GILBERT + TOBIN CENTRE OF PUBLIC LAW

UNSW AUSTRALIA | Law

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Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

Thank you for the opportunity to make a submission to this inquiry. We do so as members of the Gilbert + Tobin Centre of Public Law in the Faculty of Law, University of New South Wales. We are solely responsible for the views and content in this submission.

This submission draws upon three articles in which we examine the questioning and detention powers of the Australian Security Intelligence Organisation (Special Powers regime) in detail:

- Lisa Burton, Nicola McGarrity and George Williams, 'The Extraordinary Questioning and Detention Powers of the Australian Security Intelligence Organisation' (2012) 36(2) *Melbourne University Law Review* 415 (*Annexure A*);
- Lisa Burton and George Williams, 'The Integrity Function and ASIO's Extraordinary Questioning and Detention Powers' (2012) 38(3) *Monash University Law Review* 1 (*Annexure B*); and,
- Nicola McGarrity, 'Coercive Questioning and Detention by Domestic Intelligence Agencies' (2014) 9(1) *Journal of Policing, Intelligence and Counter-Terrorism* 48 (*Annexure C*).

Our primary submission with respect to the Special Powers regime is that Detention Warrants should be repealed (see Part A below).

We do not oppose the retention of Questioning Warrants. This is because, as noted by the former Independent National Security Legislation Monitor (INSLM), Bret Walker QC, in his 2012 Annual Report, '[t]here is no objection in principle to … compulsory powers of questioning given the need to counter terrorism, the frequently conspiratorial character of terrorist activity and the requirement for cogent evidence'.[1] However, we *do* oppose the recommendation of Walker's successor, the Hon Roger Gyles AO QC, that the current questioning powers should be repealed and replaced with powers modelled on those of the Australian Criminal Intelligence Commission (ACIC) in the *Australian Crime Commission Act 2002* (Cth) (*ACC Act*) (see Part B below).[2] The implementation of this recommendation would result in a relaxing of the checks and balances which apply to Questioning Warrants at present.

In contrast to the recommendation made by Gyles, we believe that the criteria which must be satisfied in order to obtain a Questioning Warrant should be tightened (see Part C below). Amendments should also be made to the issuing process (see Part D below) and stronger safeguards for the rights of individuals incorporated into the *Australian Security Intelligence Organisation Act 1979* (Cth) (see Part E below). This submission also set out our concerns regarding the excessive period of time during which questioning under a Questioning Warrant may take place (see Part F below) and suggests that there is a need for a stronger system of accountability and oversight (Part G below).

The submissions we make here are substantially the same as those we made to both Walker and Gyles. They are also consistent with many of the recommendations made by Walker in his 2012 Annual Report[3] and Gyles in his 2016 Report into Certain Questioning and Detention Powers in Relation to Terrorism.[4] In particular, each former INSLM recommended the repeal of Detention Warrants.

ASIO argued in its submission to the Parliamentary Joint Committee on Intelligence and Security's (PJCIS) Inquiry into the Counter-Terrorism Legislation Amendment (Foreign

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[1] Independent National Security Legislation Monitor, *Annual Report* (2012) 70.
[2] Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016) 52, Recommendation 8.
[3] Independent National Security Legislation Monitor, *Annual Report* (2012) 106.
[4] Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016) 42.

Fighters) Bill 2014 (Cth) that '[s]ince the INSLM published his Second Annual Report, the terrorism threat in Australia has increased, as indicated by the raising of the terrorism threat level in September 2014'.[5] This argument was put forward as the primary justification for extending the sunset clause with regard to the Special Powers regime. However, in our opinion, recent events with regard to foreign fighters and the identification of domestic terrorism plots do not have any bearing upon the recommendation made by Walker that Detention Warrants should be repealed. As he noted in his 2012 Annual Report, such warrants are problematic not just because of their impact upon civil liberties. After repeatedly requesting that government agencies provide evidence or examples as to why Detention Warrants are necessary, Walker commented that he had been presented with '[n]o scenario, hypothetical or real … that would require the use of a [Detention Warrant] where no other alternatives existed to achieve the same purpose'.[6] The reality is that, even accepting ASIO's claim that the terrorism threat to Australia has increased in recent years, it has never proved necessary for a Detention Warrant to be issued. Gyles commented in his 2016 report that '[n]o [Detention Warrant] has been issued, nor has an application for a [Detention Warrant] been refused, since this power was introduced in 2003. ASIO has had to respond to many terrorist threats of varying kinds in Australia over that time'.[7]

A. Detention Warrants should be repealed

Detention Warrants permit individuals who may not be suspected of any crime to be detained for up to seven days. In Australia, executive detention is the exception — not the rule. It should only be permitted where there is a clear justification for doing so. In the course of parliamentary debate, it was said that Detention Warrants were necessary 'to protect the community from (terrorism)'[8] and would sometimes be 'critical' to public safety.[9] The former Attorney-General, Daryl Williams, asserted that without Detention Warrants, 'terrorists could be warned before they are caught, planned acts of terrorism known to ASIO could be rescheduled rather than prevented, and valuable evidence could be destroyed'.[10]

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[5] Australian Security Intelligence Organisation, Submission 11, Parliamentary Joint Committee on Intelligence and Security, Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) October 2014, 6.
[6] Independent National Security Legislation Monitor, *Annual Report* (2012) 105.
[7] Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016) 40.
[8] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1935 (Daryl Williams).
[9] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10427 (Daryl Williams).
[10] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1935 (Daryl Williams).

Experience does not support these claims. ASIO has never applied for a Detention Warrant, despite stating that it 'responds to literally thousands of counterterrorism leads' each year.[11] More particularly, 16 Questioning Warrants have so far been issued (although it is notable that none have been issued for seven years). In none of these cases was it necessary for the subject of the warrant to be detained. As noted by Walker, the issuing of a Detention Warrant has never even 'been considered'.[12] Further, more than 80 people have been charged with terrorism offences under either the *Criminal Code Act 1995* (Cth) or *Charter of the United Nations Act 1945* (Cth) since the Special Powers regime came into effect in 2003, without the issue of a single Detention Warrant. This suggests Detention Warrants are either unnecessary or ineffective. It is difficult to justify the continuing existence of extraordinary powers which permit such significant inroads into fundamental human rights if they are of little utility in responding to the threat of terrorism.

Further, there is real reason to suspect the detention power will *never* be used. The Australian Federal Police (AFP) can detain terrorist suspects for up to eight days.[13] This leaves little need for Detention Warrants — other than to detain non-suspects, which the Director-General of ASIO has indicated ASIO would be wary to do.[14] Walker noted that:

> While non-use of the provisions in a decade does not automatically lead to the conclusion that they are not necessary it does lend weight to the INSLM's view that [Detention Warrants] are not at all necessary as less restrictive alternatives exist to achieve the same purpose.[15]

This was reinforced by Gyles in his 2016 Report. He concluded that:

> [T[his power is not necessary to prevent or disrupt a terrorist act. ASIO has all of its other powers and capacities including [Questioning Warrants]. The federal, state and territory police have their powers and capacities including: arrest and questioning, and pre-charge detention if there is reasonable suspicion or suspicion on reasonable grounds of a preparatory act; warrants of various kinds (eg, search warrants, delayed notification search warrants, warrants for arrest); control orders; and preventative detention. The ACIC and some state bodies have intelligence-gathering powers including questioning.[16]

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[11] Senate Legal and Constitutional Affairs Legislation Committee, Senate, Estimates Hearing, 25 May 2011, 100 (David Irvine, Director-General of ASIO).
[12] Independent National Security Legislation Monitor, *Annual Report* (2012) 105.
[13] *Anti-Terrorism Act 2004* (Cth); *Crimes Act 1914* (Cth) ss 23DB(5)(b), 23DF(7); *National Security Legislation Act 2010* (Cth) sch 3 cl 16 (inserting s 23DB(11) into the *Crimes Act*).
[14] Commonwealth, *Senate Estimates Hearing*, 24 May 2012, 110-112 (David Irvine).
[15] Independent National Security Legislation Monitor, *Annual Report* (2012) 105.
[16] Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016) 41.

B. The questioning powers of the Australian Criminal Intelligence Commission

Like his predecessor, Gyles concluded that 'a compulsory questioning power to gather intelligence is a useful tool for ASIO's counter-terrorism work'.[17] However, rather than retaining the current system of Questioning Warrants, he recommended that it should be 'replaced by a questioning power following the [Australian Crime Commission Act 2002 (Cth)] model as closely as possible'.[18]

There were two critical steps in Gyles' reasoning to reach this conclusion. First, he accepted the submissions made by ASIO and the Attorney-General's Department that the current system 'lacks utility', 'cannot be regarded as effective', is 'no longer fit for purpose', and 'is unwieldy and not being used'.[19] He then went on to recommend that the current regime be repealed and replaced with a new set of questioning powers modelled on those of the Australian Criminal Intelligence Commission (ACIC). This is because 'ASIO and the ACIC are similar Commonwealth bodies with similar roles in their fields,' and – in contrast to the lack of use by ASIO of its questioning powers – there has been 'successful use of the ACIC powers'.[20]

No details are given in the 2016 Report regarding what a questioning regime modelled on that of the ACIC might look like or how it would operate in practice. All Gyles says is that 'it would not be appropriate to cherry-pick parts of other models and graft them on, or to excise some parts unless it is necessary to accommodate the different repository of the power'.[21] What is clear, however, is the *effect* that implementation of Gyles' recommendation would have; that is, modelling a new ASIO questioning regime upon that of the ACIC would relax the 'heavy duty safeguards' that apply to the Special Powers regime.[22] There would seem to be two primary ways in which this relaxation would occur. These are drawn from Gyles' discussion of the ACIC's questioning powers in the 2016 Report as well as the submission made by the Attorney-General's Department to that inquiry.[23]

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[17] Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016) 43.
[18] Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016) 52.
[19] Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016) 42 and 51.
[20] Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016) 51.
[21] Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016) 51.
[22] Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016) 51.
[23] Attorney-General's Department, Submission No 6 to the Independent National Security Legislation Monitor's Review of Certain Questioning and Detention Powers in Relation to Terrorism, 18 August 2016, 3-17 and Attachment.

First, there would be no place in the new regime for a judge – acting in his or her personal capacity – to issue Questioning Warrants. If the ACIC model was strictly followed (as Gyles suggests it should be), an independent statutory office holder would be empowered to conduct examinations in any instances where the senior management of the organisation has declared there to be a 'special operation' or 'special investigation'. He or she would also be responsible for the conduct of the examination. This is concerning to us because, for the reasons set out in Part D below, we believe that a greater – rather than reduced – role should be given to judges in issuing Questioning Warrants. However, of even greater concern is the proposal made on behalf of ASIO by the Attorney-General's Department that all decisions should be made by the executive branch of government. Pursuant to this, the Attorney-General alone would authorise Questioning Warrants with an ASIO senior executive officer overseeing the questioning process.[24]

There can be no doubt that such a proposal would make it simpler and quicker for ASIO to exercise its questioning powers. It is correct – as the Attorney-General's Department pointed out in its submission – that the Special Powers regime is 'subject to significantly more detailed oversight and protection than other special powers under Part III'.[25] However, the undeniable fact is that a regime which permits coercive questioning and potentially even detention of non-suspects in secret has a far greater impact upon fundamental human rights than does, say, the searching of private premises or the inspection of postal articles. It is therefore imperative that such a regime incorporate particularly strong checks and balances.

There is a second way in which implementing Gyles' recommendation would result in a relaxation of the safeguards which currently attach to the Special Powers regime. So far as the criteria for ordering an examination are concerned, the ACIC Examiner need only be satisfied that: (a) the Board has determined that the intelligence operation is a special operation or that the investigation into matters relating to federally relevant criminal activity is a special investigation; and (b) issuing the summons is 'reasonable in all the circumstances'.[26] This is significantly broader than the current requirement under the ASIO Act that 'the issuing authority is satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence'.[27] For the reasons set out in Part C below, we believe that the criteria for issuing a Questioning Warrant are already

[24] Attorney-General's Department, Submission No 6 to the Independent National Security Legislation Monitor's Review of Certain Questioning and Detention Powers in Relation to Terrorism, 18 August 2016, Attachment, 1-2.
[25] Attorney-General's Department, Submission No 6 to the Independent National Security Legislation Monitor's Review of Certain Questioning and Detention Powers in Relation to Terrorism, 18 August 2016, 8.
[26] *ACC Act 2002* (Cth) s 28(1)(c).
[27] *ASIO Act 1979* (Cth) s 34E(1)(b).

insufficiently targeted to the threat posed by terrorism. Our submission is that – far from broadening the criteria to make it easier to obtain a Questioning Warrant – they should in fact be narrowed.

Given that relaxing the current system of checks and balances has the potential to undermine fundamental human rights, such as the right to silence, the right to a fair trial and the privilege against self-incrimination, it is imperative that any proposal to take this step be carefully scrutinised. To date, no clear justification for the proposal has been presented. So far as the first step in Gyles' reasoning process is concerned, the mere fact that Questioning Warrants have not been used since 2010 (and, even then, on only one occasion since 2005) is not sufficient in and of itself to prove that reform is necessary. There are other reasons for their sustained lack of use. These include: (a) the existence of alternative methods of gathering intelligence; and (b) that Questioning Warrants are not an effective tool in responding to the threat of terrorism. It is, furthermore, difficult to sustain the argument – made by the Attorney-General's Department in its submission – that '[t]he process for obtaining [Warrants] is not currently agile enough to enable [investigation] to happen quickly'[28] when one considers that, in the 2004/2005 year alone, 11 Questioning Warrants in relation to 10 individuals were issued.[29]

With respect to the second step in his reasoning, Gyles identifies five points of similarity between ASIO and the ACIC.[30] First, the organisations 'have a similar function – intelligence-gathering rather than law enforcement'. Secondly, '[t]hey have extraordinary questioning powers because of the nature of their targets'. Thirdly, '[t]he power is not restricted to those implicated in a potential breach of the law'. Fourthly, '[t]hey operate in secrecy'. And, finally, '[t]hey have partially overlapping responsibilities with regard to counter-terrorism'. However, these points of similarity present only a very weak case for the wholesale transfer of the ACIC questioning regime to ASIO. In the first place, it is important to take into account not only the similarities between the two organisations but also any differences which may justify distinct approaches. Some such differences include the breadth of the concept of 'security' upon which ASIO's functions hinge,[31] as well as the inevitable restrictions upon external oversight which apply in the national security context. It is these – amongst other – factors which necessitate imposing strict limits on ASIO's coercive powers so as to minimise the potential for misuse. As Gyles stated in

[28] Attorney-General's Department, Submission No 6 to the Independent National Security Legislation Monitor's Review of Certain Questioning and Detention Powers in Relation to Terrorism, 18 August 2016, 8.
[29] Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016) 25.
[30] Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016) 43.
[31] *ASIO Act 1979* (Cth) s 4.

his 2016 Report, 'power can be misused by the well-intended as well as those deliberately abusing the power'.[32]

Another useful way of approaching this issue is to consider the situation in comparable foreign jurisdictions. The extraordinary nature of the Special Powers regime is demonstrated by the fact that Australia is the only western democratic nation which has seen fit to bestow powers of coercive questioning upon a domestic intelligence agency.[33] In our opinion, extraordinary powers that have the potential to impinge upon fundamental human rights should always be accompanied by extraordinary safeguards.

C. Criteria for warrants

The criteria which must be satisfied in order to obtain a Questioning Warrant should be amended

Questioning Warrants permit the coercive questioning of individuals who may not be suspected of any crime. This cannot be dismissed as a mere inconvenience; questioning can carry on over many days and lead to significant civil and criminal penalties. In our view, it is dangerous to accept coercive questioning as the new norm. Lengthy periods of coercive questioning should only be permitted if this is a proportionate response to the threat of terrorism. The problem is that the current criteria are not capable of ensuring this.

- *Reasonable grounds for believing warrant will assist the collection of intelligence*[34]
  The power to coercively question non-suspects was said during parliamentary debates to be necessary to extract intelligence which would 'avert terrorism offences'.[35] However, the first criterion for requesting and issuing a Questioning Warrant only requires ASIO to show that 'the warrant ... will substantially assist the collection of intelligence that is important in relation to a terrorism offence'.[36] This sets a low threshold. It does not distinguish between: past, present or future offences; offences that are likely or unlikely to occur; or, finally, serious or relatively minor offences. This is an inadequate basis for

[32] Independent National Security Legislation Monitor, *Certain Questioning and Detention Powers in Relation to Terrorism* (2016) 41.
[33] Nicola McGarrity, 'Coercive Questioning and Detention by Domestic Intelligence Agencies' (2014) 9(1) *Journal of Policing, Intelligence and Counter-Terrorism* 48.
[34] *ASIO Act* ss 34D(4)(a), 34E(1)(b).
[35] Revised Explanatory Memorandum, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Cth) 14.
[36] *ASIO Act* ss 34D(4)(a), 34E(1)(b), 34F(4)(a), 34G(1)(b).

coercive questioning and means the issue of a Questioning Warrant may be a disproportionate measure.

It would be preferable, for example, to require reasonable belief that issuing the warrant will substantially assist the prosecution or prevention of a terrorism offence. A narrower criterion along these lines would still have allowed all of the Questioning Warrants which have been issued to date. Walker noted that '[p]robably all of the [Questioning Warrants] issued and executed have been directed against persons of interest, meaning suspected, in relation to terrorism offences'.[37]

- *The 'last resort' requirement*[38]

  As originally enacted, the Attorney-General had to be satisfied that relying on other methods of collecting the intelligence sought would be ineffective. This was eminently appropriate given that, from the outset, the Special Powers were justified as a measure of 'last resort'.[39] Furthermore, in our opinion, this criterion was a proper and important means of ensuring that Questioning Warrants were not relied upon when less intrusive measures would suffice.

  However, this criterion was expanded by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) so as to provide that the Attorney-General need only be satisfied that 'having regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued'.[40] This was said to be consistent with the recommendation made by Walker in his 2012 Annual Report.[41] The problem is that both the PJCIS and the Federal Parliament ignored the second part of this recommendation, namely, that this criterion should be scrutinised not only by the Attorney-General but also by the Issuing Authority. Walker stated that:

  > The justification in policy for this difference between the responsibility of the Attorney-General alone for the last resort prerequisite and the shared responsibility of the Attorney-General and the issuing authority for the more

[37] Independent National Security Legislation Monitor, *Annual Report* (2012) 69.
[38] *ASIO Act* s 34D(4)(b) (repealed).
[39] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1930 (Daryl Williams).
[40] *ASIO Act* s 34D(4)(b).
[41] Independent National Security Legislation Monitor, *Annual Report* (2012) 74.

> substantive prerequisite is elusive. … It is appropriate for a judicial officer to consider both prerequisites and to be satisfied that they have been met.[42]

We strongly urge that the *ASIO Act* be amended such that both the Attorney-General and the Issuing Authority must be satisfied that the amended 'last resort' criterion is met. This would provide far greater transparency and accountability of the issuing process for Questioning Warrants.

If Detention Warrants are retained, the criteria which must be satisfied in order to obtain a Detention Warrant should be amended

None of the three alternative criteria presently in place justify detention. In particular, they do not require ASIO to demonstrate that detention is reasonably necessary and appropriate to protect the public from a terrorist act (although that is the ostensible purpose of the power). This can be contrasted, for example, with the criteria which must be satisfied in order to obtain a Control Order.[43]

- *Person may not appear for questioning*[44]
  The belief that a person 'may not appear' for questioning does not justify detention, especially not for seven days. The person subject to the warrant may be an innocent bystander, akin to a witness. Nowhere else does the law permit the pre-emptive detention of witnesses who it is believed 'may not' appear for questioning which, as Walker noted in his 2011 Annual Report, is an everyday occurrence.[45]

- *Person may alert others or destroy evidence*[46]
  The belief that a person 'may alert a person involved in a terrorism offence that the offence is being investigated' or 'may destroy, damage or alter a record or thing 'that may be requested in questioning' would present a more compelling case for detention, if the criteria went further and required ASIO to show that such conduct would derail the prevention or prosecution of a terrorism offence. However, the criteria do not require such urgency or necessity. There is a strong argument that section 34ZS of the *ASIO Act* and/or ordinary procedures of criminal justice are sufficient to guard against these risks. They therefore do not justify detention.

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[42] Independent National Security Legislation Monitor, *Annual Report* (2012) 71-72.
[43] *Criminal Code Act 1995* (Cth) s 104.4(1)(d).
[44] *ASIO Act* s 34F(4)(d)(ii).
[45] Independent National Security Legislation Monitor, *Annual Report* (2011) 34.
[46] *ASIO Act* ss 34F(4)(d)(i) and (iii).

ASIO is obviously cautious about applying for a Detention Warrant — and may never do so in the full range of circumstances that these criteria permit.[47] However, this does not resolve the problem. The rule of law requires executive discretion to be tightly constrained. A regime which relies on the prudence of unelected executive officers is incompatible with Australia's public law principles.

D. Issuing Process

All criteria should be scrutinised by the Attorney-General and the Issuing Authority

All criteria should be subjected to strict, independent scrutiny given the gravity of the Special Powers. Issuing Authorities, being judicial officers, can bring powers of reason and analysis to the matter that the Attorney-General may lack. Further, the fact the Issuing Authority cannot directly scrutinise important criteria gives the troubling impression that the Issuing Authority is appointed to give a 'veneer' of judicial approval to an executive-controlled process.[48] This diminishes the apparent, if not actual, fairness of the issuing process.

- *'Relying on other methods of collecting that intelligence would be ineffective'*[49]
  This criterion ensures Special Powers warrants are used as measures of last resort. This is an important qualification which should be scrutinised by the Issuing Authority. It is difficult to see why the Attorney-General is any better placed to determine this matter than an Issuing Authority, unless the Attorney-General acts merely on ASIO's advice.

- *Warrant can only be issued against a person aged 16 to 18 if Attorney-General 'is satisfied on reasonable grounds that: ... it is likely the person will commit, is committing or has committed a terrorism offence'*[50]
  The decision to coercively question or detain a minor must be rigorously scrutinised. These questions are eminently suitable for determination by a judicial officer and, in fact, are arguably unsuitable for determination by a government minister.

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[47] Vivienne Thom, Address to Supreme and Federal Court Judges' Conference' (Hobart, 26 January 2009) 6; Commonwealth, *Senate Estimates Hearing*, 24 May 2012, 110-112 (David Irvine).
[48] Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO's Questioning and Detention Powers: Review of the Operation, Effectiveness and Implications of Division 3 of Part III in the* Australian Security Intelligence Organisation Act 1979 (2005) 36.
[49] *ASIO Act* ss 34D(4)(b), 34F(4)(b).
[50] *ASIO Act* ss 34ZE(4)(a) and (b).

- *Criteria for repeat warrants against the same person*[51]

  The criteria should be scrutinised by Issuing Authorities to guard against the possibility of unwarranted 'rolling' warrants.

- *Detention criteria*[52]

  If Detention Warrants are retained, then the decision to deprive an individual of his or her liberty must be rigorously scrutinised. Again, the detention criteria are eminently suitable for determination by a judicial officer and, in fact, are arguably unsuitable for determination by a government minister.

E. Human rights safeguards

A person subject to a Questioning Warrant has few rights; far fewer than a person who is being questioned by police on suspicion of a crime. Most importantly, the person has no right to know the reason they are being questioned, no effective right to legal representation or advice and no right to lawyer-client confidentiality.

