

Issues

- 2.1 The Intelligence Services Amendment Bill seeks to provide for the protection of ASIS staff members and agents by allowing:

ASIS to accept protection from other agencies, including armed protection to ASIS's staff members and agents. It would also allow ASIS's staff members and agents to defend themselves more adequately, including through training in self defence and the provision of weapons solely for the purposes of defence outside Australia, under strict conditions which include a Ministerial approval regime.¹

- 2.2 The Committee, in seeking to define fully what the proposed amendment represented and how it could and should be implemented, including appropriate safeguards, approvals, accountability and reporting, determined that the following issues needed to be considered:

- Who is to be covered under the proposed amendment, that is, to define ASIS staff members and agents who would be authorised to conduct activities as outlined in the proposed amendment to the Bill.
- The nature of the protection envisaged under the amendment to the Bill.

1 Explanatory Memorandum, Intelligence Services Amendment Bill, 2003, p. 3

- The range of typical situations or scenarios under which ASIS may seek to use the proposed amendment to the Bill.
- The legal and diplomatic implications that could arise from the implementation of the proposed amendment.
- The approvals procedures required to permit ASIS to undertake activities permitted by the proposed amendment to the Bill.
- The reporting and accountability requirements of ASIS to government on activities conducted under the proposed amendment.
- The training requirements and implications of the proposed amendment to the Bill.
- The logistics requirements and implications of the proposed amendment to the Bill.

2.3 This chapter will seek to examine in detail each of the above issues in order to provide guidance on the range of protocols which will need to be established to implement the Bill effectively and with full accountability.

Categorisation of ASIS Personnel

2.4 In categorising those personnel who would be enabled to undertake or participate in operational activities which would be allowed by the Bill, it is envisaged that, in addition to approvals required within the Bill, only those ASIS staff members with specific intelligence training and those agents who have been approved by the Director-General would be covered.

Range of Scenarios where Arms May be Carried

2.5 The primary intent of the proposed amendment to the Intelligence Services Act is to enable authorised ASIS staff members to carry and use a weapon and self-defence techniques for the purpose of self protection during the conduct of approved activities. However, the Committee also noted that the proposed amendment to the Act would

also allow ASIS to cooperate with other agencies, which might be able to use violence in the legitimate performance of their functions'.²

- 2.6 The Committee was concerned that, while the Bill provides for ASIS to be involved with “other organisations” in the planning for or undertaking of paramilitary activities, violence against the person, or the use of weapons and it prohibits ASIS staff members or agents themselves from undertaking these activities, it does not specify the nature of these organisations, or elaborate on the kind of scenarios in which ASIS would consider becoming involved.
- 2.7 In addressing this specific concern, the Committee accepted that it would be unlikely to be able to achieve this degree of detail in legislation, both for reasons of operational security and because of the limitations that such detail would impose on ASIS’ ability to respond to Government’s requirements in a flexible and timely fashion. However, the Committee agreed that, to enable review and accountability, appropriate oversight mechanisms needed to be established, both for the initial approval of such operations, and for subsequent reporting of them.
- 2.8 As noted above, the Bill would enable ASIS to become involved in two broad groups of operations:
- The first would include support to Australian agencies’ own operations overseas. This would include Australian Federal Police and Australian Defence Forces operations, but could also encompass the operations of other Australian agencies.
 - The second group could include support to foreign organisations, such as allied intelligence and police services.
- 2.9 The provision of ASIS support to AFP, ADF or other Australian agencies’ operations, which might involve the use of force, raised few concerns with the Committee, as these agencies are all bound to operate within Australian law, and are subject to existing accountability regimes.
- 2.10 Accompanying a foreign agency into an operation which may prove violent, however, was more problematic. Such operations would be conducted in the legal framework of another country and subject to that country’s operational priorities. While ASIS would still be prohibited from engaging in violence except in self-defence, it was considered that the line between self-defence and active participation

2 Explanatory Memorandum, Intelligence Services Amendment Bill, 2003, p. 3

could easily become blurred. The Minister's Second Reading speech notes that ASIS would be able to provide operational advice or support for a "legitimate" activity, which might involve the use of force, but the Bill as it currently stands contains no provision for oversight of this legitimacy, nor specific provision for Ministerial approval of ASIS' involvement in such operations.

