



**Submission No 219**

**Inquiry into potential reforms of National Security Legislation**

**Organisation: ASIS**

# National Security Legislation reform - Intelligence Services Act 2001 amendments relevant to ASIS

## Ministerial authorisation to enable cooperation in the performance of an ASIO function (ToR C18(b))

### The problem

- While the ISA agencies such as ASIS are primarily focused on foreign intelligence and ASIO is primarily focused on security intelligence the reality is that these functions will often intersect and overlap. It is in Australia's national interest that where this occurs Australia's foreign intelligence and security services are able to interact and work seamlessly together. It prevents unnecessary duplication of resources and important matters falling between the cracks.
- Experience with the different legislative regimes applying to the ISA agencies such as ASIS and ASIO has identified situations where ASIO could properly collect intelligence on an Australian person because it would be relevant to security, but ASIS cannot assist ASIO in collecting the intelligence. There are also situations where, even though ASIS can obtain an emergency ministerial authorisation under the current provisions of the ISA, the realities of operating in high threat areas mean that the opportunity to act quickly on the basis of that authorisation may have been lost.

### What we are seeking

- Agencies are seeking amendment of the ISA to ensure that the ISA agencies are better able to assist ASIO and to manage the risks of delay. The amendment is not intended to replicate ASIO's functions.
- Two alternatives have been raised.
- The proposal raised by the Inspector General of Intelligence and Security notes that a common standard applies to both the ISA agencies and ASIO in the form of the requirement for a warrant or other form of approval for particularly intrusive activities in Australia (eg. use of listening devices, tracking devices, interception of telecommunications etc). The IGIS proposal is that an equivalent common standard might be applied to such particularly intrusive activities involving the purpose of producing intelligence on an Australian person overseas.
- This is an elegant solution which would focus the approval regime on those activities which are most intrusive and which we believe would be most likely to be of concern for Australians. As it would be a common standard which applies to the ISA agencies and ASIO it would address the operational issues which currently arise where the agencies cooperate. It would also address the risk of delays due to the challenges in practice of arranging meetings in high threat situations.
- The second alternative is the proposed the amendment to section 13A set out in ToR C18(a). It was raised by ASIS as a means of addressing the problems we had identified, before the IGIS put forward her proposal. It is not as comprehensive as the IGIS proposal but would effectively address the problems. Some key differences between the proposals include that

the IGIS proposal would remove complexity from the interaction of the current regimes by applying a common standard, whereas the section 13A amendment has been developed as an extension of the existing regimes. Further, where the IGIS proposal effectively provides a comprehensive solution to the risks of unavoidable delays, the section 13A proposal essentially anticipates the situations where the risks of delay are likely to be greatest, but does not remove the risk entirely.

- The proposed section 13A amendment would enable the relevant Minister (the Minister for Foreign Affairs for ASIS and the Minister for Defence for DSD and DIGO) to authorise the production of intelligence on an Australian person or persons where the agency is cooperating with ASIO in the performance of an ASIO function. The objective is not to remove the requirement for the relevant Minister to authorise activities involving the production of intelligence on Australian persons but to add to the circumstances where such an authorisation can be given.
- The existing MA safeguards would continue to apply including:
  - The need for the Minister to be satisfied that:
    - any activities which may be done in reliance on the authorisation will be necessary for the proper performance of a function of the ISA agency;
    - there are satisfactory arrangements in place to ensure that nothing will be done beyond what is necessary for the proper performance of a function of the agency; and
    - there are satisfactory arrangements in place to ensure that the nature and consequences of acts done will be reasonable, having regard to the purposes for which they are carried out.
  - the restrictions imposed on the communication of intelligence concerning Australians by the privacy rules made under the ISA;
  - the requirement for all authorisations to be retained by the agency and available for inspection by the Inspector-General of Intelligence and Security.
- Where ASIS proposes to collect intelligence on an Australian person to assist ASIO with its functions, this would still need to be at the request of ASIO under either the IGIS or the section 13A approach.