In the course of parliamentary debate, the government claimed that terrorism was 'quite unlike ordinary crime, necessitating a response quite unlike the accepted responses to criminal activity'.[53] It asserted that Questioning Warrants and Detention Warrants were preventative tools, not tools of law enforcement, and so need not be attenuated by the procedural safeguards expected in the criminal justice system.[54] However, the removal of these safeguards is – for the very most part – arbitrary and not tailored to serve any counter-terrorism purpose. While the questioning process is not criminal, it can lead to significant civil and criminal penalties. Most obviously, it is an offence punishable by a significant period of imprisonment to fail to comply with the terms of a warrant.[55] More generally, questioning can last for several days and represents a significant intrusion into the privacy of the individual.

It is therefore imperative that the subject of a warrant fully understands their legal obligations and their legal rights — including, for example, to challenge the legality of a warrant. To deny the person the procedural protections which are commensurate with the consequences of a warrant significantly diminishes the fairness and accountability of the regime. The legislation

[51] *ASIO Act* ss 34D(3)(c) and (d), 34F(3)(c) and (d), 34F(6).
[52] *ASIO Act* ss 34F(4)(d)(i) – (iii).
[53] Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO's Questioning and Detention Powers: Review of the Operation, Effectiveness and Implications of Division 3 of Part III in the* Australian Security Intelligence Organisation Act 1979 (2005) 99.
[54] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10427 (Daryl Williams).
[55] *ASIO Act* s 34L.

should be amended to ensure these procedural safeguards are only restricted where it is reasonably necessary and proportionate to do so.

Persons subject to a warrant should have full access to legal representation and advice

The *ASIO Act* specifies that persons subject to a warrant must be permitted to contact a lawyer, but this 'right' is of limited value:

- the person may be barred from contacting his or her first lawyer of choice on national security grounds;[56]
- this is a bare right to contact; the person may be questioned before his or her lawyer arrives and before he or she has received legal advice;[57]
- the lawyer must play a remarkably passive role. The lawyer (like the person subject to the warrant) is not told why the warrant was issued, is not permitted to ask questions, cross-examine or 'intervene in questioning ... except to request clarification of an ambiguous question',[58] and may be ejected if deemed to be 'disrupting proceedings';[59] and
- most communication between a person and his or her lawyer must be capable of being monitored by ASIO,[60] restricting legal professional privilege.[61]

These restrictions may inhibit full and frank communication between the person and their lawyer. They create a real risk that the person will not understand their legal rights or obligations. The three latter restrictions are arbitrary; they apply regardless of whether ASIO has or could show they are reasonably necessary.

The legislation must be amended to ensure lawyers can adequately represent their client's interests. For example, all communications between a person subject to a warrant and his or her lawyer should be confidential.

The abrogation of privilege against self-incrimination under a Questioning Warrant is not sufficiently balanced by the use immunity

[56] *ASIO Act* s 34ZO.
[57] *ASIO Act* s 34ZP(1).
[58] *ASIO Act* s 34ZQ(6).
[59] *ASIO Act* s 34ZQ(9).
[60] *ASIO Act* s 34ZQ.
[61] Legal professional privilege only applies to confidential communications, defined in the *Evidence Act 1995* (Cth) as 'communication made in such circumstances that, when it was made the person who made it or the person to whom it was made was under an express or implied obligation not to disclose its contents': s 117.

Information obtained through questioning cannot be used in criminal proceedings against the person (Use Immunity). This does not sufficiently balance out the loss of the privilege against self-incrimination because it does not prevent the information from being used in four significant ways:

- in proceedings for failing to comply with the terms of the warrant or giving false or misleading information;[62]
- in civil proceedings against the person; for example, as the basis for deporting the person, cancelling their passport or obtaining a control order;
- as evidence in the criminal prosecution of another person; and
- to gather other evidence which can be used in criminal proceedings against the person. That is, there is no Derivative Use Immunity.

Thus the questioning process can still produce significant consequences for the subject, who may be denied effective legal representation or advice. If the privilege against self-incrimination is removed, then persons subject to a warrant should be accorded both Use and Derivative Use Immunities as well as full rights to legal representation and advice.

The restrictions on communication imposed by section 34ZS of the ASIO Act are disproportionate

Section 34ZS of the *ASIO Act* prohibits disclosure of a broad range of information about the Special Powers regime. The information captured by this provision is potentially innocuous, yet the offence is one of strict liability with no defence for innocent disclosures. The penalty for breaching section 34ZS is five years imprisonment. It is notable that Walker recommended in his 2012 Annual Report that this penalty should be reduced to two years.[63] This would be consistent with the penalties applicable to the ACIC questioning regime.[64]

Some disclosures are exempt from section 34ZS. However, the heavy penalty (and the fact persons subject to a warrant may not receive adequate legal advice) may discourage permitted disclosures. For example, in 2005, the Parliamentary Joint Committee on ASIO, ASIS and DSD reported that fear of prosecution had prevented some people from providing evidence to the committee, even though it would have been permitted.[65] This 'chilling' effect may hinder the

[62] *ASIO Act* s 34L(9).
[63] Independent National Security Legislation Monitor, *Annual Report* (2012) 82.
[64] *ACC Act 2002* (Cth) s 21C(1).
[65] Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO's Questioning and Detention Powers: Review of the Operation, Effectiveness and Implications of Division 3 of Part III in the* Australian Security Intelligence Organisation Act 1979 (2005) viii–ix.

functions of other statutory watchdogs, discourage disclosures necessary to obtain meaningful legal advice and diminish legitimate public debate about the regime.

Further, section 34ZS(2) remains in place for two years after a warrant expires, making it 'next to impossible to obtain' 'eyewitness and first-hand accounts of ... ASIO's activities'.[66] This makes it difficult to test the legislation or the legality of a particular warrant in court, as well as in public.

For all these reasons, section 34ZS diminishes the transparency and accountability of the Special Powers regime. It should be more closely tailored to its counter-terrorism purpose; for example, by prohibiting only those disclosures which could prejudice national security or, at the very least, including a broad defence for innocent or innocuous disclosures.

If Detention Warrants are retained, then the restrictions on the ability of the person in detention to contact other should be amended

A person subject to a Detention Warrant is prohibited from contacting '*anyone* at any time while in custody in detention',[67] except for:

- the statutory officials appointed to supervise the regime;
- persons specified in the warrant or by the Prescribed Authority; and
- a lawyer.

ASIO has not explained the need for this broad ban. It is unclear why lesser restrictions (such as a requirement that any conduct between the detainee and outsiders be monitored by ASIO or police officers) would not suffice, or why the prohibitions upon disclosure under section 34ZS are insufficient.

F. Time Limits

The 24 hour time limit for Questioning Warrants is too long

[66] Jude McCulloch and Joo-Cheong Tham, 'Secret State, Transparent Subject: The Australian Security Intelligence Organisation in the Age of Terror' (2005) 38(3) *Australian & New Zealand Journal of Criminology* 400, 405.
[67] *ASIO Act* s 34K(10) (our emphasis).

Twenty-four hours questioning must not be mistaken for one day of questioning. Questioning is typically spread 'over a number of days', from early in the morning until late in the afternoon.[68] Significant periods of time are not 'counted' when calculating how much questioning time has elapsed, including break times and time taken by the Prescribed Authority to explain the questioning process (dead-time).[69] Thus, '24 hours questioning' is in fact a very significant and prolonged disruption of the life of an individual who may not even be suspected of any crime. This questioning may be spread out over the lifespan of the warrant, which can be a maximum of 28 days. The person may thus have the threat of questioning hanging over their head for up to a month.

Further:

- Section 34ZS of the *ASIO Act* prohibits the subject of a warrant from revealing the fact a warrant has been issued, unless authorised to do so. This makes it difficult for the person to explain their whereabouts to family members or their employer. This emphasises the need to ensure the period of questioning or detention is as short as possible.
- ASIO can obtain multiple, successive warrants against the same person. The additional criteria ASIO must satisfy in order to obtain a repeat warrant may not pose a significant hurdle. There is also no limit on the number of repeat warrants which may be issued. Therefore, a person may be questioned (or detained) under successive warrants for even longer than these time limits appear to permit.

For all these reasons, the length of questioning should be restricted. The time limit should be shortened, or the dead time provision removed. Questioning should be confined to a shorter period, for example, one week.

The extended time limit for questioning through an interpreter should be repealed

Questioning involving an interpreter can carry on for twice as long; that is, for a maximum of 48 hours.[70] This seems disproportionate to the likely impact of an interpreter on the questioning process. It may discourage a subject from requesting an interpreter in the first place. Further, this extended time limit applies if an interpreter 'is present *at any* time while a person is questioned',[71]

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[68] Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO's Questioning and Detention Powers: Review of the Operation, Effectiveness and Implications of Division 3 of Part III in the* Australian Security Intelligence Organisation Act 1979 (2005) 16-18.
[69] *ASIO Act* ss 34ZE(6), 34R(13); *Statement of Procedures – Warrants Issued Under Division 3 of Part III* (2006) cl 7.4 <http://www.comlaw.gov.au/Details/F2006L03543/Explanatory%20Statement/Text>.
[70] *ASIO Act* s 34R(11).
[71] *ASIO Act* s 34R(8) (our emphasis).

regardless of for how long. In contrast, the AFP are not given any extra time to question a person suspected of a terrorism (or any other) offence because that person requires an interpreter.[72]

The extended time limit in the *ASIO Act* should be abolished. In the alternative, a flexible provision which permits ASIO to apply for an extension of time from the Prescribed Authority, but only for so long as reasonably necessary to accommodate the interpreter, should be adopted. This is consistent with Walker's recommendation that:

> An appropriate safeguard should apply requiring the prescribed authority to be satisfied on reasonable grounds that any extension of time is no more than could reasonably be attributable to the use of a foreign language. The onus must be on ASIO to demonstrate what additional time is necessary due to the use of an interpreter in each particular case.[73]

If Detention Warrants are retained, the time limit on detention should also be reduced

The subject of a Detention Warrant may be detained for up to seven times longer than a person suspected of committing a crime can be detained by the AFP. This is a striking and concerning difference; especially given that the former need not be suspected of any crime, and Detention Warrants are not limited to circumstances where questioning is necessary to enable the prevention or prosecution of a terrorism offence. Unless ASIO can demonstrate some 'appreciable operational benefit' for seven days,[74] the time limit should be shortened to something akin to 48 hours.

G. Oversight and accountability

Powers of this gravity ought to be held to the highest possible standards of accountability and oversight. Federal Parliament has gone to great lengths to design an extensive framework capable of supervising the Special Powers regime in a manner which balances ASIO's operational needs with this need for accountability. However, this framework lacks transparency and independence.

Transparency is hindered by section 34ZS of the *ASIO Act* and the restrictions placed on the ability of lawyers to obtain information about the warrants to which their clients are subject. This lack of transparency is exacerbated by broad and unchecked powers given to the Attorney-

[72] *Crimes Act* ss 23C and 23DB.
[73] Independent National Security Legislation Monitor, *Annual Report* (2012) 76.
[74] Independent National Security Legislation Monitor, *Annual Report* (2011) 31.

General and Prime Minister to censor the reports of the Inspector-General of Intelligence and Security (IGIS) and the PJCIS.

It may be justifiable to censor information in order to protect national security. However, these powers are cast too broadly, again in terms which are not limited to information which could feasibly pose a security risk. Further, the Attorney-General is a key player in the regime and should not be permitted to censor the reports of the officials appointed to supervise it. There is a real risk that the Attorney-General will use this power at the direction of ASIO, as has been alleged in the past.

The accountability framework relies heavily on 'integrity' agencies, particularly the IGIS and INSLM. These agencies are emanations of the executive and so lack the clear cut independence which courts provide. It is therefore particularly problematic that the Attorney-General can censor the PJCIS's reports, and that the IGIS must consult with the Attorney-General and/or Director-General of ASIO about her inquiries and include their comments in her report. All officials appointed to supervise the regime should be trusted to redact security sensitive information from their own reports, as the INSLM is. Their reports should be entirely independent.

Further, these integrity agencies can only report and recommend change. The ability of the courts to supervise the regime (via judicial review) is weak. Thus the supervisory framework lacks any form of hard accountability. The decisions of the Attorney-General are also subject to inadequate scrutiny.

These problems are unsurprising and, to an extent, incapable of being resolved given the inherent difficulties of exposing security sensitive counter-terrorism judgments to external and open scrutiny. However, if the Special Powers regime cannot be adequately supervised, there is good reason to suggest they should not remain at all.

Yours sincerely,

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THE EXTRAORDINARY QUESTIONING AND DETENTION POWERS OF THE AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION

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[The Australian Security Intelligence Organisation Legislation (Terrorism) Amendment Act 2003 *(Cth) is the most controversial piece of anti-terrorism legislation passed by the Commonwealth Parliament. The Act created a system of warrants that permit the Australian Security Intelligence Organisation to question and detain non-suspects for the purposes of gathering intelligence about terrorism offences. This regime is subject to a sunset clause and will expire in July 2016, unless renewed by Parliament. This article provides a comprehensive overview of the process by which warrants are issued and the powers conferred by them. It finds that the regime is insufficiently tailored to its purpose of protecting Australians against terrorism. In light of this, and evidence about how the powers have been used, the article concludes that these extraordinary questioning and detention powers should not be renewed without significant amendment.]*

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Contents

I Introduction

The *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) ('*ASIO Amendment Act*') conferred extraordinary new powers on Australia's domestic intelligence agency, the Australian Security Intelligence Organisation ('ASIO'). It did so by inserting a new pt III div 3, 'Special Powers Relating to Terrorism Offences', into the *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*'). The *ASIO Amendment Act* was part of a package of anti-terrorism legislation introduced by the then Coalition government after the 9/11 terrorist attacks in New York and Washington, DC. Among other things, the package introduced into Australian law a definition of 'terrorist act',[1] criminalised terrorist acts and a broad range of preparatory conduct,[2] provided for the proscription of terrorist

[1] *Criminal Code Act 1995* (Cth) sch s 100.1.

[2] Ibid sch divs 101–3; *Charter of the United Nations Act 1945* (Cth) ss 20–1.

organisations,[3] established a new regime for dealing with national security information in court proceedings[4] and vested new powers in intelligence and law enforcement agencies to investigate terrorism.[5]

The *ASIO Amendment Act* is one of the most controversial pieces of legislation ever passed by the Commonwealth Parliament.[6] It was, and remains, unique in the Western democratic world in that it establishes a system ('Special Powers Regime') whereby an intelligence agency may coercively question and detain a non-suspect citizen.[7] The controversial nature of the Special Powers Regime is demonstrated by the long and tumultuous process of its enactment. Few pieces of legislation have been the subject of such a high level of scrutiny by the Commonwealth Parliament, parliamentary committees and the public generally.[8] At a total of 15 months from introduction to passage,[9] the parliamentary debate on the Special Powers Regime was the second longest in Australia's history.[10]

As enacted, the Special Powers Regime was temporary in nature. A sunset clause was included such that the powers expired after three years.[11] However, in 2006, the Commonwealth Parliament renewed the powers and added a new 10-year sunset clause.[12] The then Coalition government justified the length of the renewed sunset clause on the basis that there was still a threat of terrorist attack and it was undesirable to distract ASIO from its operations any more

[3] *Criminal Code Act 1995* (Cth) sch div 102.

[4] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

[5] See, eg, *Crimes Act 1914* (Cth) pt IAA div 3A, pt IC div 2 sub-div B ('*Commonwealth Crimes Act*'). For a detailed discussion of Australian anti-terrorism legislation enacted since the 9/11 attacks, see George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136.

[6] Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002) 1.

[7] Parliamentary Library, Department of Parliamentary Services (Cth), *Bills Digest*, No 114 of 2005–06, 5 May 2006.

[8] Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (University of New South Wales Press, 2004) 218.

[9] The legislation was introduced into the Commonwealth Parliament in March 2002 and passed in June 2003.

[10] Andrew Lynch and George Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (University of New South Wales Press, 2006) 33.

[11] *ASIO Amendment Act* sch 1 item 24, inserting *ASIO Act* s 34Y.

[12] *ASIO Legislation Amendment Act 2006* (Cth) sch 2 item 32.

frequently than necessary.[13] Similarly, the Director-General of ASIO insisted that the threat of terrorism 'is a long-term, generational threat' and 'it is inevitable that we will have further attacks'.[14] The Special Powers Regime will now expire on 22 July 2016. No later than six months prior to its expiry, the Parliamentary Joint Committee on Intelligence and Security ('PJCIS') must report to the Commonwealth Parliament on the operation, effectiveness and implications of the Special Powers Regime.[15] This review will be critical. If the PJCIS recommends that the Special Powers Regime remain in effect, it is likely that the legislation will be made permanent or, at the very least, renewed with another lengthy sunset clause attached.

A considerable amount has been said and written about the Special Powers Regime. Nevertheless, there are significant and problematic gaps in the literature. During the enactment of the Regime and in the early years of its operation, much of what was said and written was highly polemical — either brimming with outrage at the significant intrusions the Special Powers Regime makes into fundamental human rights or expressing frustration at the delays and political compromises required in order to enact measures regarded by the executive as necessary to protect Australians against a terrorist attack. On the one hand, it was said that the Regime, at least in the form in which it was first introduced into the Commonwealth Parliament, would not be out of place 'in former dictatorships such as General Pinochet's Chile'[16] or Suharto's Indonesia.[17] On the other hand, those who opposed or delayed the Regime were said to be to blame if any Australian blood was spilt by terrorism as a result.[18]

Even years after the enactment of the Special Powers Regime, most of the literature still analyses the Special Powers Regime in a piecemeal fashion. For

[13] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 2006, 57 (Philip Ruddock). For a detailed discussion of the debates regarding the inclusion of the sunset clause in 2003 and its renewal in 2006, see Nicola McGarrity, Rishi Gulati and George Williams, 'Sunset Clauses in Australian Anti-Terror Laws' (2012) 33 *Adelaide Law Review* (forthcoming).

[14] Evidence to Joint Parliamentary Committee on ASIO, ASIS and DSD, Parliament of Australia, Canberra, 19 May 2005, 2 (Dennis Richardson).

[15] *Intelligence Services Act 2001* (Cth) s 29(1)(bb).

[16] Referring to the Regime as initially proposed in the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth): George Williams, 'Why the ASIO Bill Is Rotten to the Core', *The Age* (online), 27 August 2002 <http://www.theage.com.au/articles/2002/08/26/1030053032903.html>.

[17] Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 329.

[18] Lynch and Williams, above n 10, 33. See also Hocking, above n 8, 220, 223–4.

example, some commentators have focused upon the process by which it was enacted.[19] Others have examined constitutional issues, such as the legislative powers underpinning the Regime and the Regime's implications for the separation of powers.[20] Still more have examined the adequacy of the accountability mechanisms incorporated into the powers[21] and whether the framework in place to supervise use of the Special Powers is adequate to ensure the integrity of the Regime.[22] Finally, commentators have sought to explain how Australia came to enact a Regime that differs so significantly from the responses of other countries threatened (often to a much greater extent) by terrorism.[23]

For the most part, the literature has been strongly critical of ASIO's special powers. However, there has also been support for the Regime (and not just from the parliamentarians who sponsored it). Most notably, in 2005, the

[19] Dominique Dalla Pozza, 'Promoting Deliberative Debate? The Submissions and Oral Evidence Provided to Australian Parliamentary Committees in the Creation of Counter-Terrorism Laws' (2008) 23(1) *Australasian Parliamentary Review* 39; Greg Carne, 'Gathered Intelligence or Antipodean Exceptionalism? Securing the Development of ASIO's Detention and Questioning Regime' (2006) 27 *Adelaide Law Review* 1.

[20] Greg Carne, 'Detaining Questions or Compromising Constitutionality? The *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth)' (2004) 27 *University of New South Wales Law Journal* 524; Rebecca Welsh, 'A Question of Integrity: The Role of Judges in Counter-Terrorism Questioning and Detention by ASIO' (2011) 22 *Public Law Review* 138.

[21] Jude McCulloch and Joo-Cheong Tham, 'Secret State, Transparent Subject: The Australian Security Intelligence Organisation in the Age of Terror' (2005) 38 *Australian and New Zealand Journal of Criminology* 400; Sarah Sorial, 'The Use and Abuse of Power and Why We Need a Bill of Rights: The *ASIO (Terrorism) Amendment Act 2003* (Cth) and the Case of *R v Ul-Haque*' (2008) 34 *Monash University Law Review* 400.

[22] Lisa Burton and George Williams, 'The Integrity Function and ASIO's Extraordinary Questioning and Detention Powers' (2012) 38 *Monash University Law Review* (forthcoming).

[23] Some of the explanations put forward include: the lack of a Bill of Rights to constrain the legislative process (Nicola McGarrity, 'An Example of "Worst Practice"? The Coercive Counter-Terrorism Powers of the Australian Security Intelligence Organisation' (2010) 4 *Vienna Online Journal on International Constitutional Law* 467, 474; Carne, 'Gathered Intelligence', above n 19, 7–8; Nicola McGarrity and George Williams, 'Counter-Terrorism Laws in a Nation without a Bill of Rights: The Australian Experience' (2010) 2 *City University of Hong Kong Law Review* 45); Australia's comparative inexperience with terrorism (Hocking, above n 8, 232); the instrumentalisation of the terrorist threat for the purposes of 'political theatre' (Roach, *The 9/11 Effect*, above n 17, 310–11, 313–14); the strong majority held by the then Coalition government, which enabled it to push through such remarkable legislation (at 314); complex dynamics of 'antipodean exceptionalism' (Carne, 'Gathered Intelligence', above n 19) and a general paradigmatic shift away from traditional models of criminal justice and policing towards an intelligence or 'security' state (McCulloch and Tham, above n 21; Roach, *The 9/11 Effect*, above n 17, 331).

Parliamentary Joint Committee on ASIO, ASIS and DSD ('PJCAAD')[24] found that the Regime continued to be justified by the threat of terrorism. The Committee also found that the questioning that had so far occurred under the Special Powers Regime had been useful in monitoring potential terrorists in order to prevent attacks.[25] To date, the PJCAAD is the only body to have reviewed the Regime.[26]

Almost a decade has passed since the enactment of the Special Powers Regime. More than 50 other pieces of anti-terrorism legislation have been enacted since 9/11, reflecting the fact that Australian governments, from both sides of politics, view terrorism as an ongoing threat. There is every likelihood that the 'war on terror' will never come to a close. For this reason, the Special Powers Regime cannot be dismissed as a temporary or extraordinary response to the threat of terrorism. Instead, it is time to conduct a fresh evaluation of the Regime on the basis that it is (or, at least, may become in the near future) a permanent feature of the Australian legal landscape. Our intention in doing this is to start the debate — in advance of the PJCIS' 2016 review — about whether the Special Powers Regime should continue in operation as is, be amended or even repealed. We consider questions such as whether the Special Powers Regime has served an important security function over the past decade and whether its impact upon basic human rights has been necessary and proportionate. The answers to these questions shed light on whether the Special Powers Regime is sustainable over the longer term, and compatible with Australia's democratic values and public law principles.

This article adopts a holistic, first-principles approach to the Special Powers Regime. In Part II, we examine how the Special Powers Regime was brought about and the justifications provided for its enactment. Parts III and IV then examine the process by which a warrant is issued and the nature of the powers conferred by a Special Powers Warrant. Part V then sets out how the Special Powers Regime has been used to date. In 2005, the PJCAAD noted that the Regime had been in existence for 'only a very short time' and the 'whole range of the powers [had] not yet been exercised'. As a result, the

[24] The PJCAAD is the predecessor of the PJCIS.

[25] PJCAAD, Parliament of Australia, *ASIO's Questioning and Detention Powers: Review of the Operation, Effectiveness and Implications of Division 3 of Part III in the* Australian Security Intelligence Organisation Act 1979 (2005) 107 [6.41].