- 2.11 The Committee proposes that all cases where ASIS intends becoming involved in the planning or undertaking of activities with foreign organisations, and which may involve violence, be subject to the approval of the Foreign Minister, in consultation with the Prime Minister and the Attorney-General. The Inspector-General of Intelligence and Security should receive a copy of this approval as soon as practicable.
- 2.12 In addition, the guidelines on the use of weapons and self defence techniques which the Director-General ASIS must issue under Schedule 2, subclause 1(6) of the Bill should also contain a detailed protocol describing the circumstances under which ASIS might consider involvement in the planning or conduct of activities with foreign organisations, and which may include violence. These guidelines should be produced in consultation with relevant departments and agencies, be agreed by the Inspector-General of Intelligence and Security, and approved by the National Security Committee of Cabinet. Because of the degree of operational detail that would necessarily be included, the Committee agreed that these guidelines should not be available as a public document.
- 2.13 These procedures would enable Ministers to be adequately informed in advance of deciding on ASIS' involvement in foreign operations which may involve violence. In addition, for accountability purposes, the Committee considered that ASIS should include in its classified annual report an accounting of the number and broad nature of these operations over the previous year.

Recommendation 1

- 2.14 **The Committee recommends that The Intelligence Services Amendment Bill 2003 be amended to include a provision setting out oversight mechanisms for the initial approval of operations and for subsequent reporting to enable review and accountability; and**

where ASIS anticipates being involved in the planning or undertaking of operations with foreign organisations that may include the use of force, the approvals process be expanded to include the Prime Minister and the Attorney General.

Recommendation 2

- 2.15 **The Bill requires that the Director General issue guidelines on the use of weapons and self-defence techniques. The Committee recommends that these guidelines should:**

- **contain a detailed protocol describing the circumstances under which ASIS may consider involvement in the planning or conduct of activities with foreign organisations, and which may include the use of force; and**
- **be produced in consultation with relevant departments and agencies, be agreed by the Inspector-General of Intelligence and Security, and approved by the National Security Committee of Cabinet.**

Nature of Protection Proposed

- 2.16 The type of protection which is proposed in the Bill is defensive only, specifically defined as self-protection, enabling the individual:

- (i) to protect himself or herself; or
- (ii) to protect a staff member or agent of ASIS, or
- (iii) to protect a person who is co-operating with ASIS.³

3 The Parliament of the Commonwealth of Australia, Intelligence Services Amendment Bill 2003, October 2003, p. 4

2.17 The proposed Bill, or proposed amendment to the Act, allows for the provision of a weapon or the use of self-defence techniques to effect self-protection as detailed above. However, the Committee noted in particular, that the amendment does not indicate or limit the nature of the weapon that may be used. In response to a question on this issue, Mr Irvine responded that he was:

not sure what type of weapons [may be used]. We are talking about small arms. But we are going to have to take advice from the ADF and the AFP in particular on the best means of protecting ourselves, to determine what sort of weapons should be provided to our staff.⁴

2.18 It should be noted that the term “small arms” is generally considered to encompass not only hand guns, such as those normally used by law-enforcement officers, but also includes single shot rifles, semi-automatic rifles, automatic rifles and light machine guns. For the purposes of the proposed amendment to the Act, the Committee considered that while specific technical advice on the types of weapons that could be used should be sought from the AFP and the ADF, they should be limited to semi-automatic hand-guns and pistols ie. only those weapons which can be readily concealed on an individual.

2.19 The range of weapons to be used in ASIS training and operations should be defined in the guidelines required under Schedule 2, sub-clause 1 (6). The specific types of weapons to be used on each operation should be authorised as part of the Ministerial approval process for the subject operation.

Recommendation 3

2.20 **The Committee recommends that ASIS’ use of weapons under the provisions of the Bill be limited to semi-automatic hand-guns and pistols. In addition:**

- **the range of weapons to be used in ASIS training and operations be defined in the guidelines required under Schedule 2, sub-clause 1 (6); and**
- **the specific types of weapons to be used on each operation be authorised by the Minister for Foreign Affairs.**

