disagree with the premise of the Law Council's suggested amendments, that the thresholds applying to emergency authorisations are 'low'. Not only must the relevant agency head be satisfied that there is an emergency situation, and that the relevant Minister responsible for that agency is not readily available or contactable, but the authorising Minister must also be satisfied that there is an emergency, and it is appropriate to proceed by way of an emergency authorisation. This is in addition to the satisfaction of the authorisation criteria in section 9. These requirements have been in force since 2005 and are not proposed to be amended by the Bill. It is suggested that the discretion of the agency head, and the issuing Minister, in applying the ordinary meaning of the term 'emergency'[11] is an adequate limitation on the availability and use of emergency authorisations, together with the independent oversight of the IGIS in relation to an agency head's application for an emergency authorisation, and actions undertaken in reliance on such an authorisation.

AGD and agencies further disagree with the suggestion that emergency authorisations should be limited only to those circumstances in which there is an 'imminent threat' to a person's safety, or to security. While these circumstances would be key examples of an emergency situation to which section 9A would apply, they are not the only instances in which an emergency may arise. An emergency may arise, for example, because there is a very limited opportunity for relevant intelligence to be collected, notwithstanding that the

10 Law Council of Australia, *Submission 16*, p. 23.

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

relevant intelligence does not relate (or relate exclusively) to a threat to safety or security. Accordingly, limiting section 9A to such circumstances would mean that there is no longer any lawful basis on which to collect intelligence, in circumstances of urgency, outside the limited types of emergency proposed by the Law Council.

Emergency authorisations by agency heads

Submission

The Law Council submitted that emergency authorisations should not be capable of being authorised by agency heads under any circumstances, and instead the pool of eligible Ministers in proposed subsection 9A(3) should be expanded to include senior Cabinet Ministers. It was said that this approach would allow for appropriate flexibility, while preserving an absolute requirement that authorisation decisions are exclusively Ministerial in all circumstances.

AGD response

AGD and agencies do not support the suggestion that proposed section 9B undermines the policy intention that authorisation decisions – including emergency authorisations – should be taken by Ministers. Rather, it provides for a contingency in the worst case (and extraordinary) scenario that, despite best endeavours to ensure Ministerial availability, no relevant Ministers are available or contactable, and there is an urgent need to collect intelligence. As such, proposed section 9B does not disturb the primacy of Ministerial decision-making, but rather is limited to providing for contingency arrangements in those circumstances in which there is currently no lawful basis for an IS Act agency to meet an urgent need for the collection of intelligence.

Consideration could be given to authorising a pool of 'senior Cabinet Ministers' who are able to consider and, if appropriate, issue emergency authorisations. However, as noted in AGD and agencies' evidence to the Committee, this raises two significant risks. First, the larger the pool of eligible Ministers, the greater the risk that an agency head may be required to devote more of his or her time, in circumstances of emergency, to attempting to contact a Minister, potentially at the expense of the request being considered and, if appropriate, an authorisation issued.

There is also an interest in ensuring that those issuing emergency authorisations possess the requisite awareness and understanding of security and intelligence matters, including visibility of the contemporary security environment and the conduct of intelligence operations, by reason of their portfolio responsibilities. This understanding ensures appropriate scrutiny of requests for authorisations, and their timely consideration in emergencies. As the Law Council observed in its submission, this was the intention of the 2005 reforms to the IS Act, which led to the inclusion in section 9A of provisions enabling any of the Prime Minister, Defence Minister, Foreign Minister and Attorney-General to issue an emergency authorisation, in the event that the Minister responsible for the relevant IS Act agency is not readily available or contactable.

Widening the pool of eligible Ministers in section 9A to senior Cabinet Ministers more generally may dilute this intent.

Proposed section 9B has sought to balance the interests in ensuring Ministerial responsibility for and control over authorisations, and the critical need for a lawful and timely basis on which IS Act agencies can undertake activities necessary to perform their functions, in circumstances of extreme urgency. Proposed section 9B has sought to strike this balance by enabling agency heads to issue authorisations in very limited circumstances and subject to strict legislative criteria. This ability is only available where no relevant Ministers are readily available or contactable, and is subject to obligations to notify the responsible Minister as soon as practicable within 48 hours of an authorisation being issued, and the IGIS within three days. The responsible Minister is under a positive obligation to consider whether to cancel the authorisation, and can issue directions to the agency head in relation to the use or retention of intelligence collected in reliance on an emergency authorisation issued under section 9B.

Meaning of the phrase 'not readily available or contactable' / limitation of activities able to be authorised in an emergency

Submission

The Law Council submitted that the Bill or the Explanatory Memorandum should provide greater guidance as to the meaning of the phrase 'not readily available or contactable', and specifically the "situations that would result in any of the four relevant Ministers – that is, the Prime Minister, the Minister for Foreign Affairs, the Minister for Defence or the Attorney-General – not being readily available or contactable." The Law Council commented, in particular, that "a Minister should not be considered 'not readily available or contactable' if he or she is in a Cabinet or other meeting which can be interrupted".[12]

The Law Council further submitted that "the types of activities that can be approved in an emergency situation should also be defined in the Bill".[13]

AGD response

Meaning of the phrase 'not readily available or contactable'

There is no ambiguity in the ordinary meaning of the phrase 'not readily available or contactable' that requires clarification in the Bill or its extrinsic materials.[14] The phrase has been in use since the insertion of section 9A in 2005, in relation to the Minister

12 Law Council of Australia, *Submission 16*, p. 25.

13 ibid.