[26] The Independent National Security Legislation Monitor ('INSLM') discussed the Special Powers Regime in his December 2011 report but did not make any recommendations: Bret Walker, *Independent National Security Legislation Monitor — Annual Report 16 December 2011* (2012). The Monitor's second report is due by 31 December 2012.

Committee was reluctant to conclude whether the powers were 'workable', 'reasonable', 'would be used widely' and 'whether they are constitutionally valid.'[27] There is now a much greater body of evidence upon which to judge the practical operation of the Special Powers Regime. Finally, in Part VI we set out our conclusions about the current state and future of the Special Powers Regime.

II Development of the Special Powers Regime

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth) ('ASIO Bill (No 1)') was introduced by then Commonwealth Attorney-General, Daryl Williams, into the Commonwealth Parliament on 21 March 2002. Williams justified the Regime on a number of bases. First, he said ASIO required new powers to respond to the threat of terrorism. The events of September 11 marked 'a fundamental shift in the international security environment' and demonstrated that 'no country is safe from … terrorism'.[28] The Coalition government needed to take 'strong and decisive steps to ensure that Australia is well placed to respond'.[29] Williams accepted that 'there [was] no specific threat to Australia' at that time.[30] Nevertheless, there had been a general elevation of Australia's 'profile as a terrorist target' and an increased threat to its interests abroad.[31] After the Bali bombings in October 2002, there was a shift in rhetoric; the Special Powers Regime was then portrayed 'as an attempt to protect the Australian people "against a known threat".'[32]

Secondly, Williams acknowledged that the proposed coercive questioning and detention powers were 'extraordinary'. However, he argued these powers were necessary and appropriate because terrorism was an extraordinary

[27] PJCAAD, *Questioning and Detention Powers*, above n 25, 107 [6.44].

[28] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1930.

[29] Ibid.

[30] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7040.

[31] Ibid. The absence of a specific threat to Australia was the basis of strident criticisms of the proposed Regime. For example, Tanya Plibersek said:

> I think that we all agree with the Attorney-General when he says that he cannot find evidence of a current threat of terrorism in Australia. Indeed, the head of ASIO says that there is no current threat to Australia. Why then are we even considering introducing such draconian legislation … ?

Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6817.

[32] PJCAAD, *Questioning and Detention Powers*, above n 25, 100 [6.12], quoting Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2003, 17 678 (Kim Beazley).

'evil'.[33] Terrorism was 'quite unlike ordinary crime, necessitating a response quite unlike the accepted responses to criminal activity'.[34] The potentially catastrophic consequences of terrorist attacks required both intelligence-gathering and law enforcement agencies to detect and stop such attacks before they occurred. The creation of strong investigative powers was necessary to achieve this purpose.[35] Williams also said these powers would enable prosecutions of the newly-created preparatory terrorism offences: 'In order to ensure that any perpetrators of these serious offences are discovered and prosecuted, preferably before they perpetrate their crimes, it is necessary to enhance the powers of ASIO to investigate terrorism offences.'[36] Without coercive questioning powers, Williams argued, 'a terrorist sympathiser who may know of a planned bombing of a busy building … may decline to help authorities thwart the attack.'[37] Without the power to detain, terrorists may be 'warned before they are caught [and] planned acts of terrorism known to ASIO … rescheduled rather than prevented'.[38] This argument was repeated throughout the protracted parliamentary debate, for example in December 2002:

> The key aim of this important legislation is to enable ASIO to question people in emergency terrorist situations in order to obtain the information we need to stop terrorist attacks before people are hurt or killed.[39]

[33] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1932.

[34] PJCAAD, *Questioning and Detention Powers*, above n 25, 99 [6.10].

[35] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1930.

[36] Ibid. The logic of statements such as this is questionable. Can a person be a *perpetrator* of a criminal act without actually committing that act? This raises the spectre of 'pre-crime' and 'pre-punishment': see also Lucia Zedner, 'Pre-Crime and Post-Criminology?' (2007) 11 *Theoretical Criminology* 261; Jude McCulloch and Sharon Pickering, 'Pre-Crime and Counter-Terrorism: Imagining Future Crime in the "War on Terror"' (2009) 49 *British Journal of Criminology* 628.

[37] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1931.

[38] Ibid.

[39] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10 429 (Daryl Williams). This preventive rationale has been criticised. The ability of the state to prevent terrorism (and other crime) has been doubted. It is also questionable whether the possibility of preventing unknown harms justifies the expansion of executive power or the restriction of individual rights. See Jeremy Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 *Journal of Political Philosophy* 191; Lucia Zedner, 'Terrorism, the Ticking Bomb, and Criminal Justice Values' (2008) 73 *Criminal Justice Matters* 18; Jude McCulloch and Sharon Pickering, 'Counter-Terrorism: The Law and Policing of Pre-Emption' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 13.

Finally, the Coalition government argued that the strength of its response was tempered by adequate safeguards. It 'recognise[d] the need to maintain the balance between the security of the community and individual rights and to avoid the potential for abuse.' The powers were intended to be 'a measure of last resort' and were 'subject to a number of strict safeguards'.[40]

Over the next 15 months, the Special Powers Regime was debated and scrutinised. This process was a welcome exception to the general trend of 'hyperactive' legislating that otherwise characterised Australia in the years immediately after 9/11.[41] Anti-terrorism legislation had been passed hurriedly, often after limited debate, with insufficient consideration of the necessity of the measures or their impact on fundamental human rights.[42] However, the enactment of the Special Powers Regime was not perfect. Hocking suggests that the parliamentary debate was both confused and polemical, especially after the Bali bombings in October 2002.[43] Further, it was largely limited to 'fussing around the edges', leaving the essence of the regime — the power to coercively question and detain non-suspects — untouched.[44] The parliamentary process did, however, result in significant improvements to the legislation. These are evident when the initial proposal in the ASIO Bill (No 1) is compared with the Special Powers Regime as ultimately enacted. Many of the most concerning aspects of the ASIO Bill (No 1) were blunted and a better balance struck between the protection of civil liberties and national security.

The initial proposal contained in the ASIO Bill (No 1) would have permitted ASIO to question or detain any person, including a child over the age of 14, if there were 'reasonable grounds for believing' that this would 'substantially assist the collection of intelligence that [was] important in relation to a terrorism offence'.[45] A person subject to a warrant could be detained incom-

[40] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1930 (Daryl Williams). See also at 1931.

[41] Roach, *The 9/11 Effect*, above n 17, 325.

[42] See Andrew Lynch, 'Legislating with Urgency: The Enactment of the *Anti-Terrorism Act [No 1] 2005*' (2006) 30 *Melbourne University Law Review* 747; McGarrity and Williams, above n 23.

[43] 'Such was the confusion over which amendments now stood and just whose Bill this was — the government's or the Opposition's — that at one point the Senate passed the wrong amendments': Hocking, above n 8, 228. See also Lynch and Williams, above n 10, 33. Senator Bob Brown described the Prime Minister's claim that parliamentarians who delayed the passage of the legislation would be to blame for Australian lives lost in the meantime as 'a new low in [political] debate': Hocking, above n 8, 223–4.

[44] Hocking, above n 8, 220. This was in large part because the major opposition party (the Australian Labor Party) accepted the need for the legislation from an early stage.

[45] ASIO Bill (No 1) s 24.

municado. They could be prevented from contacting their family, employer and even their lawyer. Each warrant only permitted detention for a maximum of 48 hours. However, there was no restriction on the number of warrants that could be obtained and no additional criteria for a second (or third) warrant. Although rationalised by the government as an extraordinary response to an emergency situation,[46] the legislation was not subject to any sunset clause or mandatory review process.

The ASIO Bill (No 1) was referred to the PJCAAD for review. The PJCAAD was highly critical, stating that the Bill 'would undermine key legal rights and erode the civil liberties that make Australia a leading democracy.'[47] Of the 15 recommendations made by the PJCAAD, the Coalition government adopted 10. Non-government Senators and the Coalition government remained deadlocked on five points: the ability to detain non-suspects; the ability to obtain warrants in respect of children aged 14 to 18; significant restrictions on the ability of a person subject to a warrant to communicate with the outside world (and in particular, restrictions on access to legal representation and advice); and the absence of a sunset clause.[48] The Attorney-General argued that the amendments sought by non-government Senators would render the powers 'useless in the emergency situations it [was] designed to address'.[49] It was necessary to question and detain children because, in other countries, children had been used to commit terrorism offences.[50] Similarly, delaying access to a lawyer might be vital in 'extreme circumstances' in which 'there may be imminent danger to the community'.[51] The Bill was then referred to the Senate Legal and Constitutional References Committee ('SLCRC') for further consideration.[52] The SLCRC tabled its

[46] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1930 (Daryl Williams); Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10 427–8 (Daryl Williams). Note the Attorney-General refrained from labelling this a 'temporary' threat, saying '[w]e simply cannot say that these laws will no longer be required in two, three or four years': Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10 428.

[47] PJCAAD, *Advisory Report*, above n 6, vii.

[48] Hocking, above n 8, 219.

[49] It was also said that the involvement of sitting judges would be unconstitutional, despite some advice to the contrary: Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10 427.

[50] Ibid 10 429.

[51] Ibid.

[52] SLCRC, Parliament of Australia, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and Related Matters* (2002).

report in December 2002, making a further 27 recommendations. It challenged the very heart of the Special Powers Regime, asking whether questioning or detention of non-suspects was necessary.[53]

By the end of the 2002 parliamentary year, the deadlock had not been resolved and the Bill was laid aside. The proposal was revised and reintroduced as the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (No 2) (Cth) ('ASIO Bill (No 2)') on 20 March 2003. This Bill was substantially the same as its predecessor. However, after further negotiations between the government, opposition and non-government Senators, the Bill finally passed on 26 June 2003. The core of the *ASIO Amendment Act* was the same — ASIO could coercively question and detain non-suspect citizens. However, the three key points of contention identified above had been addressed: warrants could not be issued against persons under 16; detainees had (as a general rule) access to a lawyer of their choice; and the Regime was subject to a three-year sunset clause.

The Special Powers Regime has since been amended seven times. The majority of these amendments were technical in nature.[54] Only two batches of amendments were of real significance. The first — the *ASIO Legislation Amendment Act 2003* (Cth) — was made just five months after the Special Powers Regime was enacted.[55] These amendments were said to be necessary to overcome 'practical limitations'[56] and 'technical flaws'[57] since identified in the Special Powers Regime. Although the then Coalition government was criticised for so swiftly altering the legislation,[58] the amendments were passed with relatively little parliamentary debate and 'virtually no publicity'.[59] The 2003 amendments increased the time limit for the questioning of non-

[53] Ibid recommendations 5–8. The SLCRC 'proposed that a coercive questioning regime closer to those already in place for Royal Commissions should be considered: one aimed only at suspects rather than at general intelligence collection purposes': Hocking, above n 8, 220.

[54] For an overview of the amendments made up until 2005, see Lynch and Williams, above n 10, 33. Also, the *Law Enforcement (AFP Professional Standards and Related Measures) Act 2006* (Cth) sch 3A made amendments to complement the creation of the new Law Enforcement Integrity Commissioner, and to enable persons subject to a warrant to make complaints to that Commissioner.

[55] This Act received royal assent on 17 December 2003.

[56] Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 2003, 23 481 (Philip Ruddock).

[57] Ibid 23 463 (Robert McClelland).

[58] See, eg, ibid 23 470 (Michael Organ).

[59] See, eg, McCulloch and Tham, above n 21, 403.

suspects requiring an interpreter from 24 hours to 48 hours. They also made it an offence to disclose information related to a warrant.[60]

The second batch of amendments was made in response to the 2005 PJCAAD report.[61] The *ASIO Legislation Amendment Act 2006* (Cth) introduced: an explicit right to access a lawyer; provisions to facilitate the rights of review and complaint given to a person subject to a warrant; and clarification of the role of a person's lawyer in the questioning process. Most significantly, the 2006 amendments renewed the Special Powers Regime for a further 10 years (until July 2016).[62]

III Process of Issuing a Warrant

The *ASIO Amendment Act* created two categories of warrant: Questioning Warrants[63] and Questioning and Detention Warrants ('Detention Warrants').[64] This Part discusses the process by which warrants are issued and the criteria that must be satisfied for each type of warrant. Part IV discusses the powers that Questioning Warrants and Detention Warrants confer upon ASIO.

Applications for Questioning or Detention Warrants are made by the Director-General of ASIO ('Director-General'). Before an application may be made, the Director-General must obtain the consent of the Attorney-General. He or she must give the Attorney-General a draft of the application, which includes 'a statement of the facts and other grounds on which the Director-General considers it necessary that the warrant should be issued'.[65] The *ASIO Act* sets out a list of criteria of which the Attorney-General must be satisfied. If the Attorney-General is satisfied of these criteria, he or she may give the Director-General written consent to make an application to an Issuing Authority.[66]

60 *ASIO Legislation Amendment Act 2003* (Cth) sch 1 items 1, 7.

61 PJCAAD, *Questioning and Detention Powers*, above n 25, xiv–xvii.

62 There was extensive parliamentary debate about the renewal of the legislation and the length of the new sunset clause. For a discussion of these debates, see McGarrity, Gulati and Williams, above n 13.

63 *ASIO Act* pt III div 3 sub-div B.

64 Ibid pt III div 3 sub-div C.

65 Ibid s 34D(3)(b).

66 Ibid s 34D(4). The Attorney-General also has the discretion to make changes to the draft application before it is made.

An Issuing Authority is a current Federal Magistrate,[67] or a judge of a federal, state or territory court, who has consented to be appointed by the Attorney-General.[68] The Attorney-General may also 'declare that persons in a specified class are issuing authorities'.[69] This allows the Attorney-General to appoint anyone as an Issuing Authority, regardless of their position, expertise or degree of independence. It could be used, for example, to appoint an ASIO officer or another member of the executive.[70] The Issuing Authority has an important role to play in the Special Powers Regime. He or she is the ultimate decision-maker and, like the Attorney-General, must be satisfied of a list of criteria before a Questioning or Detention Warrant may be issued.[71] Therefore, it is critical that the Issuing Authority have (and be perceived to have) a high level of independence from the executive branch of government. The ability to 'declare that persons in a specified class are issuing authorities' hinders this.

A *Basic Criteria for Warrants*

Some basic criteria apply to all applications, for either a Questioning or a Detention Warrant. Before consenting to an application, the Attorney-General must be satisfied that:

a) the warrant permits the subject to have access to legal representation;[72]

b) 'there are reasonable grounds for believing that issuing the warrant … will substantially assist the collection of intelligence that is important in relation to a terrorism offence';[73]

c) 'relying on other methods of collecting that intelligence would be ineffective';[74] and

[67] In November 2012, the *Federal Circuit Court of Australia Legislation Amendment Act 2012* (Cth) renamed the Federal Magistrates Court the Federal Circuit Court of Australia, and Federal Magistrates 'judges'. The Federal Circuit Court of Australia (Consequential Amendments) Bill 2012 (Cth) — currently before the House of Representatives — will amend the *ASIO Act* to accommodate these changes.

[68] Ibid s 34AB(1).

[69] Ibid s 34AB(3). Given the small number of warrants requested to date, the Attorney-General has not felt it necessary to create any new categories.

[70] Hocking, above n 8, 228.

[71] *ASIO Act* ss 34E(1), 34G(1).

[72] Ibid s 34D(5).

[73] Ibid s 34D(4)(a).

d) a protocol is in place to guide the execution of the warrant (which there is).[75]

Despite it being the ultimate decision-making body, the criteria of which the Issuing Authority must be satisfied are substantially narrower. The Issuing Authority need only be satisfied of two criteria. First, the Issuing Authority must be satisfied that the application is in the proper form and the Attorney-General's consent was properly obtained.[76] It has been suggested that this criterion requires the Issuing Authority to indirectly scrutinise criteria (a)–(d) above.[77] This is not, however, an accurate description of the Issuing Authority's role. For example, the Issuing Authority need only be satisfied that there was evidence available to the Attorney-General on which it was open to him or her to consent to an application for a warrant. The Issuing Authority is not required — or allowed — to re-examine the Attorney-General's decision that there were or were not other methods of intelligence-gathering available.[78] Therefore, this criterion is procedural in nature.

The second criterion is substantive and replicates criterion (b) above. The Issuing Authority must be satisfied that 'there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.'[79] This criterion sets a very low threshold for the issuing of a warrant. This is so for five reasons. First, 'intelligence' is not defined in, or otherwise limited by, the legislation. Secondly, the collection of intelligence must only be 'important' (not 'necessary'). Thirdly, the person subject to the warrant need not actually possess any intelligence. Rather, it need only be believed that issuing the warrant will substantially assist the collection of intelligence: for example, the person may be able to point ASIO in the direction of someone who might possess such intelligence. Fourthly, 'in relation to' goes significantly beyond what might be regarded as the main aims of the Special Powers Regime, being to either prevent terrorist acts or enable the prosecution of terrorism offences. This

[74] Ibid s 34D(4)(b).

[75] Ibid s 34D(4)(c). A protocol was first established in 2003. This was amended in 2006 to reflect the changes made by the *ASIO Legislation Amendment Act 2006* (Cth): see Attorney-General's Department (Cth), *Explanatory Statement* — Australian Security Intelligence Organisation Act 1979: *Statement of Procedures — Warrants Issued under Division 3 of Part III* (2006).

[76] *ASIO Act* ss 34E(5)(a), 34G(8)(a).

[77] Attorney-General's Department, Submission No 102 to PJCAAD, *Review of Division 3 of Part III of the* ASIO Act 1979 *— Questioning and Detention Powers*, 22 June 2005, 20.

[78] See also PJCAAD, *Questioning and Detention Powers*, above n 25, 36–7 [2.33].

[79] *ASIO Act* ss 34E(1)(b), 34G(1)(b).

aspect of the criterion is not adequately tailored to the terrorist threat to Australia. Finally, the criterion adopts a generalised approach. It does not distinguish between: past, present or future offences; offences that are likely or unlikely to occur; and serious or relatively minor offences. The combination of these five matters means that a person may be subjected to coercive questioning without any suspicion of wrongdoing on his or her part. That person may be a friend or family member of someone suspected by ASIO to have some sort of current or past connection with terrorism, or even an academic, journalist or innocent bystander. Hence, it has been said that 'if you overhear a conversation on a bus which could assist ASIO in its investigations,' you could find yourself the subject of a warrant.[80]

The Special Powers Regime was intended to be used only as a matter of 'last resort'.[81] However, the only place where this is reflected in the Regime is in criterion (c). This criterion requires the Attorney-General to consider whether other, less intrusive methods of intelligence-gathering would be effective. If so, the Attorney-General must not consent to an application for a warrant. However, it is only the Attorney-General (and not the Issuing Authority) who must be satisfied of this criterion. The Commonwealth Attorney-General's Department advised the PJCAAD that this was deliberate and justified it on the basis that the Attorney-General 'is in the better position to know whether alternative means of intelligence gathering would be ineffective'.[82] Judges may be ill-equipped to make determinations on operational intelligence-gathering issues. However, it is difficult to see why the Attorney-General would be any better placed, unless he or she was to take the (inappropriate) step of seeking ASIO's advice on the matter.

The asymmetry between the criteria of which the Attorney-General and the Issuing Authority must be satisfied gives the troubling impression that the Issuing Authority merely 'double-checks' some aspects of the Attorney-General's decision. The involvement of the Issuing Authority has therefore been criticised as an attempt to give a 'veneer' of judicial approval to a process which is in fact controlled by the executive.[83] In our opinion, the use of extraordinary coercive questioning powers can only be justified if there is

[80] University of Technology, Sydney Community Law Centre, 'Information Sheet 3: Questioning and Detention Powers' in *Be Informed: ASIO and Anti-Terrorism Laws* (Information Kit, February 2005) 1.

[81] See above n 40 and accompanying text.

[82] PJCAAD, *Questioning and Detention Powers*, above n 25, 36 [2.31], citing Attorney-General's Department, Submission No 102, above n 77, 20.

[83] PJCAAD, *Questioning and Detention Powers*, above n 25, 35–6 [2.29].

evidence that other methods of intelligence-gathering would not be effective.[84] This is an important matter that should not be left to executive determination. The ultimate decision-maker should be the Issuing Authority.

B *Additional Criterion for Detention Warrants*

If ASIO seeks a Detention Warrant, it must satisfy the Attorney-General of the basic criteria set out above and an additional detention criterion; that is, that:

> there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person:
>
> (i) may alert a person involved in a terrorism offence that the offence is being investigated; or
> (ii) may not appear before the prescribed authority [at the time required for questioning]; or
> (iii) may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.[85]

Once again, the immediate problem is that only the Attorney-General (and not the Issuing Authority) need be satisfied of the additional detention criterion. The criteria of which the Issuing Authority must be satisfied are the same as for a Questioning Warrant.[86] This is an inadequate level of rigour for a decision that will deprive an individual of their liberty.[87]

Executive detention is the exception — rather than the rule — in Australia. It should only be permitted where there is a clear justification for circumventing the judicial process. In enacting the Special Powers Regime, the then Coalition government stated that ASIO needed a power of detention or else potential terrorists might be 'warned before they are caught [and] planned acts of terrorism known to ASIO … rescheduled rather than prevented'.[88] The authors accept that executive detention might be justified if it is necessary to protect Australia from a terrorist attack. The problem is that this justification is not reflected anywhere in the additional detention criterion.

[84] Note the INSLM appeared to support the contrary conclusion. He questioned whether this criteria imposed 'too high a test for the effective gathering of information under these warrants', but noted there was 'insufficient practical experience' to answer: Walker, above n 26, 30.

[85] *ASIO Act* s 34F(4)(d).

[86] Ibid s 34G(1).

[87] Walker, above n 26, 35.

[88] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1931 (Daryl Williams).

Like the basic criteria, the additional detention criterion is expressed in vague and broad terms. It hinges on the lax concepts of 'reasonable belief' and predictions that certain conduct 'may' occur. A much higher level of proof than this should be required before a person is detained without a finding of criminal guilt. Suspicion that a person 'may' not appear for questioning at the required time does not warrant detention for up to seven days. By contrast, witnesses who have been summonsed to give evidence by a court or other tribunal may be arrested and detained, but only once they actually fail to appear and only in order to bring them before the court.[89] Further, a person who has been charged with a crime may be detained pending trial, but that power is limited to persons already charged with a crime, subject to strict criteria, and exercised by a court after a full hearing.[90] Each of these two powers is tailored to serve a pressing public purpose: punishing 'contempt of court' and ensuring those charged with a crime are brought to justice.[91] Similar powers should not be given to an intelligence agency unless they are similarly tailored to serve a pressing public purpose.

Special powers warrants may be obtained if it is believed a warrant will substantially assist the collection of intelligence that is 'important in relation to a terrorism offence'.[92] This is a much broader category than information that is capable of preventing a terrorism offence or of enabling a past terrorism offence to be prosecuted. The additional criterion does not seem to raise the threshold adequately to justify detention. As the Independent National Security Legislation Monitor ('INSLM') has commented:

> The second possibility (risk of non-appearance) may well literally be true of everyone, in the sense that the failure to answer subpoenas or summonses in ordinary court proceedings is an everyday occurrence. … The first and third possibilities (risk of tip-off or tampering with evidence) may not provide a very high bar to be cleared before the extraordinary power of detention is exerted.[93]

The belief that the person may alert another person involved in a terrorism offence that the offence is being investigated ((a) above) is the most compelling justification for detention. The suggestion is that this will thwart ASIO's

[89] See, eg, *Federal Court Rules 2011* (Cth) r 41.05. See also Walker, above n 26, 27.

[90] See, eg, *Commonwealth Crimes Act* ss 15–15AB.

[91] See, eg, *Federal Court Rules 2011* (Cth) r 24.23; *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 241–3 (Latham CJ).