4 Mr David Irvine, Director-General of Australian Secret Intelligence Service, *Transcript*, 23 October 2003, p. 3

Legal and Diplomatic Implications

- 2.21 In its consideration of all of the issues relating to the Bill, the Committee considered that the legal standing of ASIS staff members and agents warranted particular attention. Specifically, the Committee sought to clarify the legal standing of ASIS staff members and agents when operating overseas and carrying a weapon, and the cover or protection that might be afforded to ASIS staff members and agents when operating overseas. It also sought to clarify the legal and diplomatic implications for the Australian government having approved a staff member or agent operating overseas to be armed for the purposes of self-defence.
- 2.22 In his evidence to the Committee, the Director General of ASIS, Mr David Irvine, indicated that ASIS staff members and agents were employed overseas in a number of different ways.
- 2.23 Mr Irvine stated that any decision to authorise the issue and carriage of a weapon to a staff member or agent would also involve a detailed assessment of the risks, both to individuals themselves and to Australia. The Committee considered that the outcome from the risk assessment process should be a key element of ASIS' ministerial submission requesting authority to proceed. The Committee also considered that consultation with the Department of Foreign Affairs and Trade on the possible effect on bilateral relationships should also form part of ASIS' advice to Ministers.

Recommendation 4

- 2.24 **The Committee recommends that ASIS' request to the Minister for Foreign Affairs for approval of an operation include a detailed assessment of the risks to ASIS staff members and agents involved, and to Australia as well as advice from the Department of Foreign Affairs on possible effects on bilateral relationships.**

Approval Procedures

- 2.25 The Bill states in Schedule 2, *inter alia*, that,
- The Minister [for Foreign Affairs] may, by written notice given to the Director General, approve the provision of a

weapon, or training in the use of a weapon or in self-defence techniques, to:

- (a) a specified staff member or agent of ASIS; or
- (b) the holder of a specified position in ASIS.⁵

2.26 The Committee was satisfied with the intent of this section of the proposed Bill, that is, that the responsibility for approval for training of ASIS staff members or agents in the use of weapons, or self-defence techniques, lies clearly within the portfolio of the Minister for Foreign Affairs. The Committee was concerned, however, that the Minister not be flooded with routine requests for the approval of training to the extent that the focus on higher-risk requests – the arming of staff for operational deployment – was lost.

2.27 The Committee felt that deploying an armed staff member overseas, or agreeing to the training and arming of an agent overseas, was of sufficiently higher risk that Ministerial attention should be specifically drawn to these cases. This should be possible, as subclause 3(b) of the Bill permits the Minister to approve training and provision of arms to 'the holder of a specified position in ASIS.'⁶ ASIS should therefore determine which positions were likely to require appropriate training, and ensure that this was provided for all occupants of those designated positions, without having to seek further Ministerial approval whenever staffing changes occurred. This would enable the Minister to focus on individual operational requests, while the overall planning and conduct of training of ASIS staff in the use of weapons and self-defence techniques could be more effectively managed by the Director General.

2.28 The Committee proposes that in seeking the approval of the Minister to train and arm a staff member or agent, the Director-General ASIS first consult with the Department of Foreign Affairs and Trade. The Director-General should also consult with this Department in deciding the positions to be determined as holder of a specified position in accordance with subclause 3(b), before seeking the Minister's approval for this list. Copies of Ministerial approvals for both the list of positions so determined, as well as any other specific approvals, should be made available to the Inspector-General of Intelligence and Security as soon as practicable.

5 The Parliament of the Commonwealth of Australia, Intelligence Services Amendment Bill 2003, October 2003, p. 4

6 The Parliament of the Commonwealth of Australia, Intelligence Services Amendment Bill 2003, October 2003, p. 4

Recommendation 5

- 2.29 **The Committee recommends that the Minister for Foreign Affairs approve a general training programme in the use of weapons and self-defence techniques for specific ASIS officer positions as designated by the Director General. This training programme would be ongoing and managed by the Director General. In addition:**
- **a copy of the training programme be provided to the Inspector General of Intelligence and Security. Any changes to this programme should also be advised as soon as practicable; and**
 - **the Department of Foreign Affairs and Trade be consulted in the designation by the Director General of any position as requiring training in the use of weapons and self-defence techniques.**

Recommendation 6

- 2.30 **The Committee recommends that the Minister for Foreign Affairs approve each deployment of an armed ASIS staff member overseas, and/or the training and arming of an agent overseas.**