14 For example, the Macquarie Dictionary (6th Edition, October 2013) defines the terms 'readily', 'available' and 'contactable' as follows: *readily* – "promptly, quickly, easily"; *available* – "suitable or ready for use; at hand; of use or service"; and *contactable* – "to initiate communication".

responsible for the relevant IS Act agency. AGD understands that no difficulties have arisen in its application or oversight to date.

AGD submits that it is preferable to leave the application of the ordinary meaning of the phrase to the judgment of agency heads, subject to Ministerial decision-making (under section 9A) and control (under proposed section 9B), and the independent oversight of the IGIS. This reflects that an assessment of whether a Minister is readily available or contactable will be highly fact-specific in individual cases. The agency head's assessment may turn, for example, on his or her assessment of the degree of urgency involved in particular circumstances – including the estimated period of time in which it is possible to collect the relevant intelligence, and any estimated period of time within which a security or another type of threat may eventuate if the intelligence was not collected or shared if required.

Types of activities able to be the subject of an emergency authorisation

Emergency authorisations must satisfy the requirements in subsections 9(1) and 9(1A). This includes the requirement in subsection 9(1A) that the authorisation must relate to an Australian person who is engaged in activities of a type specified in paragraph (a). Therefore, in AGD's view, there is already an adequate degree of particularity in the Bill.

To the extent that the Law Council may be suggesting that there should be a further limitation on the types of activities able to be issued under an emergency authorisation pursuant to section 9A (as proposed to be amended by the Bill) and proposed section 9B, AGD provides the following remarks in response.

Since the enactment of section 9A in 2005, emergency Ministerial authorisations can authorise an IS Act agency to engage in an activity, as specified in the authorisation, for the purpose of that agency performing one of its statutory functions. (This is provided that the relevant authorisation criteria are satisfied and the activity does not contravene any of the additional limitations in the IS Act – such as those in subsection 6(4) in relation to ASIS and sections 11 and 12 in relation ASIS, AGO and ASD.)

AGD submits that the appropriate limitations on an agency's activities – whether in circumstances of emergency or otherwise – are found in the authorisation criteria in section 9, together with the relevant agency's functions, and the express limitations in sections 11 and 12 of the IS Act. Imposing additional limitations on the specific activities able to be the subject of an emergency authorisation may unduly limit the agility of IS Act agencies to collect potentially vital intelligence in circumstances of emergency. It may also inappropriately reveal agencies capabilities and practices (noting that the IS Act deliberately does not prescribe particular activities agencies can undertake) as well as creating a risk that the provisions of the Act may not keep pace with technical developments in capability, or the changing security environment.

It is noted that proposed section 9B (emergency agency head authorisations) are further limited to those circumstances in which the relevant agency head is satisfied that, if an authorisation is not given, there is, or is likely to be, serious prejudice to security or risk to a person's safety. This is in recognition of the extraordinary nature of authorisations by

agency heads, and that authorisations should be issued by Ministers to the greatest possible extent (that is, unless none of the relevant Ministers are readily available or contactable, such that there would otherwise be no lawful basis on which to collect the intelligence).

Agreement to emergency authorisations by the Director-General of Security

Submission

The Law Council submitted that corresponding amendments should be made to proposed section 9C as to its suggested amendments to proposed section 9B, so that a Cabinet Minister could perform the role of the Attorney-General in providing agreement to the issuing of an emergency authorisation, where such agreement is required.[15]

AGD response

AGD and ASIO strongly oppose the suggestion that the role of the Attorney-General (and, in his or her absence, the proposed role of the Director-General of Security) should be performed by any other Minister. Such an arrangement would fail to take adequate account of the special role of the Attorney-General, by reason of his or her portfolio responsibility for ASIO. As noted in the submissions of ASIO and AGD to the inquiry, the Attorney-General's role in the IS Act ensures that appropriate consideration is given to security matters in decision-making about Ministerial authorisations. The involvement of the Attorney-General is due to his or her awareness and understanding of the security environment due to his or her portfolio responsibility for ASIO, including an awareness of how any proposed activity or activities may relate to or interact with any existing security operations being undertaken by ASIO. As this role arises due to the particular and special portfolio responsibilities of the Attorney-General, it is not one that can be readily transferred to any Minister, in the event that the Attorney-General is not readily available or contactable.

Accordingly, AGD and ASIO are of the view that, in the event that the Attorney-General is not readily available or contactable in circumstances of extreme urgency, the Director-General of Security is the next best person to provide agreement to the issuing of an authorisation, where such agreement is required. As head of ASIO, the Director-General possesses the necessary security expertise, and is under statutory obligations of independence and accountability to the Attorney-General as responsible Minister.

15 Law Council of Australia, *Submission 16*, pp. 24-25.