[92] *ASIO Act* ss 34E(1)(b), 34G(1)(b).

[93] Walker, above n 26, 34.

attempts to prevent a terrorist attack.[94] However, the criterion stops short. ASIO is not required to show that the tip-off could jeopardise ASIO operations, or that issuing the warrant would otherwise substantially assist in preventing a terrorist act. There is a strong argument that the secrecy provisions in the Special Powers Regime are sufficient to prevent a person subject to a warrant revealing sensitive information.[95] Alternatively, it may be more appropriate to deal with persons who tip off terrorists (or destroy evidence) through the ordinary procedures of criminal justice, given this very likely constitutes a crime.

It should be noted that similar (but not identical) criteria are used in other anti-terrorism laws. Division 105 of the schedule to the *Criminal Code Act 1995* (Cth) ('*Criminal Code*') allows a preventative detention order to be made if it is necessary to preserve evidence of or relating to a terrorist act. However, it must also be shown 'a terrorist act has occurred within the last 28 days' and detaining the person is 'reasonably necessary' 'to preserve evidence of, or relating to, [that] terrorist act'.[96] Division 104 of the *Criminal Code* allows a control order to be made — which may significantly curtail, but not entirely abrogate, an individual's liberty. A court must be satisfied, on the balance of probabilities, 'that making the order would substantially assist in preventing a terrorist act' or 'that the person has provided training to, or received training from, a listed terrorist organisation'.[97] Further, any restriction imposed upon the subject of the order must be 'reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.'[98] These criteria are more closely tailored to serve a pressing public purpose than those that apply to Detention Warrants.

C *Additional Criteria for Repeat Warrants*

As will be discussed in Part IVA2 below, questioning and detention are both subject to clear time limits — 24 hours for questioning and seven days for detention. The efficacy of these time limits is, however, diminished by the power to obtain multiple, successive warrants ('repeat warrants'). In its original form, the Special Powers Regime permitted ASIO to obtain unlim-

[94] Ibid.

[95] Ibid 35.

[96] *Criminal Code* s 105.4(6).

[97] Ibid s 104.4(1).

[98] Ibid s 104.4(1)(d).

ited, successive warrants without satisfying any additional criteria.[99] The current form of the Special Powers Regime represents a compromise between the political parties. Repeat warrants continue to be permitted. Additional criteria must, however, be satisfied ('repeat warrant criteria').

The Director-General must, when seeking the consent of the Attorney-General, provide him or her with details of any requests previously made in respect of the same person. If a warrant was actually issued, the Director-General must also provide details of that warrant, including the length of time for which the person was previously questioned and/or detained.[100] This is the only limitation on ASIO's ability to obtain a repeat Questioning Warrant.

Three other criteria must be satisfied if ASIO is seeking a repeat Detention Warrant ('repeat detention criteria'). First, in deciding whether to consent to or issue a repeat Detention Warrant, the Attorney-General and the Issuing Authority must 'take account of those facts'; apparently meaning the fact that a warrant has been issued and that the person 'has [previously] been detained'.[101] It is arguable that, far from being a substantive consideration, this simply requires acknowledgement of the fact of prior questioning or detention. Secondly, the Attorney-General and Issuing Authority must be satisfied that the warrant 'is justified by information additional to or materially different from that known to the Director-General at the time the Director-General sought the Minister's consent to request the issue of the last of the earlier warrants'.[102] This criterion may be relatively easy to satisfy, as ASIO will have had ample opportunity to question the person and extract new information before applying for a repeat warrant.[103] ASIO may also be able to argue that the particular information upon which it now relies was not 'known' at the time the earlier warrant was sought (an assertion that would be difficult to challenge). Finally, the person must be released from detention before the repeat Detention Warrant is issued (but not before ASIO requests the Attorney-General's consent).[104] This ensures that a person is not held in *continuous* detention for longer than the maximum seven days. It would, however, permit ASIO to release a person from custody and detain him or her just a few

[99] This aspect of the Bill was criticised. See PJCAAD, *Advisory Report*, above n 6, 22–3, 32; Hocking, above n 8, 227.

[100] *ASIO Act* ss 34D(3)(c)–(d), 34F(3)(c)–(d).

[101] Ibid ss 34F(6)(a), 34G(2)(a).

[102] Ibid ss 34F(6)(b)(i), 34G(2)(b)(i).

[103] Carne, 'Detaining Questions', above n 20, 568–9.

[104] *ASIO Act* s 34G(2)(b).

moments later. This requirement is little more than a procedural inconvenience for ASIO.[105]

The repeat warrant criteria do not substantially limit ASIO's ability to obtain multiple warrants and question or detain a person for longer than the prima facie time limits. There is also no limit on the number of repeat warrants that may be issued. Therefore, the Special Powers Regime retains the same flaw as that initially proposed in the ASIO Bill (No 1): a person may be questioned or detained for an indefinite period of time under successive warrants (including in circumstances where there is little reason for detention in the first place).[106]

If a repeat warrant is sought, the Inspector-General of Intelligence and Security ('IGIS'), an independent office-holder, must be given a copy of the draft request. The IGIS must consider whether the particular request satisfies the repeat warrant criteria and set out this decision in its Annual Report.[107] This procedure ensures that there is a further level of oversight of repeat warrants. However, the IGIS is something of a toothless tiger in this regard. It does not have the power to veto a repeat warrant if it believes that the criteria are not satisfied. Even if it did have this power, it is unlikely that the IGIS would make a decision until well after the repeat warrant had been executed.

D *Additional Criterion for Warrants against Minors*

In its original form, the Special Powers Regime permitted ASIO to obtain Questioning or Detention Warrants against children as young as 14. Called an 'appalling proposal'[108] by its critics, this was regarded as one of most indefensible aspects of the Regime.[109] The then Coalition government defended its Bill, insisting that international intelligence demonstrated that children could perpetrate and had perpetrated terrorist attacks[110] and '[t]he Australian public would be appalled to think that we failed to prevent a 17-year-old terrorist

[105] The government rejected calls for a seven-day 'immunity period' between successive warrants, as creating unnecessary 'red tape': Commonwealth, *Parliamentary Debates*, Senate, 25 June 2003, 12 588–9 (Chris Ellison).

[106] For further criticism of the continued availability of repeat warrants, see Hocking, above n 8, 228, 230.

[107] *ASIO Act* s 34ZJ.

[108] Hocking, above n 8, 216.

[109] Roach, *The 9/11 Effect*, above n 17, 330.

[110] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10 429 (Daryl Williams); Commonwealth, *Parliamentary Debates*, House of Representatives, 23 June 2003, 12 135, 12 184 (Chris Ellison).

bomber because ASIO was not allowed to ask him or her questions.'[111] After protracted disagreement, the power to issue a warrant in respect of persons under the age of 16 was removed.[112] Further, while warrants may be obtained against persons aged between 16 and 18, an additional criterion must be satisfied ('additional minors criterion'). To date, it does not appear that any warrants have been issued in respect of young people.[113]

The question of whether coercive questioning and detention powers should be used against minors is an emotive one. It is unlikely this power will ever be comfortably accepted — even if it is subject to appropriately stringent criteria. In the authors' opinion, the Special Powers Regime is only justifiable if it is necessary to protect Australia from a terrorist threat or to prosecute a terrorism offence. The additional minors criterion reflects this. The Attorney-General may only consent to a warrant against a person aged 16 to 18 if the Attorney-General 'is satisfied on reasonable grounds that … it is likely the person will commit, is committing or has committed a terrorism offence',[114] and that the warrant confers upon the young person the additional rights stipulated in the legislation.[115] This is a clear step in the right direction.[116] A similar provision should be included for all warrants.

Nevertheless, the additional minors criterion is insufficient to comply with Australia's international obligations, in particular, the *Convention on the Rights of the Child* ('*CRC*').[117] The *CRC* requires that the best interests of the child be given primary consideration in executive decision-making.[118] The imprisonment of a child should also be used only as a measure of last resort and for the shortest appropriate period of time.[119] It would be appropriate to

[111] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10 429 (Daryl Williams).

[112] *ASIO Act* ss 34ZE(1)–(2).

[113] In December 2011, the INSLM stated 'experience has not extended to any of the exceptional cases of special rules for people aged between 16 and 18 years': Walker, above n 26, 29. No warrants have been issued since.

[114] *ASIO Act* s 34ZE(4)(a).

[115] Ibid s 34ZE(4)(b).

[116] Walker, above n 26, 29.

[117] Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). See also McGarrity, 'Worst Practice', above n 23, 473; Christopher Michaelsen, 'Antiterrorism Legislation in Australia: A Proportionate Response to the Terrorist Threat?' (2005) 28 *Studies in Conflict & Terrorism* 321, 327–8.

[118] *CRC* art 3.

[119] Ibid art 37(b).

make these matters prerequisites for the issuing of a Questioning or Detention Warrant in respect of a minor.

A further problem is that, once again, the additional minors criterion is determined by the Attorney-General alone. The decision to coercively question or detain a minor should be subject to the highest degree of scrutiny. Judicial consideration would be particularly appropriate in light of the nature of the additional minors criterion. This criterion poses the question of whether a minor will commit, is committing or has committed a terrorism offence. Such a question is eminently suitable for determination by a judicial officer (even if acting in his or her personal capacity), and arguably unsuitable for determination by a government minister. Therefore, at the very least, the additional minors criterion should be scrutinised and determined by the Issuing Authority.

IV Nature of the Powers

There is considerable overlap in the powers conferred by, and operation of, Questioning and Detention Warrants.[120] The following sections will explain key aspects of the powers. Parts IVA and IVB examine the questioning process and the conditions of detention. Part IVC then looks at the availability of legal representation and advice to a person subject to either a Questioning or Detention Warrant. Finally, Part IVD assesses the extent to which communications per se and the content of those communications are restricted by the Special Powers Regime.

A *Questioning*

A Questioning Warrant empowers ASIO to 'request' a person to 'give information' or 'produce records or things that are or may be relevant to intelligence that is important in relation to a terrorism offence'.[121] ASIO may make copies and/or transcripts of any material so produced.[122] It is important to understand that detention under a Detention Warrant is not an end in itself — in contrast with other anti-terrorism measures that limit a person's liberty, such as Control Orders under div 104 and Preventative Detention Orders under div 105 of the *Criminal Code*. The main purpose of a Detention

[120] This overlap has been criticised for creating confusion about the rights and obligations of persons subject to a warrant: PJCAAD, *Questioning and Detention Powers*, above n 25, 38.

[121] *ASIO Act* ss 34E(4)(a), 34G(7)(a). See also at s 34ZD.

[122] Ibid s 34E(4)(b).

Warrant is to detain a person so that they may be effectively questioned in order to obtain intelligence that is important in relation to a terrorism offence.[123] Therefore, the following discussion about the questioning process applies equally to Questioning and Detention Warrants.

1 *Questioning Process*

A Questioning Warrant stipulates a time in the future that the person subject of the warrant must appear before a Prescribed Authority. In contrast, a person subject to a Detention Warrant must be brought before a Prescribed Authority for questioning 'immediately' after he or she is detained.[124] The first task of the Prescribed Authority is to explain a number of matters and to 'satisfy him or herself that the subject has understood the explanations given.'[125] These matters include: the terms of the warrant; the person's rights and obligations;[126] the questioning process;[127] and 'the use which may be made of any information or materials provided by the subject, including any derivative use for the purpose of criminal investigations.'[128] Most obviously missing from this list of matters is an explanation of the reasons why the warrant was issued.

In addition, the Prescribed Authority must explain to the subject of the warrant 'the function or role of all persons present during questioning'.[129] The questioning process occurs in a 'closed room'; that is, the public does not have access to the questioning. There will, however, be more than 10 people present during the questioning.[130] Obviously, one will be the person being questioned. It is likely that his or her lawyer will also be present unless, as discussed in Part IVC below, the lawyer is excluded by the Prescribed Authority. If the person is between 16 and 18 years, he or she is also entitled to have a parent,

123 See the discussion of the additional detention criterion, above Part IIIB.

124 *ASIO Act* s 34H.

125 Attorney-General's Department, Australian Security Intelligence Organisation Act 1979: *Statement of Procedures — Warrants Issued under Division 3 of Part III* (2006) cl 7.3 ('*Protocol*').

126 If the person is aged between 16 and 18, this will include explanation of the 'special rules' that apply to 'young people': *ASIO Act* s 34ZE(8).

127 Ibid s 34J.

128 Attorney-General's Department, *Protocol*, above n 125, cl 7.3.

129 Ibid.

130 PJCAAD, *Questioning and Detention Powers*, above n 25, 13 [1.4.2]. No more recent evidence is available.

guardian or other suitable representative in the room.[131] The next group of persons allowed to be present are the questioners. The Prescribed Authority does not conduct the questioning. This is done by an ASIO officer or, alternatively, by a solicitor from the Australian Government Solicitor's office representing ASIO.[132] This solicitor is also there to provide advice to the ASIO officer. The *Protocol* requires a police officer to be present at all times during the questioning.[133]

The final group of persons present are those supervising the questioning process. The IGIS is permitted to be present, but does not have to be. In practice, the IGIS has chosen to be present at the overwhelming majority of questioning.[134] To protect against abuses of process, the legislation requires that the questioning must be video- and audio-recorded.[135] Video technicians will therefore be in the room for this purpose.

The most important supervisory function is performed by the Prescribed Authority. He or she has the ultimate responsibility for the questioning process and, to this end, may make binding directions regarding this process. The Prescribed Authority may, for example, direct that there be a break in questioning or that questioning be deferred until a later date.[136] Failure to comply with these directions is a criminal offence.[137] Directions may be requested by either the person subject to the warrant[138] or ASIO.[139] They may

131 *ASIO Act* ss 34ZE(6)(b), (8).

132 Ibid ss 34E(4)(a), 34G(7)(a); PJCAAD, *Questioning and Detention Powers*, above n 25, 13 [1.4.2].

133 Attorney-General's Department, *Protocol*, above n 125, cl 7.1.

134 *ASIO Act* s 34P. In November 2005, then IGIS, Ian Carnell, informed the PJCAAD that he had attended 20 of the 21 days of questioning carried out under the first three warrants issued thus far. See PJCAAD, *Questioning and Detention Powers*, above n 25, 13 [1.4.1]. Carnell made similar statements in 2009, stating that he had 'sat in on much of the questioning' that had occurred: see Ian Carnell, 'The Role of the IGIS and Some Recent Developments' (Speech delivered at the Supreme and Federal Court Judges' Conference, Hobart, 26 January 2009) 6. The two most recent reports issued by the IGIS confirm that it is still common practice to attend questioning where possible. The IGIS supervised the questioning which occurred in 2010: see IGIS, *Annual Report 2009–2010* (2010) 23; IGIS, *Annual Report 2010–2011* (2011) 29. No warrants have been issued since.

135 *ASIO Act* s 34ZA; Attorney-General's Department, *Protocol*, above n 125, cl 10.1.

136 *ASIO Act* s 34K(1)(e).

137 Ibid s 34ZF(2).

138 See, eg, ibid ss 34K(1)(e), (9), which enable the Prescribed Authority to defer questioning in response to a complaint made by the person subject to the warrant, and s 34N, which enables a person being questioned to request an interpreter and the Prescribed Authority to defer questioning until such interpreter arrives.

also be made by the Prescribed Authority on his or her own initiative. The main limitation on the Prescribed Authority's power to make directions is that they must generally be consistent with the terms of the warrant. The Prescribed Authority may only make an inconsistent direction if it is authorised in writing by the Attorney-General or is necessary to address a concern 'about impropriety or illegality' raised by the IGIS.[140] Therefore, it is possible that even if the Prescribed Authority perceived ASIO officers to be acting unlawfully, he or she would not be able to stop the questioning unless the Attorney-General approved or the IGIS had raised a similar concern.

The power to make directions is something of a double-edged sword. On the one hand, it means the Prescribed Authority is able, to a certain extent, to safeguard the interests of the person being questioned. On the other hand, the Prescribed Authority becomes intimately involved in the questioning process and cannot be described as an entirely detached observer. As with Issuing Authorities, the independence and impartiality of the Prescribed Authority from the executive branch is of critical importance.

A Prescribed Authority is typically a former judge, that is, a person 'who has served as a judge in one or more superior courts for a period of 5 years and no longer holds a commission as a judge of a superior court.'[141] The High Court, Federal Court, Family Courts, and the Supreme and District Courts of each state and territory are all 'superior courts'.[142] The Prescribed Authority must consent to be appointed by the Attorney-General.[143] If the Attorney-General believes that there are insufficient people in this category, he or she may appoint a person who is currently serving as a judge of a state or territory superior court, and who has been in this position for at least five years.[144] If, in turn, there are not enough people in this category, the Attorney-General may appoint a President or Deputy President of the Administrative Appeals Tribunal ('AAT') who has been on the legal roll for at least five years.[145] To date, there have been sufficient numbers of former judges who have consented

[139] This is not expressly stated in the legislation: see ibid s 34K(1)(a). However, it would seem that many directions would be made at the initiative of ASIO, for example, a direction to detain a person on the grounds that evidence may otherwise be destroyed.

[140] Ibid ss 34K(2)(b), 34Q.

[141] Ibid s 34B(1).

[142] Ibid s 34A.

[143] Ibid s 34B(1).

[144] Ibid s 34B(2).

[145] Ibid s 34B(3).

to be appointed as Prescribed Authorities. Therefore, it has not been necessary to recruit from the latter two categories.[146]

In our opinion, the power to appoint sitting judges and members of the AAT should be repealed. There are strong policy reasons for using judges to supervise the questioning process. First, the involvement of judges ensures a level of independence which is absent if the supervisory function is performed by a member of the executive branch of government (such as a member of the AAT).[147] Secondly, there is no apparent advantage to appointing sitting rather than former judges as Prescribed Authorities. Former judges tend to retain the same qualities of independence, impartiality and integrity that they possessed when they were sitting on the courts. Finally, there are clear disadvantages to the appointment of sitting judges. There is an argument that such appointments are unconstitutional.[148] Regardless of whether this is so, the involvement of sitting judges in the non-judicial and, in some minds, oppressive questioning process may adversely affect the public's confidence in the courts.[149]

The actual questioning process is governed by rules set out in the legislation and, in particular, the *Protocol*. These rules allow for considerably more flexibility than do the ordinary rules of evidence and procedure applied by the Australian courts. The *Protocol* states that questioning should be conducted in a manner that is 'humane', 'courteous', and not 'demeaning', 'unfair or oppressive in the circumstances'.[150] In 2011, the INSLM reported that its inquiries had not 'throw[n] up any cause for concern as to compliance' with these requirements.[151] This is supported by the findings of the IGIS. In 2009, the IGIS noted that the conduct of ASIO officers had been described as 'professional and appropriate', and 'very formal and certainly polite and dispassionate, if persistent'.[152] Similar comments were made by the PJCAAD in a 2005 report.[153] The PJCAAD did, however, receive submissions from

[146] PJCAAD, *Questioning and Detention Powers*, above n 25, 7 [1.23].

[147] The AAT is an executive body. The President of the AAT must be a judge, who serves in his or her personal capacity. Deputy Presidents need not be judges: see *Administrative Appeals Tribunal Act 1975* (Cth) s 7.

[148] Welsh, above n 20, 149.

[149] Ibid.

[150] Attorney-General's Department, *Protocol*, above n 125, cl 7.1.

[151] Walker, above n 26, 29.

[152] Carnell, above n 134, 6.

[153] PJCAAD, *Questioning and Detention Powers*, above n 25, 107 [6.43].

lawyers involved in the process who were highly critical of ASIO's conduct.[154] Some claimed that ASIO asked repetitive and leading questions. Another suggested that the questioning was 'quite circular and rambling'. Still more described it as a 'fishing expedition', with 'much of the questioning … relating to historic circumstances and with no connection with any imminent terrorist threat.'[155] Finally, one lawyer claimed: 'tracts of questioning were not intelligence gathering; they were for no other purpose than preparing ground for a possible prosecution for giving false and misleading answers.'[156]

The *Protocol* states that the subject of the warrant must at all times be provided with facilities that the Prescribed Authorities regard as appropriate for making a complaint to the IGIS, the Australian Federal Police ('AFP') Commissioner, the Commonwealth Ombudsman or another complaints body.[157] However, in 2005, the PJCAAD reported that a Prescribed Authority had refused permission for questioning to be stopped so that the subject of the warrant could make a complaint to the IGIS (who was not present at the time).[158] This indicates the considerable discretion that the Prescribed Authority has in determining how the questioning will proceed.

2 *Time Limits on Questioning*

The maximum period of time that a warrant may be in force is 28 days, although a shorter period of time may be specified in the warrant itself.[159] If, before the expiry of this period, the Director-General is satisfied that the grounds on which the warrant was issued have 'ceased to exist', he or she must discontinue the warrant and 'take such steps as are necessary to ensure that action under the warrant is discontinued'.[160]

A person (regardless of age) may be questioned for at least eight hours.[161] The Prescribed Authority may thereafter grant two eight-hour extensions of time (up to a maximum of 24 hours of questioning).[162] Such extensions may only be granted if the Prescribed Authority is 'satisfied that … there are reasonable grounds for believing that permitting the continuation will

[154] Ibid 15 [1.4.7]–[1.4.8].

[155] Ibid 14 [1.45], 31 [2.20].

[156] Ibid 15 [1.48].

[157] Attorney-General's Department, *Protocol*, above n 125, cl 12.

[158] PJCAAD, *Questioning and Detention Powers*, above n 25, 22 [1.67].

[159] *ASIO Act* ss 34E(5)(b), 34G(8)(b).

[160] Ibid s 34ZK.

[161] Ibid s 34R(1).

[162] Ibid ss 34R(1)–(2), (6).

substantially assist the collection of intelligence that is important in relation to a terrorism offence' and questioning has so far been conducted 'properly and without delay'.[163] To date, extensions of time have been requested, and in each case granted, at least five (and possibly six) times.[164]

In his 2011 report, the INSLM noted that '[a] questioning period of 24 hours is quite remote from the ordinary experience of Australians. On any view, it is an extraordinary power.'[165] However, the power is even more extraordinary than the INSLM's report suggests. It is possible for a person to be questioned for considerably longer than the 24-hour time limit. This is because certain periods of time are not taken into account when calculating the questioning time that has elapsed. These periods include: the time taken by the Prescribed Authority to give the required explanations when the person first appears for questioning; any breaks in questioning (30 minutes every four hours for adults and every two hours for minors);[166] and 'any other time determined by a prescribed authority before whom the person appears for questioning.'[167] The breadth of the latter is of particular concern. A similar 'dead time' provision in the *Crimes Act 1914* (Cth) ('*Commonwealth Crimes Act*') has been strongly criticised for effectively permitting indefinite detention.[168] The PJCAAD's 2005 report demonstrates that questioning is typically spread 'over a number of days'[169] and people tend to be questioned from early in the morning until late in the afternoon.[170]

If an interpreter is provided to the person being questioned, a different set of time limits apply. An interpreter must be provided — either on the initia-

[163] Ibid s 34R(4).

[164] In the year ending June 2004, three people were questioned for more than eight hours; one person for over 42 hours (in the presence of a translator). In the year ending June 2005, two people were questioned for more than eight hours. However in that year, one person was subject to two warrants. As a result, it is unclear whether the extended questioning of one of these people occurred under the extension mechanism or as a result of a repeat warrant: ASIO, *Report to Parliament 2003–2004* (2004) 40; ASIO, *Report to Parliament 2004–2005* (2005) 41.

[165] Walker, above n 26, 32.

[166] Attorney-General's Department, *Protocol*, above n 125, cl 7.4; *ASIO Act* s 34ZE(6)(b)(ii).

[167] *ASIO Act* s 34R(13)(d).