Reporting and Accountability

- 2.31 The procedures for seeking Ministerial approval are outlined elsewhere in the Committee's report. This section deals with the requirements for reporting and accountability of the new capabilities that this Bill would entail.
- 2.32 ASIS is held accountable under a number of existing reporting regimes. The Minister for Foreign Affairs (whose portfolio agency it is) has visibility of its operations through formal consultations as well as regular discussions with the ASIS senior executive. This Committee (the Parliamentary Joint Committee on ASIO, ASIS, and DSD) may review ASIS' administration and expenditure, and review any matter referred to it by the responsible Minister or by a resolution of either House of Parliament. The Inspector-General of Intelligence and Security regularly reviews ASIS' operational activities. ASIS

participates in the annual review of the performance of intelligence agencies coordinated by PM&C for the National Security Committee of Cabinet, and produces its own classified annual report. The Director-General ASIS must also, according to the *Intelligence Services Act 2001* (Part 3, clause 19) consult regularly with the Leader of the Opposition in the House of Representatives for the purpose of keeping him or her informed on matters relating to ASIS. All of these reporting regimes would remain current.

- 2.33 We have suggested above that the Bill require that provision of weapons or training be at the discretion of the Minister for Foreign Affairs, following ASIS consultation with the Department of Foreign Affairs. Agreement for ASIS to become involved in foreign operations which may involve violence should be taken by the Minister for Foreign Affairs in consultation with the Prime Minister and the Attorney-General. Detailed guidelines governing both procedures should be drawn up in consultation with relevant agencies, and the Inspector-General of Intelligence and Security, and agreed by the National Security Committee of Cabinet.
- 2.34 In addition to these regulatory practices, the Committee feels that there is a need for a reporting and accountability regime, to ensure that there is sufficient visibility of how ASIS' new capabilities are being put into practice. The Inspector-General of Intelligence and Security (IGIS), Mr Bill Blick, indicated to the Committee that he anticipated being able to 'incorporate inspection of this kind of matter into our normal inspection routine'⁷, to ensure that ASIS was complying with the conditions under which approval had been given.
- 2.35 The Committee proposes that the results of IGIS' inspections should be included in the IGIS' annual reports to Parliament, and could include – at the unclassified level – basic data on how frequently the new capabilities are being exercised. No further detail would be possible in a public report (although may be available in a classified supplement which IGIS occasionally judges necessary to provide to the Prime Minister). The Committee also expects that ASIS would account for the exercise of these capabilities in more detail in its own classified annual report to the National Security Committee of Cabinet, and include this information in its regular discussions with the Leader of the Opposition in the House.

7 Mr William Blick, Inspector-General of Intelligence and Security, *Transcript*, 23 October 2003, p. 1

Recommendation 7

- 2.36 **The Committee recommends that the Bill be amended to require the Director General of ASIS to provide to the Inspector General of Intelligence and Security a report on any operational incident with the potential to embarrass Australia. This information could then be included in the Inspector-General's reports to Government as appropriate.**

Training requirements and implications

- 2.37 The Bill specifies that ASIS must develop and issue guidelines on the training and use of weapons and self-defence techniques before any weapons or self defence training are provided (Schedule 2 subclause 2(c)). These guidelines should comprise a detailed policy framework covering training, handling, use, storage and logistics. ASIS should draw on the expertise of relevant Australian agencies in developing the framework, and the Committee notes that ASIS has already had preliminary discussions with both the AFP and ADF. Mr Castles, the General Manager International, Australian Federal Police, drew attention to the fact that, 'the use of force is a training package; it is not just about firearms or the use of a weapon.'⁸
- 2.38 The Committee welcomes the AFP's willingness to share its doctrine, frameworks, policies and training with ASIS, and considers that the AFP's general approach to weapons and self defence is more likely to be immediately relevant to ASIS than, for example, that of the Special Forces. This is borne out by the view of the ADF that, while aspects of ADF training may be useful to ASIS, the AFP's focus on self-protection and self-defence, as opposed to the ADF's emphasis on aggressive assault, means that the AFP is probably better placed to assist ASIS in getting this aspect of its operations off the ground.
- 2.39 Training would be required for a range of ASIS staff; selected ASIS intelligence staff and agents would require thorough training in use and handling of weapons, and in techniques for self-protection against physical assault. Other ASIS members would also require training in handling and storage of weapons and ammunition – some

8 Mr Shane Castles, General Manager International, AFP; *Transcript 27 October 2003*, p.12

of these issues are addressed in Section 8 below, dealing with Logistics. All ASIS staff would require training in the scope and limitations of their cooperation in operations with other agencies.