### **New Ministerial Authorisation Ground in section 9 of the Intelligence Services Act 2001 (ToR C18(a))**

#### **The problem**

- ASIS is only able to collect intelligence on an Australian person where it is authorised by the Minister on one of the grounds in section 9(1A) of the ISA.

- The current Term of Reference and discussion paper describe the proposed amendment in very general terms. It can be more precisely described as an MA ground related to operational security.
- Operational security is about the protection of the integrity of ASIS operations from the risk of being undermined by foreign and non-State adversaries such as terrorist organisations, or reliance on inaccurate or false information. It is important to the protection of individuals, maintaining the effectiveness of ASIS and other Australian intelligence and security agencies, as well as protecting Australia's international reputation.
- Operational security is part of ASIS's counter intelligence function under section 6(1)(c) of the ISA.
- The grounds on which the Minister can authorise an ISA agency to produce intelligence on an Australian person do not include where an Australian person is or is likely to be involved in an activities that are or are likely to undermine operational security. This means that there are situations where ASIS is concerned about a threat to operational security involving an Australian person, but cannot seek ministerial authorisation to collect intelligence to properly assess that threat .

#### **What we are seeking**

- A new MA ground in section 9(1A) to enable the relevant Minister to authorise activities for the purpose of producing intelligence on an Australian person who as is or is likely to be involved in an activities that are or are likely to undermine ASIS operational security.

#### **Cooperation on self-defence and weapons training (ToR C18(c))**

##### **The problem**

- ASIS staff members and agents have been permitted to carry weapons in dangerous locations overseas (like Afghanistan) since 2004. The carriage of weapons by ASIS is strictly for defensive purposes in accordance with schedule two of the ISA.
- Under the current regime, ASIS is only permitted to provide training in the use of weapons to ASIS staff members and agents. This appears inconsistent with ASIS's ability to use weapons to protect others who are cooperating with ASIS in the performance of its functions under section 13. At a practical level, this inconsistency restricts joint training exercises with close allies.
- Such training is important as a lack of understanding poses a risk to ASIS staff members and to the persons whom ASIS is cooperating with.

##### **What we are seeking**

- This amendment will only allow ASIS to cooperatively train with a limited number of Australian agencies that have a lawful right to carry weapons in Australia, such as the ADF and the AFP, as well as to train and to train with a limited number of trusted foreign partners approved by the Foreign Minister under section 13(1)(c) and section 13(1A). In practice, this will be US, UK, Canadian and NZ agencies.
  
- Section 13(1A) provides for the Minister to approve ASIS cooperating with an authority of another country in planning or undertaking an activity that involves:
  - (a) paramilitary activities; or
  - (b) violence against the person; or
  - (c) the use of weapons.

The Foreign Minister must first consult with the Prime Minister and the Attorney-General before approving such cooperation. We would propose that section 13(1A) would also provide that extended cooperation involving training of staff from an authority of another country in self defence and weapons will also require that the Foreign Minister has first consulted with the Prime Minister and the Attorney-General.

- In addition to meeting the requirements of section 13(1A), a further Ministerial approval for training of specified staff members of the foreign agency will be required in accordance with Schedule 2 of the ISA. Under paragraph 4 of Schedule 2 the approval must specify
  - (a) the purpose for which the weapon or training is provided; and
  - (b) any conditions that must be complied with in relation to the provision of the weapon or training; and
  - (c) if the approval is for the provision of a weapon or training in the use of a weapon—the kind or class of weapon involved.
  
- Schedule 2 also includes the requirement for all Ministerial approvals for the provision of training to be provided to the IGIS who oversees the legality and propriety of the operations of the intelligence agencies.
  
- The proposed amendment is not intended to allow ASIS to provide weapons, or training in the use of weapons, to ASIO officers.