[168] See, eg, Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter-Terrorism Laws* (2008) [4.1]; Law Council of Australia, 'Policing in the Shadow of Australia's Anti-Terror Laws' (Paper presented at the Clarke Inquiry Public Forum, Sydney, 22 September 2008) 6–7.

[169] PJCAAD, *Questioning and Detention Powers*, above n 25, 16 [1.50].

[170] Ibid 17–18 [1.53].

tive of the Prescribed Authority[171] or at the request of the person being questioned[172] — if the Prescribed Authority 'believes on reasonable grounds that the person is unable, because of inadequate knowledge of the English language or a physical disability, to communicate with reasonable fluency in that language.'[173] The provision of an interpreter is an important safeguard for the person being questioned. It ensures that he or she will understand the information being provided to him or her, is able to obtain proper advice from his or her lawyer and can make informed decisions about how to respond to ASIO's questions. However, there is also a considerable disadvantage to being provided with an interpreter. If an interpreter 'is present at any time while a person is questioned',[174] the person may be questioned for twice as long: that is, for an initial period of 16 hours and, with the two possible extensions of time, up to a maximum of 48 hours.[175] The phrase 'at any time' suggests that this increased time limit applies even if the majority of questioning occurs without an interpreter. In the year ending June 2004, one person was questioned with the assistance of an interpreter for over 42 hours.[176] It is unclear whether an interpreter has been used on any other occasions.[177] If an interpreter has been required on other occasions, ASIO has not relied upon the extended time limit. Nevertheless, the likely consequence of the extended time limit is 'to inhibit a subject asking for the use of [an interpreter], even where that might be advisable.'[178] A more flexible provision that permitted time to be extended, but only for so long as was reasonably necessary to accommodate the interpreter, would be preferable.[179]

3 *Coercive Nature of Questioning*

Questioning under the Special Powers Regime is coercive. Failure to appear for questioning, to answer ASIO's questions or to give ASIO the requested

[171] *ASIO Act* ss 34M(1)–(2).

[172] Ibid s 34N.

[173] Ibid s 34M(1).

[174] Ibid s 34R(8).

[175] Ibid ss 34R(8)–(12).

[176] ASIO, *Report to Parliament 2003–2004*, above n 164, 40.

[177] In 2005, the PJCAAD reported: 'In the first eight questioning warrants, an interpreter was requested on four occasions and granted on one. The Committee was not supplied with information regarding interpreters in relation to the last six warrants': PJCAAD, *Questioning and Detention Powers*, above n 25, 19 [1.56]. No more recent statistics are available.

[178] Ibid 20 [1.58].

[179] See also Walker, above n 26, 32.

records or things, or to give ASIO false or misleading information is a criminal offence punishable by five years' imprisonment.[180] Such a regime is unusual. Australians are generally understood to enjoy a right to silence. A person is not, for example, obliged to answer questions asked by a police officer.[181] This is, of course, only a general rule and is, at times, subject to exceptions.[182] Certain federal, state and territory bodies, such as the Australian Crime Commission and the Independent Commission against Corruption, are also given coercive questioning powers.[183] Even where a person is subject to a regime of coercive questioning, he or she will generally be entitled to refuse to give information on the basis of the privilege against self-incrimination. That is, that giving the information would tend to expose him or her to conviction for a crime or, in some cases, the imposition of a civil penalty.[184] The privilege against self-incrimination is absent from the Special Powers Regime.

In his 2011 report, the INSLM stated that the circumstances in which coercive questioning is permitted are so broad that 'there is no objection in principle to such compulsory powers of questioning.'[185] There can be no doubt that, at times, the right to silence and privilege against self-incrimination are restricted in order to serve more pressing purposes.

[180] *ASIO Act* s 34L.

[181] See, eg, the codification of the right to silence in the *Commonwealth Crimes Act* s 23S (except where required to do so by or under an Act).

[182] See, eg, section 3ZQO of the *Commonwealth Crimes Act*. The AFP may apply for a warrant to compel a person to provide it with a document relevant to a serious offence. The document must assist the investigation of the offence and be a 'reasonably appropriate and adapted … for the purpose of investigating the offence'. In some jurisdictions, people are required to provide their names and addresses to the police: *Summary Offences Act 1953* (SA) s 74A; *Police Administration Act 1978* (NT) s 134; *Police Offences Act 1935* (Tas) s 55A.

[183] See Walker, above n 26, 26–7. However, these powers are generally subject to strict procedural safeguards, such as full access to legal representation and use and derivative use immunities. See, eg, *Fair Work (Building Industry) Act 2012* (Cth) ss 53–4. Further, these powers are generally only used against persons suspected of some wrongdoing: Walker, above n 26, 26. If not, they are used to gather evidence about the wrongdoing of others and not as an intelligence-gathering exercise: Murray Wilcox, *Proposed Building and Construction Division of Fair Work Australia: Discussion Paper* (Commonwealth of Australia, 2008) 30 [115]. If the powers are backed up by criminal sanction, the penalties are generally far less than the five years' imprisonment which can be imposed under the Special Powers Regime: see, eg, six months' imprisonment under s 52(1) of the *Fair Work (Building Industry) Act 2012*.

[184] See, eg, *Evidence Act 1995* (Cth) s 128; *Evidence Act 1995* (NSW) s 128 (in the criminal law context); *Competition and Consumer Act 2010* (Cth) s 44ZJ (in the civil context). In some circumstances, negative inferences may be drawn from a criminal defendant's silence at trial.

[185] Walker, above n 26, 26.

However, the INSLM did not appreciate the fundamental difference between the Special Powers Regime and the other circumstances in which coercive questioning is permitted. The Special Powers Regime gives coercive questioning powers to an intelligence-gathering — rather than a law enforcement — body in a non-criminal context. The right to silence and privilege against self-incrimination lie at the heart of liberal democracies. They protect the privacy and autonomy of the individual against the state. They also support the presumption of innocence and the idea that the state should bear the burden of proving criminal guilt. It would therefore be very dangerous to look at coercive questioning as the new norm. Instead, we should only accept its extension to new circumstances where there is a clear justification.[186]

The coercive nature of the questioning power was justified by the then Coalition government on the following basis:

> In some situations, a person with highly relevant information may refuse to volunteer it. For example, a terrorist sympathiser who may know of a planned bombing of a busy building but who will not actually take part in the bombing may decline to help authorities thwart the attack. In order for the new powers to be effective, it is necessary that penalties apply in relation to the failure to answer questions accurately or produce documents or other requested things.[187]

More recently, coercive questioning was said to be 'particularly useful where the threat of terrorism is immediate and other methods of intelligence collection will be … too slow'.[188] In relation to the privilege against self-incrimination specifically, the Explanatory Memorandum accompanying the ASIO Bill (No 1) explained that it was removed

> to maximise the likelihood that information will be given or records or things produced that may assist to avert terrorism offences. The protection of the community from such violence is, in this special case, considered to be more important than the privilege against self-incrimination.[189]

[186] See also Kent Roach, 'The Consequences of Compelled Self-Incrimination in Terrorism Investigations: A Comparison of American Grand Juries and Canadian Investigative Hearings' (2008) 30 *Cardozo Law Review* 1089, 1112–15, for a discussion of the problematic consequences of compelled self-incrimination in Canada and the United States.

[187] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1931 (Daryl Williams).

[188] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 August 2005, 82 (Philip Ruddock).

[189] Explanatory Memorandum, ASIO Bill (No 1) 16.

The problem with these justifications is that they are not reflected in the criteria for issuing a Questioning Warrant. The legislation does not require any proof of imminent danger or that the intelligence sought is capable of preventing a terrorism offence before coercive questioning is permitted.[190]

There are significant restrictions upon what ASIO may do with the information once it has been obtained through the questioning process. '[A]nything said by the person' or records or things produced by the person 'while before a prescribed authority for questioning under a warrant, in response to a request made in accordance with the warrant for the person to give information' cannot be used in criminal proceedings against the person ('use immunity').[191] The conferral of use immunity is a clear improvement on the ASIO Bill (No 1). This Bill would have allowed information obtained through the questioning process to be used against the person in a criminal prosecution.[192]

The information may still be used in four ways. First, it may be used in proceedings for failing to comply with the terms of the warrant or giving false or misleading information.[193] Secondly, the use immunity only applies to criminal proceedings. The information may therefore be used in civil proceedings, for example, as the basis for deporting the person, cancelling their passport or obtaining a control order.[194] Thirdly, the use immunity only applies to proceedings against the person giving the information. The information may still be used as evidence in the criminal prosecution of another person. Finally, there is no derivative use immunity. This means that information obtained during questioning may be used to gather other information which may, in turn, be used as evidence in criminal proceedings. For example, if the name of an associate was given during questioning, ASIO could then contact that person and ask him or her to give evidence in criminal proceedings. Similarly, if the location of explosive materials was revealed, ASIO could use those physical materials as evidence in criminal proceedings. This stands in sharp contrast to Canada's now-lapsed investigative hearing regime, which is the closest international comparator to the

[190] PJCAAD, *Questioning and Detention Powers*, above n 25, 31 [2.13]–[2.14].

[191] *ASIO Act* s 34L(9)(a).

[192] Hocking, above n 8, 218; ASIO Bill (No 1) cl 34G(9).

[193] *ASIO Act* s 34L(9).

[194] Lynch and Williams, above n 10, 36.

Special Powers Regime. Information obtained under the investigative hearing regime was protected by both use and derivative use immunities.[195]

B *Detention*

Citizens in modern, liberal democratic states have a fundamental expectation that they will not be deprived of their liberty without good reason. One of the authors of this article wrote in 2002 that '[t]his principle underpins Australia's democratic system and the separation of powers entrenched by the *Australian Constitution*'.[196] As a general rule, the involuntary detention of a citizen may only be ordered by a court after a finding of criminal guilt or as an adjunct to the judicial process.[197] There are some well-established exceptions to this in Australia. Hence, the executive may order the 'non-punitive' detention of a citizen for a pressing public purpose, in particular, to protect the community from non-criminals who nevertheless pose a risk to public health or safety. For example, the executive may quarantine people with infectious diseases or confine people with serious mental illnesses.[198] Despite these exceptions, executive detention continues to be viewed warily, and is generally only permitted where it is justified on strong grounds.

The Special Powers Regime empowers ASIO to request the detention of a non-suspect for the purpose of intelligence-gathering. This is an unprecedented development. No other democratic country in the Western world has given a power of detention to its domestic intelligence agency.[199] In introducing the ASIO Bill (No 1), the Coalition government insisted that the power to detain was a necessary tool for preventing terrorist attacks. Without it, 'terrorists could be warned before they are caught, planned acts of terrorism known to

[195] Roach, *The 9/11 Effect*, above n 17, 329, 331.

[196] George Williams, Submission No 148 to PJCAAD, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, 30 April 2002, 1.

[197] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ) ('*Chu Kheng Lim*'). The principle espoused in *Chu Kheng Lim* has since been reformulated — and narrowed — by the High Court, but it remains largely intact: *Kruger v Commonwealth* (1997) 190 CLR 1, 110–11 (Gaudron J); *Al-Kateb v Godwin* (2004) 219 CLR 562, 584 [44] (McHugh J), 611–14 [135]–[140] (Gummow J), 650–1 [267] (Hayne J); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, 24–7 [57]–[62], 29–33 [66]–[78], 35 [82] (McHugh J).

[198] *Chu Kheng Lim* (1992) 176 CLR 1, 28 (Brennan, Deane and Dawson JJ), 55 (Gaudron J).

[199] *Bills Digest*, above n 7, 2. Provision for administrative detention exists in Israel and Singapore, but these powers are not conferred on intelligence agencies: Roach, *The 9/11 Effect*, above n 17, 117–24; 133–4.

ASIO could be rescheduled rather than prevented, and valuable evidence could be destroyed.'[200] The ability to detain non-suspects will, in some circumstances, 'be critical' to protect public safety.[201] Furthermore:

> Those at the front line in meeting this threat tell us that, in order to protect the community from this kind of threat, they need the power to hold a person incommunicado, subject to strict safeguards, while questioning for the purpose of intelligence gathering. We accept this need …[202]

The power to detain has not yet been used. Nevertheless, it is important to understand, even in the abstract, the scope and operation of this power. A Detention Warrant, as the name suggests, provides that the person subject to the warrant is to be taken into detention. It is not ASIO who takes the person into custody. Nor is it ASIO who holds the person for the period of the Detention Warrant. Rather, these functions are performed by police officers.[203] Given this, it might be argued that there is no problem with the extension of the power to detain, which obviously already exists in the law enforcement context, for the purpose of intelligence gathering. However, this argument cannot be sustained. There is a fundamental difference between the power of law enforcement officers to detain and the Special Powers Regime. The former are only permitted to detain persons *suspected* of committing an offence.[204]

Under the Special Powers Regime, police officers may enter and search any premises where they reasonably believe the person is, and may also use reasonable force in order to take the person into custody.[205] These powers are broadly similar to those granted to the AFP in arresting a person suspected of

[200] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1931 (Daryl Williams).

[201] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10 428 (Daryl Williams).

[202] Ibid.

[203] *ASIO Act* ss 34G(3)(a)(i), (iii). 'Police officer' is defined as 'a member or special member of the Australian Federal Police or a member of the police force or police service of a State or Territory': at s 34A.

[204] A person may only be arrested and detained by the AFP or a state or territory law enforcement agency if the person is reasonably suspected of committing a serious crime or if a warrant permitting their arrest has been obtained. A warrant may ordinarily be granted only if some wrongdoing is suspected. See, eg, *Commonwealth Crimes Act* s 3ZA. The only exception to this is the Preventative Detention Order regime in div 105 of the *Criminal Code*. This regime has never been used.

[205] *ASIO Act* ss 34U(1), 34V(1).

committing a crime.[206] However, there is a critical difference. When arresting a person, the AFP officer must usually inform him or her of the nature of the crime of which they are suspected.[207] In executing a Detention Warrant, the AFP officer need not give the person any information about the grounds for the warrant.

As already noted above, once a person is detained, he or she must be 'immediately' brought before a Prescribed Authority.[208] This ensures that the Prescribed Authority is in charge of the detention and questioning process right from the beginning and guards against abuses of process by ASIO or the AFP. In contrast, a person subject to a Questioning Warrant is not initially taken into custody. He or she is simply served with a copy of the warrant and required to attend for questioning at a stipulated time. There are, however, two circumstances in which a person subject to a Questioning Warrant may be detained. First, failure to attend before the Prescribed Authority as prescribed by the Questioning Warrant is a criminal offence.[209] Therefore, if the person fails to attend, the police may arrest him or her.[210] Secondly, the Prescribed Authority may direct that a person the subject of a Questioning Warrant be detained.[211] Broadly speaking, the Prescribed Authority may make such a direction if he or she is satisfied of the basic criteria and additional detention criterion set out above.[212]

A person may be detained for a maximum of seven days.[213] For a person subject to a Detention Warrant, this period starts when the person is first brought before the Prescribed Authority.[214] For a person detained at the direction of the Prescribed Authority, it starts when the direction to detain is made.[215] The person must be released before the seven days have elapsed if one of the following events occurs: ASIO informs the Prescribed Authority that it has no more questions to ask; the Prescribed Authority directs that the

206 *Commonwealth Crimes Act* s 3ZB.

207 Ibid s 3ZD.

208 *ASIO Act* s 34G(3). The requirement of immediacy was introduced at the recommendation of the PJCAAD in its 2002 report: PJCAAD, *Advisory Report*, above n 6, 27 [2.54] recommendation 5.

209 *ASIO Act* s 34L(1).

210 Ibid s 34K(7).

211 Ibid s 34K(1)(a).

212 Ibid s 34K(4).

213 Ibid s 34S.

214 Ibid s 34G(4).

215 Attorney-General's Department, *Protocol*, above n 125, cl 8.1.

person be released; or the person has been questioned for the maximum period of time.[216] These provisions ostensibly ensure that a person is detained only for the purpose of questioning relevant to a terrorism investigation. It is, however, instructive to compare the time limits on detention under the Special Powers Regime with the pre-charge detention of terrorism suspects by the AFP. Such a comparison indicates that the Regime is not adequately tailored to the purpose of investigating terrorism offences. A person detained under the Regime — who is potentially a non-suspect — may be held for up to seven times longer than a suspect by the AFP.[217] This is a striking and concerning difference. In his 2011 report, the INSLM suggested that there is 'no appreciable operational benefit' that had been put forward to justify a seven-day time limit (rather than some shorter period of time).[218]

The *ASIO Act* does not set out in any detail the conditions under which a person is to be detained. These conditions will be determined 'under arrangements made by a police officer',[219] although they 'must be consistent with applicable police practices and procedures in relation to custody of persons.'[220] The *ASIO Act* does, however, provide that a detained person may be searched by a police officer. This can take the form of an ordinary search or, subject to additional criteria and strict procedures, a strip search.[221] There is nothing extraordinary about this provision. It is broadly similar to the position of suspects detained by the police.[222] The *ASIO Act* does provide for some additional protections for minors. A person between the ages of 16 and 18 may only be strip-searched at the direction of the Prescribed Authority and, if such a direction is made, the search must take place in the presence of their parent or guardian.[223] More detailed guidelines about the day-to-day conditions in which a person may be detained are contained in the *Protocol*. For example, the *Protocol* states that the person must be properly supervised and given adequate food, water and sanitary facilities.[224] He or she must be

[216] *ASIO Act* s 34G(4).

[217] *Commonwealth Crimes Act* ss 23DB(5)(b), 23DF(7); Lynch and Williams, above n 10, 40; McGarrity, 'Worst Practice', above n 23, 473; Welsh, above n 20, 138.

[218] Walker, above n 26, 31.

[219] *ASIO Act* s 34G(3)(a)(iii).

[220] Attorney-General's Department, *Protocol*, above n 125, cl 8.2.

[221] *ASIO Act* s 34ZB.

[222] See, eg, *Commonwealth Crimes Act* ss 3ZE–3ZI.

[223] *ASIO Act* s 34ZC(1)(f).

[224] Attorney-General's Department, *Protocol*, above n 125, cls 9.2, 9.4.

given the opportunity to sleep uninterrupted for eight hours every day[225] and to engage in religious practices required by the person's religion.[226]

C *Access to a Lawyer*

A person subject to a Questioning or Detention Warrant ostensibly has the right to a lawyer of his or her choice.[227] This is a significant improvement on the ASIO Bill (No 1). That Bill would have denied a detainee access to a lawyer for the first 48 hours of detention.[228] In the criminal context, the right to a lawyer of one's choice is recognised by Australian common law and international law as being of critical importance.[229] Of course, the questioning of a person under the Special Powers Regime is not a criminal investigation. Nevertheless, the Regime may have serious (and even criminal) implications. First, the information obtained during the questioning process may be used indirectly as the basis for terrorism or other criminal prosecutions against the person. Secondly, a person has a long list of complicated obligations under a Questioning or Detention Warrant. These include the obligation to answer ASIO's questions and the prohibition on disclosing information about the warrant. If the person fails to comply with these obligations, they face the possibility of a lengthy period of imprisonment. Finally, the provisions in the *ASIO Act* for challenging the legality of a particular warrant or a person's treatment by ASIO or the police will likely only be effective if the person can obtain legal advice. For all these reasons, it is vital that persons subject to a warrant are given adequate access to legal representation and advice. However, as the Special Powers Regime currently stands, there are a number of significant limitations on the right to legal representation that undermine this apparent protection.

The most significant limitation is that the Prescribed Authority may prohibit a person from contacting a particular lawyer if it is satisfied that:

(a) a person involved in a terrorism offence may be alerted that the offence is being investigated; or

[225] Ibid cl 9.3.

[226] Ibid cl 9.6.

[227] *ASIO Act* ss 34D(5), 34E(3), 34F(5), 34G(5).

[228] ASIO Bill (No 1) cl 24.

[229] *Dietrich v The Queen* (1992) 177 CLR 292, 298, 301–2 (Mason CJ and McHugh J); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(3)(b).

(b) a record or thing that the person may be requested in accordance with the warrant to produce may be destroyed, damaged or altered.[230]

If the person's first choice of lawyer is vetoed by the Prescribed Authority, he or she may contact another lawyer. However, that lawyer may then be vetoed (and so on).[231] It is unclear whether the veto power has ever been used. Even if it has not, that should not be the end of the matter. The right to a lawyer of one's choosing is so fundamental that it must only be restricted or abrogated where there is good reason to do so. For example, under the *Commonwealth Crimes Act*, the AFP may deny a person access to a lawyer of their choice in 'exceptional circumstances'.[232] In 2002, Attorney-General Daryl Williams accepted that depriving a person of access to a lawyer of his or her choice would be generally unacceptable. It would only be acceptable in 'extreme circumstances' in which 'there may be imminent danger to the community.'[233] The problem with this justification is that there is no requirement of 'extreme' or 'exceptional' circumstances in the Special Powers Regime. The circumstances in which the right to a lawyer of one's choosing may be restricted are far broader. Therefore, persons subject to a Questioning or Detention Warrant must hope that ASIO, in applying for a lawyer to be vetoed, and the Prescribed Authority, in making the ultimate decision, exercise restraint.

The right conferred by the *ASIO Act* is really just a right for the person to 'contact' a lawyer. It is not a substantive right to legal representation and advice. This is so for a number of reasons. First, as already discussed, a person's lawyer of choice may be vetoed by the Prescribed Authority. Secondly, the person may be questioned before they have been able to consult with their lawyer.[234] Thirdly, the lawyer must play a very passive role in the questioning. Fourthly, the lawyer may be excluded from the questioning in certain circumstances. Finally, there is no right for a person to communicate with his or her lawyer in private. Each of these points will now be discussed in turn. Their cumulative effect is to make very significant inroads into the right to legal representation and advice.

230 *ASIO Act* ss 34ZO(2).

231 Ibid s 34ZO(4).

232 *Commonwealth Crimes Act* s 23L(2).

233 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10 428 (Daryl Williams).

234 *ASIO Act* s 34ZP(1).

The Prescribed Authority may — but is not obligated to — defer questioning until the person's lawyer arrives.[235] In 2005, the PJCAAD reported that '[a]lmost all persons who have been subject to questioning warrants have had access to legal representation at all times.'[236] In our opinion, 'almost' is not good enough. Again, the Special Powers Regime contrasts sharply with the position under the *Commonwealth Crimes Act*. There is a general right under the *Commonwealth Crimes Act* to have questioning deferred for a reasonable time until the person has communicated with his or her lawyer and, after that, to wait a reasonable time to allow that person to attend the questioning. This right may be abrogated, but only in circumstances far more limited than under the Special Powers Regime. In addition to proof that 'exceptional circumstances' exist, the investigating officer must also reasonably believe that the questioning is so urgent, having regard to the safety of other people, that it should not be delayed.[237] In any event, even if the questioning is not deferred, the person being questioned may nevertheless refuse to answer any questions until he or she has received legal advice. This is so because he or she, unlike persons being questioned under the Special Powers Regime, is entitled to the right to silence and privilege against self-incrimination.[238] This will be discussed in more detail in Part IVD below. In the absence of such rights, persons subject to a Questioning or Detention Warrant should at the very least be entitled to a deferral of questioning for a reasonable time until legal advice has been obtained.

Where the lawyer is present during the questioning, he or she must play a passive role. He or she is not permitted to ask questions, cross-examine or 'intervene in questioning … except to request clarification of an ambiguous question.'[239] This is reinforced by the fact that lawyers are not seated next to their clients during the questioning. The subject of the warrant is either placed in the witness box or, at the very least, there is an ASIO officer between him or her and the lawyer.[240] The Prescribed Authority may — but need not — permit the lawyer to address him or her during a break in questioning.[241] The

[235] Ibid s 34K(1)(e); Attorney-General's Department, *Protocol*, above n 125, cl 11.2; Hocking, above n 8, 229. In contrast, if an interpreter is requested, questioning must be deferred: *ASIO Act* ss 34M(3)–(4), 34N(3)–(4).