- 2.40 The Committee welcomed Mr Irvine's advice that ASIS would be guided by the practice of police forces in defining self-defence training, and the assurance that ASIS would be 'looking at the use of force as a last resort'⁹. The training guidelines, when developed, should include a more detailed understanding of what is implied by self-defence training.
- 2.41 Training courses themselves will need to cover a range of areas, including initial training and refresher/requalification training. A skills assessment regime will need to be developed, and training certification will have to be managed in such a way as to ensure that abilities are maintained, and that staff in designated positions receive adequate training (initial or refresher) before being posted. The Committee considers it a far lower risk for ASIS staff members and agents to be trained and familiar with the handling requirements of weapons well in advance of being put in the situation of having to use them.
- 2.42 The location, security and use of facilities, either ASIS or other for training of ASIS staff members and agents will need to be considered in the policy framework. Consideration will need to be given to managing the security aspects of training agents, as distinct from other ASIS staff members.
- 2.43 The Committee proposes that ASIS' training policies, once developed, be subject to the review of the Inspector-General of Intelligence and Security, who may call on the expert advice of relevant Australian agencies to assist him in his assessment of the policies. The policies should then be subject to the approval of the Minister for Foreign Affairs. Ministerial approval of training of individual staff members and agents is dealt with above, in Section 5.

9 The Deputy Director-General of Australian Secret Intelligence Service, *Transcript*, 23 October 2003, p. 19

Recommendation 8

- 2.44 **The Bill requires that the Director General issue guidelines on the use of weapons and self-defence techniques. The Committee recommends that these guidelines also cover all aspects of training, handling, use, storage and logistics; and**
- **that training courses cover initial training and refresher/requalification training; and**
 - **that a skills assessment regime be developed, and training certification be managed in such a way as to ensure that ASIS' capabilities are maintained.**

Logistics requirements and implications

- 2.45 The guidelines referred to in Section 7 on Training will also have to cover the logistical aspects of ASIS' use of weapons. The guidelines will need to address the acquisition of weapons, the secure storage of weapons, and the secure carriage of weapons. The guidelines will need to cover these issues both in the Australian context, and also for staff members or agents deployed overseas.
- 2.46 A regime must be developed to ensure that at least those weapons held by ASIS staff are accounted for. It may not be feasible to insist that weapons passed to agents can be produced on demand, but ASIS should endeavour to keep these to a minimum.
- 2.47 These guidelines and accounting regimes will have to deal with ammunition in a similar manner.
- 2.48 The experience of the AFP in its overseas deployments in close personal protection, or in missions to East Timor and Solomon Islands, will be a useful guide to ASIS. ASIS will, however, have to develop its own policies on covert possession and transmission of weapons and ammunition, which the AFP does not practise. ASIS may wish to consult with allied agencies to see whether they have any relevant experience from which ASIS might draw.

Recommendation 9

- 2.49 **The Committee recommends that, in developing training and logistics guidelines, the Director General, while consulting broadly, use the training and logistics models of the AFP as a basis.**

Conclusions

- 2.50 The Committee considers that the provisions of the Bill are required to enable ASIS to perform its proper functions under the *Intelligence Services Act 2001*, and fulfil the requirements placed on it by government.
- 2.51 Two major areas of concern emerged during the Committee's hearings: the approval and regulatory provisions for ASIS' involvement in the planning or support for operations conducted by foreign organisations which may involve the use of force; and the need for further detail on the guidelines on the use of weapons and self-defence techniques required by the Bill.
- 2.52 The Committee has recommended that, where ASIS anticipates becoming involved in the planning of operations by foreign organisations, which may involve the use of force, approval be sought from the Minister for Foreign Affairs, in consultation with the Prime Minister and the Attorney-General. There may also be cases where the views of the Minister for Defence will also need to be sought. This expanded consultation process, analogous to the consultation requirements of Defence Aid to the Civil Authority, is required because of the higher risks inherent in operating in a foreign operational environment.
- 2.53 The Committee welcomes the speed with which ASIS moved to respond to the need for greater detail on the guidelines for use of weapons and self-defence. The detailed outline provided in ASIS' supplementary submission was very much in accord with the Committee's own thinking on the guidelines' coverage, and the need for consultation with relevant agencies and departments, as well as the Inspector-General of Intelligence and Security. The Committee also considers it appropriate that the National Security Committee of Cabinet endorse these guidelines.

DAVID JULL, MP

Chairman

11 March 2004