[236] PJCAAD, *Questioning and Detention Powers*, above n 25, 11 [1.36].

[237] *Commonwealth Crimes Act* s 23L(1)(b).

[238] *Petty v The Queen* (1991) 173 CLR 95, 128–9 (Gaudron J); *Evidence Act 1995* (Cth) s 89.

[239] *ASIO Act* s 34ZQ(6).

[240] PJCAAD, *Questioning and Detention Powers*, above n 25, 22 [1.67].

[241] *ASIO Act* s 34ZQ(7).

Prescribed Authority may also direct an ASIO or police officer to remove the lawyer from the questioning room if the Prescribed Authority 'considers the legal adviser's conduct is unduly disrupt[ive]'.[242] If this occurs, the person being questioned must be permitted to contact another lawyer but, once again, there is no requirement to defer questioning until the new lawyer arrives.[243] As at 2005, this power to remove a lawyer had not been used.[244] However, the possibility of eviction may result in the lawyer being more of an observer than active participant. These issues may account for the complaint made by many lawyers that the questioning process is inherently 'unfair'.[245]

The *ASIO Act* states that the Special Powers Regime 'does not affect the law relating to legal professional privilege.'[246] However, there are two problems with the scope of this apparent protection. The first problem is that a person is not able to communicate with his or her lawyer in private. Confidentiality is central to the effective operation of legal professional privilege. A person arrested by the AFP and charged with an offence is entitled to communicate with his or her lawyer in private.[247] In contrast, all contact between a person subject to a Detention Warrant and his or her lawyer 'must be made in a way that can be monitored by a person exercising authority under the warrant.'[248] The same rule applies to communications between a person subject to a Questioning Warrant and his or her lawyer except to the extent that communication occurs while 'the person is appearing before a prescribed authority for questioning'.[249] This exception likely exists because such communications are already made in front of the more than 10 persons present in the questioning room.[250] All other communications between a person subject to a Questioning Warrant and his or her lawyer, including during breaks in questioning and once the person has returned home at the end of the day, must be capable

[242] Ibid s 34ZQ(9). If a person is represented by a parent or guardian, that person may be ejected for similar reasons: at s 34ZR(2).

[243] Ibid s 34ZQ(10).

[244] PJCAAD, *Questioning and Detention Powers*, above n 25, 11 [1.37]. No more recent statistics are available.

[245] Ibid 12 [1.37].

[246] *ASIO Act* s 34ZV.

[247] *Commonwealth Crimes Act* s 23G(3)(a).

[248] *ASIO Act* s 34ZQ(2). If the relevant person is represented by a parent or guardian, contact with that person must also be capable of being monitored: at s 34ZR(2), but see s 34ZR(3).

[249] Ibid ss 34ZQ(3), 34E(3)(a).

[250] PJCAAD, *Questioning and Detention Powers*, above n 25, 13 [1.4.2].

of being monitored.[251] Whether and how those communications are actually monitored is not clear.

In practice, Prescribed Authorities generally allow a person subject to a Questioning or Detention Warrant and his or her lawyer to communicate in private.[252] The important point, however, is that the right to privacy is not guaranteed by the *ASIO Act*. The constant fear of surveillance means that a person may refuse to speak freely and candidly with his or her lawyer. There may be understandable concern that ASIO will use any conversations that it overhears as the basis for further investigations (if not evidence in and of itself).[253] If this is the case, the person will be unable to provide his or her lawyer with adequate instructions, the lawyer will not be able to give proper advice and the person will be deprived of the real protection of the legal professional privilege.[254] This problem is exacerbated by the limited information that the lawyer is given about the basis for the warrant. ASIO must provide the lawyer with a copy of the warrant. However, this does not include the evidence on which it is based.[255] This is so even if the lawyer has a security clearance.[256]

Secondly, legal professional privilege generally only applies to communications made in confidence.[257] As the vast majority of communications between a person subject to a Questioning or Detention Warrant and his or her lawyer are monitored by ASIO (and are therefore not confidential), it is questionable whether they are actually protected by legal professional privilege at all.[258] Therefore, the Special Powers Regime attacks 'the heart of the basis of the

[251] George Williams and Ben Saul, Submission No 55 to PJCAAD, *Review of Division 3 of Part III of the* ASIO Act 1979 — *Questioning and Detention Powers*, 24 March 2005, 7.

[252] PJCAAD, *Questioning and Detention Powers*, above n 25, 12 [1.38].

[253] Williams and Saul, above n 251, 7.

[254] Ibid.

[255] *ASIO Act* s 34ZQ(4)(b); *Australian Security Intelligence Organisation Regulations 1980* (Cth) reg 3B ('*ASIO Regulations*').

[256] *ASIO Regulations* reg 3B(3).

[257] *Evidence Act 1995* (Cth) ss 118–19. 'Confidential communication' is defined as 'communication made in such circumstances that, when it was made: (a) the person who made it; or (b) the person to whom it was made; was under an express or implied obligation not to disclose its contents': at s 117.

[258] In 2005, the PJCAAD reported that communications monitored by ASIO were probably not protected by the legal professional privilege: PJCAAD, *Questioning and Detention Powers*, above n 25, 54 [3.37].

relationship between client and lawyer, on which [the legal professional privilege] is predicated'.[259]

When introducing the Special Powers Regime into the Commonwealth Parliament, the government claimed that terrorism was 'not like ordinary crime … [as] the destruction that acts of terrorism can cause distinguish terrorism from other types of crime'.[260] The Powers were thus intended to serve a preventative (rather than law enforcement) purpose.[261] It was said that this purpose necessitated the removal of safeguards that would be expected in the criminal justice system.[262] However, it is clear from the above analysis that the restrictions on access to legal representation and advice are not always tailored to a preventative purpose. In some instances, these restrictions apply only where ASIO is able to demonstrate particular facts, for example, that contact with a particular lawyer may lead to the destruction of evidence. In others, no factual basis is required — for example, the rule that all contact between a person subject to a Detention Warrant and his or her lawyer must be capable of being monitored. This is of great concern given the serious criminal consequences that may arise from the Special Powers Regime, and the fact that it may be used against a broad range of persons including non-suspects and minors.

D *Secrecy Provisions*

ASIO has typically conducted its intelligence-gathering activities under a cloak of secrecy.[263] For example, there is a blanket ban on directly or indirectly disclosing, without the permission of the Attorney-General or the Director-General, the name or identity of an ASIO officer, employee or agent or

[259] Jane Stratton and Robin Banks, Public Interest Advocacy Centre, Submission No 90 to PJCAAD, *Review of Division 3 of Part III of the* ASIO Act 1979 — *Questioning and Detention Powers*, 8 April 2005, 25. See also Sorial, above n 21, 406.

[260] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7040 (Daryl Williams).

[261] Then Attorney-General Daryl Williams stated that '[t]he opposition is fixated on a flawed notion of a law enforcement regime and does not appear to be able to grasp that this is an intelligence-gathering exercise where law enforcement concepts are not appropriate': Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10 427–8.

[262] Ibid 10 428.

[263] See, eg, Michael Head, 'ASIO, Secrecy and Lack of Accountability' (2004) 11 *eLaw: Murdoch University Electronic Journal of Law* 27, [17]–[21]; Joo-Cheong Tham, 'ASIO and the Rule of Law' (2002) 27 *Alternative Law Journal* 216, 217.

someone 'in any way connected with' one of these persons.[264] This level of secrecy is arguably appropriate given the goals of intelligence-gathering; namely, the detection and investigation of potentially dangerous activities at a very early point in time. The problem is that the Special Powers Regime vests ASIO with coercive questioning and detention powers that have traditionally been reserved for law enforcement agencies in the criminal context. Where these powers are exercised by law enforcement agencies, they are generally subject to high levels of oversight and scrutiny. The same does not apply to the Special Powers Regime. ASIO's cloak of secrecy is extended to this Regime. We have already discussed the 'closed' nature of questioning. That is, the public is given no access to, or information about, the questioning process. This section will examine two other aspects of the secrecy surrounding the Special Powers Regime: first, restrictions on communications per se; secondly, restrictions on the *content* of communications.

1 *Restrictions on Communications Per Se*

A person subject to a Questioning Warrant may communicate with any person unless specifically prohibited by the Prescribed Authority.[265] This is only logical. It would be ridiculous for a person to be prohibited from speaking to family or friends when he or she returns home at the end of each day of questioning. In contrast, the *ASIO Act* places significant restrictions on the ability of a person subject to a Detention Warrant to contact outsiders. The starting point is that '[a] person who has been taken into custody, or detained … is not permitted to contact, and may be prevented from contacting, anyone at any time while in custody in detention.'[266]

There are four main exceptions to this. First, the *ASIO Act* provides that a person may contact the statutory officials responsible for overseeing the operation of the Special Powers Regime. These include the IGIS, the Commonwealth Ombudsman and the AFP Commissioner.[267] To this end, the person must be given the facilities necessary to make a complaint.[268] He or she must also be allowed, at any time, to lodge an application for judicial review of the warrant and/or his or her treatment.[269] These provisions play a significant

[264] *ASIO Act* s 92(1).

[265] Attorney-General's Department, *Protocol*, above n 125, cl 11.1.

[266] *ASIO Act* s 34K(10).

[267] Ibid ss 34K(11)(b), (d), (f), (h).

[268] Ibid ss 34K(11)(c), (e), (g), (i).

[269] Ibid ss 34J(1)(f), (5).

role in ensuring that a person's rights are not breached. The *ASIO Act* sets out a number of offences that may be committed by ASIO or police officers in the exercise of their powers under the Special Powers Regime.[270] For example, it is an offence to breach the requirement in s 34T that persons subject to a warrant 'must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment'. Without the ability for detainees to contact complaints bodies, these offences would be rendered ineffective.

The next two exceptions are closely related: the Detention Warrant may specify persons or classes of persons whom the detainee may contact;[271] and/or the Prescribed Authority may direct that the detainee be allowed to contact a person not specified in the warrant.[272] If, however, no persons are specified in the Detention Warrant or in a direction, the detainee may not contact anyone else: family, friends, employers or a medical professional. Young persons aged between 16 and 18 are given somewhat greater protection. A young person subject to a Detention Warrant must be permitted to contact a parent or guardian.[273]

This blanket prohibition on outside contact seems disproportionate. There is no need for ASIO to prove that such contact poses (or even *may* pose) a security risk. To date, no clear explanation has been given by ASIO of the need for this blanket rule. Even if restrictions on outside contact are justified in the interest of national security, the question nevertheless remains whether lesser restrictions upon communication would suffice. For example, there could be a requirement that any contact between the detainee and outsiders be monitored by ASIO or AFP officers (except contact between the detainee and his or her lawyer which, we would argue for the reasons above, should generally be confidential). In judging what restrictions are appropriate, it must be kept in mind that there are already criminal offences prohibiting disclosure of even the fact of a warrant (discussed below) as well as a requirement that any communications between the detainee and his lawyer must be capable of being monitored.[274] These make it unlikely that a person would, while in detention, reveal information that might threaten national security.

[270] Ibid s 34ZF.

[271] Ibid ss 34G(5), 34K(11)(a).

[272] The Attorney-General's consent is required if such a direction would be inconsistent with the terms of the warrant: ibid ss 34K(1)(d), (2).

[273] Ibid ss 34ZE(6)(a)–(b). See also s 34ZE(7).

[274] Attorney-General's Department, *Protocol*, above n 125, cl 11.2.

The final exception relates to a person's right to contact a lawyer 'at any time that is a time the person is in detention in connection with the warrant'.[275] 'At any time' should not, however, be read literally. As has been discussed in Part IVC above, the right to contact a lawyer is far more limited than this. The right only arises 'after … the person has been brought before a prescribed authority for questioning' and after ASIO has had an opportunity to veto the person's lawyer of choice for security reasons.[276]

2 *Restrictions on the Content of Communications*

The *ASIO Act* imposes restrictions on the content of communications between persons subject to either a Questioning or Detention Warrant and any other person. Section 34ZS of the *ASIO Act* contains two 'secrecy offences'. These offences were introduced in late 2003, only a few months after the enactment of the Special Powers Regime.[277] The Coalition government insisted that they were necessary to prevent a person subject to a warrant from warning other people about an ongoing terrorism-related investigation and 'jeopardi[sing] efforts to stop such an attack.'[278] This is a legitimate and important goal. However, the real question is whether the secrecy offences are appropriately tailored to this goal.

The first offence provides that, for the period of time that a warrant is in effect, a person may not disclose any information that 'indicates the fact that a warrant has been issued or a fact relating to the content of the warrant or to the questioning or detention of a person in connection with the warrant'.[279] This offence is too broad. It prohibits the disclosure of information which could in no way jeopardise a terrorism-related investigation.[280] The prohibition on disclosing even the fact of a warrant may be appropriate in certain circumstances: for example, where evidence is provided to the Prescribed Authority which demonstrates that the subject of the warrant may tip off a potential terrorist. Such a person is likely to already be the subject of a Detention (rather than a Questioning) Warrant. As discussed in Part III above, a Detention Warrant may be sought and issued where there is evidence that the person may alert another person involved in a terrorism offence to

[275] *ASIO Act* ss 34D(5)(b), 34E(3)(b).

[276] Ibid s 34F(5).

[277] *ASIO Legislation Amendment Act 2003* (Cth) sch 1 pt 4.

[278] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 2003, 23 109 (Philip Ruddock).

[279] *ASIO Act* s 34ZS(1)(c)(i).

[280] McCulloch and Tham, above n 21, 406.

the ongoing ASIO investigation. Such a person could, if necessary, have their communications restricted under the detention regime. The secrecy offences would not be required.

In any event, the Special Powers Regime is not limited to this category of persons. Amongst other things, it extends to non-suspects. A person might therefore be brought in for questioning simply on the basis of what they have observed (that is, an 'innocent bystander'). In circumstances where there is no evidence that the person has any involvement with terrorism or relationship with potential terrorists, there is no reason for prohibiting them from informing an outsider of the fact that they are being questioned. This prohibition will have a simple but profound impact on the person being questioned. As explained above, questioning may be spread out over a number of days, and last from morning until afternoon. A person subject to a warrant will be unable to explain this absence to their employer or their family.

It is also an offence, while the warrant is in effect and for two years afterwards, to disclose operational information that a person has as a direct or indirect result of the issue or execution of the warrant.[281] This offence, like the first, is overly broad. 'Operational information' is not limited to information the disclosure of which might pose a risk to national security. It includes 'information indicating … information that [ASIO] has or had'; a 'source of information' (other than the person subject to the warrant) or 'an operational capability, method or plan of [ASIO]'.[282] The period of time after the expiry of a warrant for which it is an offence to disclose operational information — two years — is also a cause for concern. This is particularly so given the very limited categories of 'permitted disclosure'.[283] Some of these categories are undoubtedly significant. For example, information may be provided to the IGIS or Commonwealth Ombudsman in the course of performing their statutory duties. In legal terms, this means that operational information may be disclosed by a person if it is necessary for him or her to make an official complaint. The practical effect may be somewhat different. The 'chilling' effect of the secrecy offences was evident in the PJCAAD's 2005 report, where the PJCAAD complained of the difficulty in obtaining evidence about the use of the Special Powers.[284] Further, a person may wish to have alleged abuses of power assessed in public rather than by making an official complaint. Such

[281] *ASIO Act* s 34ZS(2).

[282] Ibid s 34ZS(5).

[283] Ibid s 34ZS(5).

[284] PJCAAD, *Questioning and Detention Powers*, above n 25, viii–ix.

potential abuses are not permitted to be revealed to the public for at least two years after the warrant has expired. By this time, it 'will be next to impossible to obtain … eyewitness and first-hand accounts … of much of ASIO's activities.[285] Other 'permitted disclosures' relevant to the subject of the warrant include communications between the person and his or her lawyer and disclosures covered by the implied constitutional freedom of political communication. The latter provides little reassurance as it would fall upon the person seeking to defend their disclosure to prove that it was covered by the implied freedom of political communication. Few people would be willing to risk five years' imprisonment in the hope that they would be able to prove this.[286] These exceptions are insufficient. A person is not, for example, able to discuss their experiences with their family or doctor or to explain their absence from work to their employer. This exacerbates the punitive impact of the Regime.[287]

There are a number of other 'technical' concerns about the secrecy offences. First, the penalties for breach are arguably disproportionate. The maximum penalty is five years' imprisonment. This contrasts unfavourably with the maximum two years' imprisonment that may be imposed against ASIO and police officers who misuse their powers.[288] Secondly, if the person making the disclosure is the person subject to the warrant or their lawyer, the offence is one of strict liability (otherwise, the disclosure need only be 'reckless').[289]

V USE OF THE SPECIAL POWERS REGIME

ASIO is required to provide statistics about the use of the Special Powers Regime in its Annual Report to the Commonwealth Parliament.[290] The

[285] McCulloch and Tham, above n 21, 405.

[286] The implied freedom of political communication is subject to restrictions that are appropriate and adapted to a purpose which is consistent with the system of representative government for which the *Constitution* provides: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561–2 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ), as modified by *Coleman v Power* (2004) 220 CLR 1, 51 [95]–[96] (McHugh J), 77–8 [195]–[196] (Gummow and Hayne JJ), 82 [211] (Kirby J).

[287] McCulloch and Tham, above n 21, 407–9.

[288] Walker, above n 26, 35–6.

[289] *ASIO Act* s 34ZS(3).

[290] Ibid s 94.

following table provides a breakdown of the Questioning and Detention Warrants issued to date.[291]

Table 1

Year ending 30 June	Warrants sought	Warrants issued	Number of persons	Length of questioning (by person)	Total hours of questioning
2004	3	3	3	15:57 10:32 42:36	69.05
2005	11	11	10	15:50 5:17 7:37 12:49 2:38 5:24 4:05 4:05 5:17 6:02	69.04
2006	1	1	1	4:20	4.20
2007	0	0	0	0	0
2008	0	0	0	0	0
2009	0	0	0	0	0
2010	1	1	1	5:48	5.48
2011	0	0	0	0	0
2012	0	0	0	0	0
Totals	**16**	**16**	**15**	**148 hours and 17 minutes**	**148 hours and 17 minutes**

[291] ASIO, *Report to Parliament 2003–2004*, above n 164, 39–40; ASIO, *Report to Parliament 2004–2005*, above n 164, 41; ASIO, *Report to Parliament 2005–2006* (2006) 45; ASIO, *Report to Parliament 2006–2007* (2007) 122; ASIO, *Report to Parliament 2007–08* (2008) 122; ASIO, *Report to Parliament 2008–09* (2009) 112; ASIO, *Report to Parliament 2009–10* (2010) 136; ASIO, *Report to Parliament 2010–11* (2011) 158; ASIO, *Report to Parliament 2011–12* (2012) 129.

The first lesson that may be taken from the table is that every application for a Questioning Warrant (16 in total) has been granted. There are two ways of interpreting this statistic. On the one hand, it might add weight to our concerns about the lack of rigour in the issuing process. Alternatively, it could mean that ASIO exercises restraint, only applying for warrants where there is 'good reason' for doing so. This latter conclusion is supported by the IGIS.[292]

Secondly, Questioning Warrants have been used infrequently; on average, only twice a year. Between 2003 and the end of 2005, 14 warrants were issued. However, in the seven years since, only two Questioning Warrants have been issued. It might be guessed (although it is impossible to conclude) that Questioning Warrants were used more frequently in the early period because they were novel and ASIO was 'testing the waters'. It may have been found that such warrants were of limited use, especially given that they run counter to ASIO's normal modus operandi of covert surveillance. Issuing a warrant obviously alerts a subject to ASIO's interest in them, and so may compromise future opportunities to gather intelligence.

Thirdly, in the early period, there was a rough correlation between the number of Questioning Warrants issued and the number of persons charged with terrorism offences. In the year ending 30 June 2004, three Questioning Warrants were issued. During that year, three men were also charged with terrorism offences.[293] In the year ending 30 June 2005, 11 Questioning Warrants were issued. One man was arrested on terrorism charges in this year[294] and a further 22 men were arrested just a few months afterwards (in November 2005).[295] There is no longer even a rough correlation between the use of the Special Powers Regime and terrorism prosecutions. The use of Questioning Warrants has sharply declined since 2005. However, this has not been matched by a corresponding decline in the laying of terrorism charges. Since the beginning of 2006, a further 10 men have been charged with terrorism offences.[296] Six of these men were convicted. Australia's official

[292] Carnell, above n 134, 6.

[293] Nicola McGarrity, '"Testing" Our Counter-Terrorism Laws: The Prosecution of Individuals for Terrorism Offences in Australia' (2010) 34 *Criminal Law Journal* 92. These men were: Faheem Lodhi (April 2004): at 96; Izhar Ul-Haque (April 2004): at 98; and Belal Khazaal (June 2004): at 105.

[294] Joseph 'Jihad Jack' Thomas (November 2004): ibid 101.

[295] Thirteen men (including Abdul Nacer Benbrika) were arrested in raids in Melbourne: ibid 106–7. A further nine men were arrested in related raids in Sydney: at 109.

[296] John Amundsen (May 2006): ibid 104; Mohamed Haneef (July 2007): at 102; three Tamil men (May and July 2007): at 110; and five men in connection with a plan to attack Holsworthy Army Barracks (August 2009): at 112–13.

terrorism alert level has remained at 'medium',[297] and ASIO has continued to report that the threat of terrorism is 'very real'.[298] Yet, in the period from 2006 to 2012, only two Questioning Warrants were sought by ASIO. None at all were sought between June 2010 and June 2012. In May 2011, the Director-General said: 'Each year ASIO responds to literally thousands of counterterrorism leads … we are currently involved in several hundred counterterrorism investigations and inquiries.'[299]

Despite this, Questioning Warrants do not seem to be being used, either to enable arrests or gather intelligence. The inescapable conclusion seems to be that ASIO does not regard the Special Powers as particularly useful and that Questioning Warrants are not an essential weapon in the fight against terrorism.

Fourthly, there is a real (albeit relatively slim) possibility of repeat warrants being issued. In the year ending 30 June 2005, one person was the subject of two separate Questioning Warrants. It is unclear how long this person was questioned for under each warrant or the reasons why a repeat warrant was issued. Nevertheless, this statistic reinforces that the 24-hour time limit on questioning is not, of itself, a guarantee against lengthy detention.

Finally, no Detention Warrant has been either sought or issued (although ASIO had 'considered' making an application on one occasion).[300] Further, no person has been detained pursuant to a Questioning Warrant.[301] ASIO has offered no public explanation for this statistic. It has made no attempt to explain why the detention power continues to be required despite not having been used once in the last decade. Practical and political factors mean that it is highly doubtful whether a Detention Warrant will *ever* be sought. When the Special Powers Regime was enacted, the AFP had no additional power to detain terrorism suspects for interrogation. Criminal suspects — both terrorists and otherwise — could only be questioned for a maximum of 12 hours without charge.[302] Therefore, Detention Warrants were regarded as

[297] Australian Government, *National Terrorism Public Alert System* (6 December 2011) Australian National Security <http://www.nationalsecurity.gov.au>.

[298] Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra (2011) 100 (David Irvine).

[299] Ibid.

[300] PJCAAD, *Questioning and Detention Powers*, above n 25, 6 [1.20].

[301] Walker, above n 26, 30.

[302] The initial investigation period is four hours: *Commonwealth Crimes Act* s 23C(4)(b), later amended by *Anti-Terrorism Act 2004* (Cth) sch 1 item 3. This may be extended by up to eight hours by a magistrate: at s 23DA(7). This regime still applies to non-terrorism offences: at ss 23C(4)(b), 23DA(7).

performing a crucial role in the investigation of terrorism. This is no longer the case. The *Anti-Terrorism Act 2004* (Cth) subsequently doubled the time for which terrorism suspects could be questioned (to 24 hours).[303] It also gave a broad power to magistrates to declare periods of detention to be 'dead time'. As such, these periods were disregarded in calculating whether the maximum 24 hours had elapsed.[304] For many years there was no limit on the amount of 'dead time'. The *National Security Legislation Amendment Act 2010* (Cth) introduced a seven-day limit on certain categories of dead time.[305] This 'dead time' regime means that the AFP has the power to question and detain suspects for at least as long as under the Special Powers Regime. Given that the AFP would be expected to take the lead role in a terrorism investigation, this leaves little need for ASIO to exercise its detention powers. The only situation in which there is still an arguable need for these powers is in respect of non-suspects. However, it is very unlikely that the additional detention criterion could be satisfied in respect of non-suspects. ASIO will also no doubt be alert to the public reaction that detention of a person, especially a non-suspect, might provoke. The case of Dr Mohamed Haneef demonstrates how the use of extraordinary powers that contravene accepted community standards may cause considerable damage to the reputation of executive agencies.[306] This suggests that it will take a truly extraordinary case for the detention power to be used (if at all). It is therefore questionable whether it is worthwhile retaining such extraordinary legislation.

[303] The initial investigation period is four hours: *Commonwealth Crimes Act* s 23DB(5)(b). This may be extended by up to 20 hours by a magistrate: at s 23DF(7).

[304] Ibid s 23DB(9)(m). This section provides that the Magistrate may 'disregard any reasonable time during which the questioning of a person is suspended, or delayed … so long as the suspension or delay in the questioning of the person is reasonable.' An equivalent provision does not apply to extensions of time for non-terrorism offences: at ss 23C(4), 23DA(7).

[305] *National Security Legislation Amendment Act 2010* (Cth) sch 3 item 16, inserting *Commonwealth Crimes Act* s 23DB(11). This limit only applies to dead time declared by a magistrate under s 23DB(9)(m).

[306] Haneef was detained at Brisbane Airport on 2 July 2007 after Australian authorities became aware that he had given a partially used SIM card to his second cousins in England. One of his cousins was subsequently connected to an attempted bombing at Glasgow Airport. The AFP made four separate applications to the courts for time to be specified as 'dead time'. As a result, Haneef was not charged with any offence until 12 days after he was first detained. On 14 July 2007, Haneef was charged with the offence of recklessly providing support to a terrorist organisation. On 27 July 2007, the charge against Haneef was withdrawn after strident media criticism and public concern over the circumstances and length of his detention. This outcry led to an independent inquiry, chaired by the Hon John Clarke, which reported that the evidence on which the charge was based was 'completely deficient': M J Clarke, *Report of the Inquiry into the Case of Dr Mohamed Haneef* (Commonwealth of Australia, 2008) vol 1, x.

The fact that ASIO has seldom used the Special Powers Regime does not necessarily mean it is unjustified. The former Coalition government acknowledged that the Special Powers were 'extraordinary measures'[307] of 'last resort'.[308] The limited use of the Special Powers is, however, an important factor to take into account. In 2005, one of the bases for the PJCAAD's recommendation that the Regime be renewed was that it had 'been useful' in enabling ASIO to monitor potential terrorists.[309] It is unlikely the same could be said today. The Coalition government's assertion that the Special Powers Regime is necessary to protect Australia from terrorism can no longer be maintained. It is difficult to justify the continuing existence of extraordinary powers which permit such significant inroads into fundamental human rights if they are also of little use at a time when the Director-General has said that ASIO is 'involved in several hundred counterterrorism investigations and inquiries.'[310]

VI Conclusions

The coercive questioning and detention powers conferred on ASIO by the Special Powers Regime are extraordinary. There is no precedent for such powers either in Australia or in other like nations. In 2003, after protracted debate, the Commonwealth Parliament concluded that these powers were necessary to protect Australia against the threat of terrorism. The Regime was accepted as an exceptional measure, and the inclusion of a sunset clause demonstrates that parliamentarians believed that it would be temporary. Ten years on, the Special Powers Regime can no longer fall back on these justifications. Today, a different question must be asked — whether there is a basis for the Special Powers Regime becoming a *permanent* feature of Australia's legal landscape. This article has sought to answer this question by examining the legislative framework, in particular, the issuing criteria and the nature of the powers, as well as the actual use made of the powers.

The most extraordinary aspect of the Special Powers Regime is the power of detention. By this, we mean both the power to issue a Detention Warrant

[307] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2003, 17 675 (Daryl Williams).

[308] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1930 (Daryl Williams).

[309] PJCAAD, *Questioning and Detention Powers*, above n 25, 107 [6.41].

[310] Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra (2011) 100 (David Irvine).

and also the power for a Prescribed Authority to direct the detention of a person subject to a Questioning Warrant. This power challenges the general rule that Australians should only be detained as a result of a finding of criminal guilt by a judicial officer. For this reason, the power should not be accepted unless there is clear evidence that it is necessary to protect the community from terrorism. It is not enough to say that ASIO will exercise restraint and only request a Detention Warrant if it believes that the circumstances necessitate it. The rule of law requires that legislation tightly constrain executive discretion. However, nowhere in the *ASIO Act* does it require the Issuing Authority to be satisfied that issuing a Detention Warrant is necessary to protect the community. At the very least, the issuing criteria should be amended to include such a requirement. This, together with the existing additional detention criterion, should be exposed to the scrutiny of the Issuing Authority, rather than left to the judgement of the Attorney-General alone.

However, practical considerations suggest that the detention power should be repealed rather than merely amended. Since 2002, 16 Questioning Warrants have been issued. In none of these cases was it regarded as necessary for a person to be detained. This suggests that other provisions of the *ASIO Act*, such as the secrecy offences, are sufficient to prevent a person from, for example, alerting another person involved in a terrorist act to an ongoing investigation. Further, 37 people have been charged with terrorism offences since 2003. The fact that no Detention Warrant has been issued in respect of any of these people suggests that the detention power is not necessary for terrorism investigations or prosecutions. If this is the case, then there is no need to renew the detention power again in 2016.

The statistics also indicate problems with the Questioning Warrants regime. A statistical breakdown of the 16 Questioning Warrants indicates that there is no correlation between the issue of such warrants and terrorism prosecutions. If Questioning Warrants are not intended to aid prosecutions, what function are they intended to serve? The answer to this is, ostensibly, to enable ASIO to gather intelligence necessary to protect Australia against the threat of terrorism. However, at no point are either the Attorney-General or the Issuing Authority asked to consider whether the questioning of an individual is actually necessary to achieve this end. We do not argue in this article that Questioning Warrants should be repealed, though certainly there is a good case that can be put to that effect. At the very least, the criteria for issuing a Questioning Warrant should be amended to require that questioning a person will substantially assist with the collection of intelligence that is reasonably believed capable of preventing a terrorism offence or enabling the

prosecution of an offence. This, and the existing criterion that a Questioning Warrant may only be issued if other methods of intelligence gathering would be inadequate, should also be exposed to the scrutiny of the Issuing Authority.

The issue of repeat Questioning Warrants also poses a very real problem, albeit one that has seldom materialised. In our opinion, the criteria for such a warrant should be modified such that they establish a significantly higher threshold than for the issue of a Questioning Warrant in the first place. This would go some way towards reducing the possibility of ASIO using repeat warrants as means of harassment.

The punitive impact of the coercive questioning regime is exacerbated by restrictions on the procedural safeguards provided to a person subject to a warrant. First, the *ASIO Act* empowers a Prescribed Authority to restrict a person's access to a lawyer of his or her choice. Other provisions, such as that allowing ASIO to monitor communications between a lawyer and his or her client, undermine the efficacy of legal representation and advice. Secondly, there is a blanket prohibition on disclosure of information about a warrant — including even the fact that a warrant has been issued. The presumption underlying these restrictions is that any communications by a person subject to a warrant — whether to a lawyer or someone else — are potentially dangerous. At times, this means the onus is effectively shifted to the person subject to the warrant to prove that communications do not pose a risk to national security; at other times, the presumption is not rebuttable.

There may well be situations in which such restrictions are appropriate. However, these are likely to be the exception rather than the norm and the restrictions should be narrowed to reflect this. Otherwise, the restrictions are disproportionate and unnecessarily hinder access to legal representation and advice. There should, for example, be a requirement of exceptional circumstances before the right to a lawyer of one's choice is restricted. The same rule should apply to the monitoring of communications between the subject of the warrant and his or her lawyer. The secrecy provisions which restrict disclosure of information about a warrant should be amended for similar reasons. Communications between the subject of a warrant and his or her family, friends, employers or medical professionals should only be restricted where there is evidence to conclude that disclosure may pose a risk to national security. As they stand, these restrictions are disproportionate to the Regime's purposes and mean that the use of the powers is shrouded in an undue degree of secrecy.

The question of whether — and to what extent — individual rights and freedoms can be restricted in times of emergency is one of the most challenging to have faced Western democracies. An even more difficult question faces

us today. A decade on from the September 11 terrorist attacks, this state of emergency has become the norm; there is no end in sight for the 'war on terror'. Therefore, Australia must start considering and answering the question of what its anti-terrorism laws should look like for the long term. Is it prepared to accept the ASIO Special Powers Regime as an 'ordinary' part of the legal framework? The Regime makes substantial inroads into fundamental human rights. Intelligence agencies are given unprecedented powers to detain non-suspects. These powers might be acceptable if they were required to protect Australia from a terrorist act. However, as this article has demonstrated, they have rarely been used and the need for them over the longer term has not been made out.

THE INTEGRITY FUNCTION AND ASIO'S EXTRAORDINARY QUESTIONING AND DETENTION POWERS

LISA BURTON* AND GEORGE WILLIAMS**

The Australian Security Intelligence Organisation Act 1979 *(Cth) permits ASIO to coercively question and detain non-suspects in order to gather intelligence about terrorism offences. This article examines the extensive checks and balances that constrain these powers, and whether they meet the standard embodied in the emerging concept of the 'integrity function'. This involves elaboration of the content of the integrity function and its application in a problematic context, as ASIO must be permitted to act with some degree of secrecy, and executive judgments on matters of national security have long been considered unsuited to external scrutiny. This study illustrates the difficulty of holding national security powers to account. It also reveals extant questions about the integrity function, including: whether it incorporates a law reform component; how independent the integrity branch must be; the intersection between the integrity function and judicial review, and whether and how the integrity branch can be silenced to protect national security. In turn, this article raises broader questions about the proper scope of ASIO's powers.*

I INTRODUCTION

In 2003 the Australian Parliament conferred extraordinary new powers on the Australian Security Intelligence Organisation ('ASIO') in response to the terrorist attacks in the United States and Bali. It did so by amending the *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*') to enable ASIO to obtain a 'Special Powers Warrant' to question and, in some circumstances, detain individuals so as to gather intelligence about terrorism offences.[1] This 'Special Powers Regime' is unprecedented in Australia and the common law democracies with which Australia is commonly compared.[2] Most strikingly, it permits the

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1 *Australian Security Intelligence Organisation Act 1979 (Cth)* pt III div 3 ('*Special Powers Relating to Terrorism Offences*').

2 Department of Parliamentary Services (Cth), *Bills Digest*, No 114 of 2005–2006, 5 May 2006, 2. See generally Lisa Burton, Nicola McGarrity and George Williams, 'The Extraordinary Questioning and Detention Powers of the Australian Security Intelligence Organisation' (2012) 36 *Melbourne University Law Review* 415.

questioning and detention of a citizen not suspected of any crime, terrorism-related or otherwise.

ASIO's Special Powers ('Powers') are in key respects broader and more coercive than the powers traditionally given to police, yet are attenuated by fewer procedural safeguards. For example, individuals subject to a Special Powers Warrant are not informed of the reason the warrant was issued, have limited access to legal representation and have no right to silence or to the privilege against self-incrimination. The *ASIO Act* also prohibits anyone from disclosing information about the fact that a Special Powers Warrant was issued or the way it was used, subject to limited exceptions. The exceptional nature of the Special Powers Regime is reflected in the fact that it is subject to a sunset clause. The Regime will expire in July 2016 unless renewed by Parliament.

Extraordinary powers of this kind must be subject to rigorous oversight and held to the highest possible standard. Many of the checks and balances used to supervise the use of public power are now commonly described as 'integrity functions', as reflected in the creation of 'integrity commissioners'[3] and the use of integrity as a criterion by which 'to evaluate the health of governmental systems'.[4] Applying this concept to the Special Powers Regime poses a number of challenges. While the Powers ought in principal to be held to the same — if not higher — standards as other public powers, it is difficult to do so without revealing sensitive national security information. Executive judgments on matters of national security have also long been considered expert and political, and so inherently unsuitable to outside scrutiny.

Despite — or perhaps because of — these challenges, the Special Powers Regime is subject to an 'elaborate'[5] and unusual supervisory framework. First, three independent statutory authorities supervise the Powers: the Inspector General of Intelligence Security ('IGIS'), the Commonwealth Ombudsman and the Independent National Security Legislation Monitor ('Monitor'). Secondly, the Powers are supervised by the Parliamentary Joint Committee of Intelligence Security ('PJCIS') and the Commonwealth Attorney-General as the responsible Minister. Thirdly, the legality of a Special Powers Warrant and its execution can be challenged in the courts via judicial review.

This framework provides a unique case study. It demonstrates the difficulties of applying traditional forms of accountability, such as judicial review, to the national security context. It also provides an opportunity to put the emerging concept of integrity function to a practical test by using it as a rubric to assess the efficacy

3 Including the Australian Commission for Law Enforcement Integrity, the Tasmanian Integrity Commission, the Victorian Office of Police Integrity, the Victorian Integrity and Anti-Corruption Commission, the Victorian Parliamentary Integrity Commissioner, the Victorian Integrity Coordination Board and Western Australian Integrity Coordinating Group (which oversee other integrity agencies), the New South Wales Police Integrity Commission, the Queensland Integrity Commissioner and the proposed National Integrity Commissioner.

4 John McMillan, 'The Ombudsman and the Rule of Law' (Paper presented at the Public Law Weekend, Canberra, 5–6 November 2004) 18.

5 Bret Walker, Independent National Security Monitor, Parliament of Australia, *Annual Report* (16 December 2011).

of a specific supervisory framework. The powers given to the agencies that make up this framework reveal uncertainties about the nature and scope of the integrity function. Does the function include scrutinising legislation and recommending legislative change? Does it include scrutinising action for compatibility with human rights? To what extent must integrity bodies be independent from the authorities they supervise? To what extent may high-level political decisions be immunised from the scrutiny of the integrity branch? What is the difference between the integrity function and judicial review, and are the two substitutable?

This article begins with an outline of the Special Powers Regime. It then explores the framework in place to supervise the Regime and assesses whether it is sufficient for the task, using the concept of integrity as a guide. This inquiry sheds light on whether extraordinary anti-terrorism legislation can be supervised in a manner consistent with the standards applied to other public powers and the extent to which the concept of integrity must adapt to such circumstances.

II THE SPECIAL POWERS REGIME

There are two types of Special Powers Warrants: Questioning Warrants and Questioning and Detention Warrants (referred to in this article as Detention Warrants). A Questioning Warrant is broadly similar to a subpoena. It compels the subject to appear for questioning by ASIO before a Prescribed Authority at a stipulated time.[6] A Detention Warrant empowers a police officer to take the subject into custody. The subject will then be brought before the Prescribed Authority for questioning and kept in detention when not being questioned, for up to seven days.[7] All warrants are operative for a maximum of 28 days.[8]

The issue of a Special Powers Warrant is an ex parte executive process. First, the Director-General of ASIO ('Director-General') drafts an application setting out the terms of the warrant sought. The Director-General then presents this application to the Attorney-General for his or her consent.[9] If the Attorney-General consents, the Director-General can make the application to an Issuing Authority, who decides whether or not to issue the warrant.[10] An Issuing Authority

6 *ASIO Act* s 34E(2). The subject will be questioned by ASIO officers or Australian Government Solicitor lawyers representing ASIO.

7 Ibid ss 34G(3), 34S. Note this seven day time limit would also appear to apply to persons subject to a Questioning Warrant detained for failure to appear for questioning or at the direction of the Prescribed Authority: see below n 16.

8 Ibid ss 34E(5)(b), 34G(8)(b).

9 Ibid ss 34D, 34F.

10 Ibid ss 34E, 34G.

is a current Federal Magistrate or a judge of a Federal, State or Territory court, acting *persona designata*.[11]

The Attorney-General can only consent, and the Issuing Authority only issue a warrant, if the application satisfies the criteria set out in the *ASIO Act*. Some criteria must be demonstrated to the satisfaction of both the Attorney-General and Issuing Authority. Some criteria are determined by the Attorney-General alone.[12] No warrant can be issued unless the Attorney-General and Issuing Authority are satisfied 'that there are reasonable grounds for believing that issuing the warrant … will substantially assist the collection of intelligence that is important in relation to a terrorism offence'.[13] Thus it is not necessary that the proposed subject is suspected of committing a crime (terrorism-related or otherwise), or that the intelligence sought may enable ASIO to prevent a terrorist act. The Attorney-General (but not the Issuing Authority) must also be satisfied that 'relying on other methods of collecting that intelligence would be ineffective'.[14] This indicates Special Powers Warrants are to be used as a measure of last resort.[15]

Additional criteria may then apply, depending on which type of warrant ASIO seeks. A Detention Warrant obviously confers more coercive powers than a Questioning Warrant.[16] The Attorney-General can only consent to a Detention Warrant if satisfied:

> that there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person:
>
> (a) may alert a person involved in a terrorism offence that the offence is being investigated;
>
> (b) may not appear before the prescribed authority [at the time required for questioning]; or

11 An Issuing Authority must consent to his or her appointment: ibid s 34AB. The Attorney-General may also 'declare that persons in a specified class are issuing authorities', regardless of their position, expertise or degree of independence: at s 34AB(3). This is obviously a highly problematic power, though it has not yet been used. See also Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (UNSW Press, 2003) 228. The power to appoint sitting judges to perform this executive function also raises constitutional problems, discussed further in Rebecca Welsh, 'A Question of Integrity: The Role of Judges in Counter-Terrorism Questioning and Detention by ASIO' (2011) 22 *Public Law Review* 138, 140–6.

12 The Issuing Authority may consider these criteria indirectly when determining whether the Attorney-General's consent was properly given, but this is an indirect and low-level form of scrutiny, at best.

13 *ASIO Act* s 34D(4)(a). Both the Attorney-General and Issuing Authority must be satisfied of some procedural criteria; for example, that the proposed warrant gives the proposed subject the rights and privileges conferred by the *ASIO Act* and is in proper form: at ss 34D(4)(c), 34E(1)(a), 34F(4)(c), 34G(1)(a).

14 Ibid s 34D(4)(b). See also s 34D(5).

15 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1935 (Daryl Williams). See again more recently Commonwealth, *Parliamentary Debates,* Senate, 9 May 2012, 3056 (Joe Ludwig).

16 Though note, the subject of a Questioning Warrant can also be detained after the warrant is issued, if the subject fails to appear for questioning (*ASIO Act* s 34K(7)) or by direction of the Prescribed Authority during the course of questioning. The Prescribed Authority can only do this if satisfied of the additional detention criterion: at ss 34K(1)(a), 34K(4)).

(c) may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.[17]

The Issuing Authority need not be satisfied of this important criterion. It is also possible to obtain multiple, sequential warrants against the same subject and warrants against minors aged between 16 and 18, subject to additional criteria.[18]

Once issued, all warrants empower ASIO to 'request' a subject to 'give information' or 'produce records or things' 'that [are] or may be relevant to intelligence that is important in relation to a terrorism offence'.[19] Though expressed as a power to 'request', it is in fact a power to compel. Failure to give ASIO the information, records or things it requests is a criminal offence punishable by five years imprisonment.[20] It is no defence that the information requested might tend to incriminate the subject.[21] Thus the subject has no right to silence or privilege against self-incrimination, though information gathered through questioning cannot be used directly in criminal proceedings against the subject.[22] Questioning can carry on for up to 24 hours, which is typically split over several days.[23]

Questioning is supervised by a Prescribed Authority; an individual appointed by the Attorney-General, who is typically a former judge of state or territory District or Supreme Courts.[24] The Prescribed Authority steers the questioning process (for example, by explaining the subject's rights to him or her, and directing that a break in questioning occur).[25] However, the Prescribed Authority's autonomy is restricted. For example, the Prescribed Authority cannot generally make a direction which is inconsistent with the terms of a warrant.[26] The IGIS, visual technicians responsible for recording the questioning, an officer from the Australian Federal Police ('AFP') and (subject to the limitations discussed below) the subject's lawyer will also be present during questioning.[27]

17 Ibid s 34F(4)(d).

18 Ibid ss 34F(6)(a)(b), 34F(2)(a)(b), 34ZE(4).

19 Ibid ss 34E(4)(a), 34G(7)(a). See also ss 34E(4)(b), 34ZD.

20 Ibid s 34L(2).

21 Ibid s 34L(8).

22 Other than criminal proceedings for failure to comply with the request itself, or for giving false or misleading information — both of which are criminal offences punishable by five years imprisonment: ibid ss 34L(2), (4)–(7). The information gathered during questioning can be used derivatively to gather other evidence which can then be used in criminal proceedings against the subject. The information can also be used directly in civil proceedings against the subject, such as deportation proceedings or proceedings to have the subject's passport cancelled: at s 34L(9).

23 Initially, the *ASIO Act* permits questioning for up to eight hours. Extensions of time (up to a total of 24 hours) may be granted by the Prescribed Authority if he or she is satisfied that 'permitting the continuation will substantially assist the collection of intelligence that is important in relation to a terrorism offence' and the questioning which has taken place so far has been conducted properly and without delay: ibid ss 34R(1)–(2), (4), (6).

24 The Attorney-General may also appoint a sitting judge to perform this role, but so far this has not been done. Ibid ss 34A, 34B(1)–(3). The constitutional validity of this power is considered further in Welsh, above n 11.

25 *ASIO Act* s 34K.

26 Ibid s 34K(2).

27 Ibid ss 34K, 34E(4)(a), 34G(7)(a); Attorney-General's Department (Cth), *Statement of Procedures — Warrants Issued under Division 3 of Part III*, 2006, cl 7.1 ('*Protocol*').

A subject who is detained may be searched and — subject to certain criteria — strip-searched.[28] While in detention the subject may be prevented from contacting his or her friends, family, employer and medical professionals.[29] The subject must be permitted to contact the various officials responsible for supervising the Regime and be given the facilities needed to do so.[30] The person may also lodge an application for judicial review of the issue of the warrant or their treatment.[31]

The subject must also be allowed to contact a lawyer, but there are significant restrictions on this 'right'.[32] The subject may be barred from contacting his or her first lawyer of choice on national security grounds.[33] The subject may also be questioned before his or her lawyer arrives and before he or she has received legal advice.[34] A subject's lawyer (like the subject him or herself) is not told why the warrant was issued, is not permitted to ask questions, cross-examine or 'intervene in questioning … except to request clarification of an ambiguous question',[35] and may be ejected if deemed to be 'disrupting proceedings'.[36] Most communication between a subject and his or her lawyer must be capable of being monitored by ASIO,[37] thereby limiting access to legal professional privilege.[38]

The *ASIO Act* and a Protocol developed by the Director-General in consultation with the IGIS and AFP[39] stipulate additional conditions of questioning and detention. For example, the Protocol states that a person in detention must be given adequate food, water, light, space, sleep and sanitary facilities.[40] The *ASIO Act* states that all subjects 'must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment'.[41] The Protocol is not legally binding, but a subject may make a complaint to the IGIS, Ombudsman or AFP if the subject believes the Protocol has not been followed.[42] A person executing a warrant who breaches one of the

28 *ASIO Act* s 34ZB, 34ZC.

29 A Detention Warrant may specify additional persons or classes or persons whom the detainee may contact, and the Prescribed Authority may direct that the detainee be allowed to contact a person not specified in the warrant. If no persons are specified in the Detention Warrant or in a direction, the detainee may not contact anyone else. By contrast, a minor must be permitted to contact a parent or guardian. Ibid ss 34G(5), 34K(1)(d), (2), (10), (11)(a), 34ZE(6).

30 Ibid s 34K(11).

31 Ibid ss 34J(1)(f), 34J(5).

32 Ibid s 34D(5).

33 Ibid s 34ZO.

34 Ibid s 34ZP(1).

35 Ibid s 34ZQ(6).

36 Ibid s 34ZQ(9).

37 Ibid s 34ZQ.

38 Sarah Sorial, 'The Use and Abuse of Power and Why We Need a Bill of Rights: The *ASIO (Terrorism) Amendment Act 2003* (Cth) and the Case of *R v Ul-Haque*' (2008) 34(2) *Monash University Law Review* 400, 406.

39 The *ASIO Act* requires that a Protocol be in place: at 34D(4)(c). A Protocol was first established in 2003. This was amended in 2006 to reflect the changes made by the *ASIO Legislation Amendment Act 2006* (Cth). See *Protocol*.

40 *Protocol* cl 9.

41 *ASIO Act* s 34T(2).

42 Ibid s 34ZG.

rules or restrictions in the *ASIO Act* commits a criminal offence punishable by two years imprisonment, but only if the person 'knows of the contravention'.[43]

Once a Special Powers Warrant is issued, it is very difficult to discuss its existence or use. Broad 'Secrecy Provisions' apply while a warrant is on foot and, in some cases, for two years after it expires.[44] Though justified as necessary to prevent the disclosure of information which 'could jeopardise efforts to stop [a terrorist] attack',[45] these Secrecy Provisions are broadly worded to capture a range of potentially innocuous information, including 'information [that] indicates the fact that the warrant has been issued or a fact relating to … the questioning or detention of a person in connection with the warrant; and … information that the Organisation has or had.'[46]

These provisions apply to everyone — not just persons subject to a warrant. If the person making the disclosure is the subject of a warrant or their lawyer, the offence is one of strict liability.[47] Any breach of the provisions is an offence punishable by five years imprisonment.[48]

Some disclosures are exempt from the Secrecy Provisions.[49] For example, the Secrecy Provisions permit:

- disclosures made for the purpose of obtaining legal advice;
- disclosures to the officials appointed to supervise the Regime, such as the IGIS and Ombudsman;[50] and
- disclosures which would be protected by the implied constitutional freedom of political communication.[51]

In addition, the *ASIO Act* prohibits the publication of any information that indicates the identity of a (current or former) ASIO officer without the Director-General or Attorney-General's consent.[52] The penalty for this offence is one year imprisonment.

These Special Powers are rarely used.[53] ASIO has never applied for a Detention Warrant. ASIO has applied for and been issued 16 Questioning Warrants against

43 Ibid s 34ZF.

44 Ibid s 34ZS.

45 Commonwealth, *Parliamentary Debates,* House of Representatives, 27 November 2003, 23109 (Philip Ruddock).

46 *ASIO Act* s 34ZS.

47 Otherwise, the disclosure need only be reckless: ibid s 34ZS(3).

48 Ibid ss 34ZS(1), (2).

49 Ibid s 34ZS(5).

50 Ibid s 34ZS(5), para (f) of the definition of 'permitted disclosure'. This only seems to protect the ability of persons subject to a warrant (or their representative) to contact the various officials, not the ability of the public at large to disclose to these officials.

51 Ibid s 34ZS(13).

52 Ibid s 92.

53 The fact that the Special Powers are so rarely used raises questions about their necessity. See also Burton, McGarrity and Williams, above n 2.

15 subjects. Three of these were issued in the year ending 2004 and 11 in the year ending 2005;[54] only two Questioning Warrants have been issued since.[55]

III THE SUPERVISORY FRAMEWORK

When the Special Powers Regime was introduced into Parliament, the then federal government assured that it was subject to strict safeguards.[56] The Regime is subject to a supervisory framework comprised of multiple entities with significant roles and powers. This section outlines these entities and their powers.

A *The Courts*

Decisions made under the Special Powers Regime are not subject to merits review.[57] A subject could not, for example, challenge the issue of a Special Powers Warrant on the basis that it was not the correct or preferable course of action. A subject can, however, challenge the legality of a Special Powers Warrant and the questioning and detention process. Several provisions in the *ASIO Act* acknowledge a subject's right to judicial review and facilitate that right.[58] For example, the Prescribed Authority must inform and regularly remind the subject that they may lodge an application for judicial review.[59]

The Act expressly excludes the jurisdiction of state and territory courts while a warrant is on foot.[60] This appears to prevent judicial review of the actions of a state or territory police officer in executing a Special Powers Warrant until the warrant expires. However, in light of the High Court's decision in *Kirk v Industrial Relations Commission*,[61] this provision may not prevent a state Supreme Court from hearing an application and granting a remedy for jurisdictional error.[62]

In practice, judicial review is likely to be weak for several reasons. First, some avenues of judicial review are closed. Decisions made under the *ASIO Act* cannot

54 Australian Security Intelligence Organisation, *Report to Parliament 2003–2004* (2004); Australian Security Intelligence Organisation, *Report to Parliament 2004–2005* (2005).

55 These statistics are drawn from ASIO's Annual Reports for the years 2003–2004 to 2010–2011.

56 Commonwealth, *Parliamentary Debates,* House of Representatives, 21 March 2002, 1930 (Attorney-General Daryl Williams).

57 As the *ASIO Act* does not provide that applications for merits review may be made: *Administrative Appeals Tribunal Act 1975* (Cth) s 25(1).

58 *ASIO Act* ss 34J(1)(f), 34J(5).

59 Ibid ss 34J(1)(f).

60 Ibid s 34ZW.

61 (2010) 239 CLR 531 ('*Kirk*').

62 *Kirk* held that the jurisdiction of state Supreme Courts to correct jurisdictional errors is constitutionally entrenched to a similar degree as the s 75(v) jurisdiction of the High Court. See John Gilmour, '*Kirk*: Newton's Apple Fell' (2011) 34 *Australian Bar Review* 155; Simon Young and Sarah Murray, 'An Elegant Convergence? The Constitutional Entrenchment of "Jurisdictional Error" Review in Australia' (2011) 11 *Oxford University Commonwealth Law Journal* 117.

be reviewed via the *Administrative Decisions (Judicial Review) Act 1977* (Cth).[63] This precludes ADJR review of any decision made about the issue or execution of a warrant by any person involved in the Regime. Judicial review is only available in the High Court under the jurisdiction conferred by s 75(v) of the *Constitution*, or the Federal Court under the jurisdiction conferred by s 39B of the *Judiciary Act 1903* (Cth). This will generally require the applicant to show that a jurisdictional error was made.[64]

Secondly, judicial review may be constrained by deference.[65] The actions of ASIO and others involved in the national security context are not immune from judicial review.[66] Nevertheless, the standard of scrutiny which the court applies may be low. Courts are often reluctant to engage in rigorous scrutiny of decisions related to national security; because officials such as the Attorney-General are thought to be politically responsible for making these judgments and because courts can lack the information and expertise to question them.[67] The *Communist Party Case* is often held up as an 'honourable exception' to this trend.[68] However, the light-touch review employed in more recent cases, such as *Thomas v Mowbray*,[69] and *Leghaie v Director-General of Security,*[70] suggest that case was very much the exception to the rule.[71] The question of whether the judiciary *ought* take a deferential approach to national security claims is beyond the scope of this paper; for present purposes, it is enough to note that that they usually do.

For example, one of the criteria which must be satisfied in order to obtain a warrant is that 'relying on other methods of intelligence would be ineffective.' This criterion is not considered by the Issuing Authority because it was thought an Issuing Authority (generally a magistrate or judge) would not have the expertise

63 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5, sch 1 ('*ADJR Act*'). Decisions made under the *ASIO Act*, the *Intelligence Services Act 2001* (Cth) and the *Inspector-General of Intelligence and Security Act 1986* (Cth) are 'not decisions to which [the *ADJR Act*] applies', and therefore not within the jurisdiction conferred on the Federal Court or Federal Magistrates Court by the *ADJR Act*.

64 Certiorari is available to correct error of law on the face of the record. Injunction and (possibly) declaration are available for non-jurisdictional error, in accordance with the general equitable principles. See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

65 We acknowledge that 'deference' is a contentious term. Here, we use it as a short-hand description of the difficulties courts encounter in this kind of context discussed in this paragraph and the next.

66 *Church of Scientology Inc v Woodward* (1982) 154 CLR 25.

67 The tendency to deference in times of emergency is also a contentious issue. See David Dyzenhaus, 'Cycles of Legality in Emergency Times' (2007) 18 *Public Law Review* 165; Kieran Hardy, 'ASIO, Adverse Security Assessments and a Denial of Procedural Fairness' (2009) 17 *Australian Journal of Administrative Law* 39; Lucia Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32(4) *Journal of Law and Society* 507.

68 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

69 (2007) 233 CLR 307.

70 [2005] FCA 1576.

71 See also Ben Saul, 'The Kakfa-esque Case of Sheikh Mansour Leghaei: The Denial of the International Human Right to a Fair Hearing in National Security Assessments and Migration Proceedings in Australia' (2010) 33(3) *University of New South Wales Law Journal* 629, 645–6; Oscar I Roos, 'Alarmed, But Not Alert in the "War on Terror"? The High Court, *Thomas v Mowbray* and the Defence Power' (2008) 15 *James Cook University Law Review* 169.

or information necessary to do so.[72] It would be very difficult for a subject to challenge the issue of a warrant on the basis that this criterion was not satisfied as a court may be unwilling to engage in an assessment of counter-terrorism strategy.

Thirdly, an applicant seeking judicial review would struggle to collect the evidence necessary to demonstrate that a jurisdictional error has been made. In 1982, the High Court stated that an applicant 'would face immense practical difficulties in building a case against such a secretive organisation [as ASIO]'.[73] These difficulties are exacerbated by provisions of the *ASIO Act,* including the Secrecy Provisions, which prohibit publication of an ASIO officer's identity, and restrictions on lawyers' ability to access information about the warrants to which their clients are subject. An applicant may also be denied access to information or the opportunity to use evidence in court by a claim of public interest immunity,[74] or the issue of a 'non-disclosure certificate', which can prevent the disclosure in any federal court proceedings of information which the Attorney-General believes 'is likely to prejudice national security'.[75]

ASIO, the Attorney-General, Issuing Authorities and Prescribed Authorities are also not required to provide reasons for the decisions they make under the Special Powers Regime.[76] ASIO is also exempt from the operation of the *Freedom of Information Act 1982* (Cth).[77] It is now subject to the *Archives Act 1983* (Cth), but this only permits access to records which are more than 20 years old. These restrictions are not surprising. Nevertheless, they make it very difficult to access current information about the decisions ASIO, the Attorney-General and others involved in the Special Powers Regime have made and their reasons for doing so. This then makes it difficult for a subject to prove an error has been made and succeed in an application for judicial review.[78]

Fourthly, the powers conferred by the *ASIO Act* would be difficult to exceed. Most of the key criteria for the issue of a warrant hinge on the discretionary judgments of the Attorney-General and Issuing Authority. Discretionary discretions based on 'reasonable satisfaction' are still subject to legal limits. The Attorney-General or Issuing Authority's satisfaction would have to be objectively reasonable, he or

72 Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO's Questioning and Detention Powers: Review of the Operation, Effectiveness and Implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979* (2005) 36–7.

73 *Church of Scientology v Woodward* (1982) 154 CLR 25; Hardy, above n 67, 39.

74 *Sankey v Whitlam* (1978) 142 CLR 1; *Evidence Act 1995* (Cth) s 130. ASIO has used the public interest immunity in the past; see, eg, *Parkin v O'Sullivan* (2009) 260 ALR 503 (regarding disclosure of documents regarding adverse security assessments).

75 *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) s 26.

76 No such requirement is imposed by the *ASIO Act*. As decisions made under the *ASIO Act* are not reviewable under the *ADJR Act,* no right is imposed by *ADJR Act* s 13. It is possible, but unlikely, that such a right would be imposed as a requirement of natural justice under the *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 approach.

77 *Freedom of Information Act 1982* (Cth) s 7, sch 2 pt 1 div 1.

78 See also Nicola McGarrity, 'An Example of Worst Practice'? The Coercive Counter-Terrorism Powers of the Australian Security Intelligence Organisation' (2010) 4 *International Journal of Constitutional Law,* 467, 479–80.

she could not have regard to irrelevant considerations (or fail to take into account relevant considerations) in reaching that satisfaction, and he or she could not then exercise the discretion for an improper purpose.[79] However it would be very difficult to show these legal limits were breached.

For example, the Attorney-General can only consent to the issue of a warrant if, among other things, he or she is satisfied that there are reasonable grounds for believing it will substantially assist the collection of intelligence important to a terrorist offence. It would be difficult to show that the Attorney-General's satisfaction was not objectively reasonable, given the judgment on matters of national security, prediction and assessment of intelligence that it entails. It would also be difficult to show that a consideration the Attorney-General took into account was irrelevant to this broad-ranging inquiry.[80]

Fifthly, the grounds of review which are available are limited. Many aspects of the Regime which a subject may wish to challenge (such as its impact on his or her right to liberty, privacy or silence, or the proportionality of the issue of a warrant to its purpose)[81] are not recognised grounds of review, or protected by any judicially enforceable bill of rights. The *ASIO Act* may have also altered the requirements of procedural fairness. For example, the *ASIO Act* expressly states that a subject may be questioned without legal representation.[82] A subject could not therefore argue that the denial of legal representation constituted a denial of procedural fairness.[83]

Finally, the Secrecy Provisions may dissuade subjects from seeking legal advice or applying for judicial review at all, even though disclosures made for this purpose would be exempt. Subjects may not fully understand they are able to make disclosures for this purpose, or may not want to risk prosecution.

As of November 2005, no applications for judicial review of warrants or their use have been made.[84] More recent statistics are not available.

79 Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 4th ed, 2009) 96–8.

80 Similar comments were made in *Traljesic v Attorney-General (Cth)* (2006) 150 FCR 199, in the context of adverse security assessments. The applicant argued that the Attorney-General had taken an irrelevant consideration into account in issuing an adverse security assessment. The Court stated:

> The minister has an unconfined discretion to have regard to what he, as a high officer of the executive, considers is in the public interest and may prejudice the security of Australia … I am of opinion that one cannot read any of those sections in a way which confines the considerations which the minister is able to take into account in forming a view as to whether or not a certificate should be issued …

at [26]–[27].

81 Assuming the issue of a warrant is not so disproportionate to its purpose as to constitute 'unreasonableness'.

82 *ASIO Act* s 34ZP.

83 The High Court accepts that the common law content of procedural fairness can be altered (and reduced) by clear and unambiguous words in the relevant statute: *Kioa v West* (1985) 159 CLR 550, 584; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57. Recent jurisprudence on the 'entrenched minimum provision of judicial review' has complicated, but not ostensibly changed, this position.

84 Parliamentary Joint Committee on ASIO, ASIS and DSD, above n 72, 56–7.

B *IGIS*

The IGIS is an independent executive office created by the *Inspector-General of Intelligence and Security Act 1986* (Cth) ('*IGIS Act*') and currently held by Dr Vivienne Thom. The IGIS is responsible for supervising the activities of Australia's intelligence community, including ASIO. The IGIS was created in response to concerns that Australia's intelligence agencies 'were not sufficiently under ministerial control, nor subject to enough scrutiny' and a general desire that 'Commonwealth departments and agencies be made more accountable'.[85] It was hoped that the creation of a 'specialised review body' to supervise the intelligence agencies would balance the need for accountability with the need for secrecy.[86]

The IGIS is the watchdog which is most intimately and actively involved in the Special Powers Regime and privy to most information about its use. The IGIS is empowered to investigate the legality and 'propriety' of ASIO's actions, 'the effectiveness and appropriateness of the procedures of ASIO relating to the legality or propriety of the activities of ASIO', whether ASIO has complied with directions and guidelines issued by the Attorney-General and whether ASIO has acted consistently with human rights.[87] The IGIS has acknowledged that some aspects of this jurisdiction — particularly, the 'propriety' of ASIO's actions — are vague. The IGIS has said it will interpret its mandate broadly and look beyond matters of strict legality.[88] The IGIS reports its findings to Parliament each year.[89] This is the limit of its powers; the IGIS can reveal problems and recommend action, but its reports have no legal force.

The IGIS plays a limited supervisory role in the process of issuing a Special Powers Warrant. If ASIO applies for a Detention Warrant against a person who has previously been detained under a prior warrant, the Director-General must give the IGIS a copy of the draft application before it is presented to the Issuing Authority. The IGIS must inspect the application to determine whether the additional criteria which apply are satisfied. The IGIS reports its finding in its annual report.[90]

The IGIS then reviews all documentation relating to all warrants 'shortly after it [has] been considered by the Attorney-General' and once again when the warrant expires.[91] The Attorney-General must give the IGIS all relevant information, such

85 Vivienne Thom, 'Address to Supreme and Federal Court Judges' Conference' (Speech delivered at the Supreme and Federal Court Judges' Conference, Hobart, 26 January 2009) 3.

86 Ibid 3–4.

87 *IGIS Act* s 8.

88 Vivienne Thom, 'Balancing Security and Individual Rights' (Address to Institute of Public Administration Australia, Canberra, 29 February 2012).

89 *IGIS Act* s 8.

90 *ASIO Act* s 34ZJ(3). No repeat Detention Warrants have been issued. One repeat Questioning Warrant has been issued so far, but this is not subject to the additional criteria and process described above.

91 IGIS, *Annual Report 2010–2011* (2011) 26–7. Note in 2011 the IGIS reported that it has recently adopted the practice of reviewing warrants on a continual basis, but as no Special Powers Warrants have been issued since 2006 we have referred to the old practice.

as copies of warrants and video recordings of questioning.[92] The IGIS has said it was 'impressed' with the quality of this documentation and assured there were sound reasons for obtaining a warrant in each case.[93] It also assured that '[t]hese inspections are intensive and go beyond simply "ticking off" each warrant'.[94] The IGIS did note that errors had been made in the process of issuing other kinds of warrants — which resulted in ASIO acting unlawfully — but no such errors had been made in the process of issuing a Special Powers Warrant.[95] The IGIS again reports the results of these inspections in its annual reports. It is clear the IGIS also consults with ASIO on an ongoing basis and will notify ASIO of errors when they are detected.[96] However, once again the IGIS's powers are advisory only. It could not, for example, prevent the execution of a warrant that it found had been unlawfully issued.

Once a warrant is issued, the IGIS has significant capacity to supervise its execution. The IGIS can be present while a subject is questioned before a Prescribed Authority.[97] The former and current IGIS have reported that they attended the vast majority of questioning sessions and reviewed recordings of the rare few they have not.[98] From this, the IGIS has reported that all questioning has been conducted professionally and without cause for concern.[99] The IGIS can also be present when a subject is taken into custody and enter premises occupied by ASIO, including those where a subject is being detained.[100] These powers have not been tested as no Detention Warrant has yet been issued.

If the IGIS is concerned that some illegality or impropriety has occurred, it can raise this concern with the Prescribed Authority.[101] The Prescribed Authority must consider the IGIS's concern.[102] The Prescribed Authority can then make a direction to address the concern; for example, by directing that questioning be suspended or that the subject be released from detention.[103] This is an important safeguard that has been used at least once.[104]

92 *ASIO Act* s 34ZI.

93 See, eg, IGIS, *Annual Report 2005–2006* (2006) 28. Note no Special Powers Warrants have been issued since this report.

94 IGIS, *Annual Report 2010–2011* (2011) 27.

95 IGIS, *Annual Report 2005–2006* (2006) 28; ibid 28.

96 See, eg, IGIS, *Annual Report 2005–2006* (2006) 28; IGIS, *Annual Report 2009–2010* (2010) 18; IGIS, *Annual Report 2010–2011* (2011) 28.

97 *ASIO Act* s 34P.

98 Drawn from IGIS's Annual Reports.

99 Drawn from IGIS's Annual Reports. See also Thom, 'Address to Supreme and Federal Court Judges' Conference', above n 85, 6.

100 *ASIO Act* s 34P; *IGIS Act* ss 19, 19A.

101 *ASIO Act* s 34Q(1)–(2).

102 Ibid s 34Q(3).

103 Ibid s 34Q(4). Such a direction may obviously be inconsistent with the terms of the warrant but need not be authorised by the Attorney-General: at ss 34Q(4), 34K(2).

104 Ian Carnell, Submission No 74 to Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO's Questioning and Detention Powers: Review of the Operation, Effectiveness and Implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979*, 2005, [24]. The IGIS's annual reports indicate it has not been used since.

The IGIS also has broad investigative powers. It can respond to complaints made by individuals;[105] a power facilitated by provisions which ensure a subject is aware of the right to make a complaint and given the facilities necessary to do so.[106] The IGIS is the only member of the supervisory framework who can receive complaints about the conduct of ASIO, its lawyers or the Prescribed Authority.

The IGIS can also commence an inquiry on its own motion or at the request of the Attorney-General or the Prime Minister.[107] The IGIS is given powers akin to a royal commission in order to conduct these inquiries.[108] It can compel persons to give evidence, though that evidence cannot be used against the person in any court proceeding.[109]

The powers of the IGIS are clearly broad. However, one important element is excluded. The IGIS is expressly prohibited from inquiring into action taken by the Attorney-General.[110] Therefore the IGIS cannot conduct an inquiry into the propriety or legality of the Attorney-General's consent to an individual warrant or a broader inquiry into the way the Attorney-General approaches this task. The IGIS may only scrutinise the Attorney-General's conduct indirectly when it reviews the documentation lodged in support of all warrants.

The IGIS is an integrity agency which, though strictly speaking an 'emanation of the executive'[111] strongly asserts its independence from the executive government.[112] The IGIS cannot be directed by ministers of the government as to how an inquiry is conducted.[113] However, the *IGIS Act* does give ASIO and the government a significant degree of influence over the IGIS's reports.

First, the IGIS must notify the Attorney-General and the Director-General of ASIO that it proposes to conduct an inquiry before it begins.[114] If the proposed inquiry relates directly to the Director-General, the IGIS need only notify the Attorney-General.[115] Secondly, if the IGIS proposes to 'set out in a report … opinions that are either expressly or impliedly critical' of ASIO it must, before it makes its report:

105 *IGIS Act* s 8(1)(a), div 2.

106 *ASIO Act* s 34J(3)(i); *Protocol* cl 12.

107 *IGIS Act* ss 8, 9.

108 Ian Carnell and Neville Bryan, 'Watching the Watchers: How the Inspector-General of Intelligence and Security Helps Safeguard the Rule of Law' (Paper delivered at the Safeguarding Australia Conference, Canberra, 12–14 July 2005) 33–48.

109 Other than proceedings for failure to give evidence: *IGIS Act* s 18.

110 Except to the extent it is necessary to inquire into ASIO's compliance with directions or guidelines given by the Attorney-General: ibid s 9AA(b).

111 James Spigelman, 'The Integrity Branch of Government' (First Lecture in the 2004 National Lecture Series by the Australian Institute of Administrative Law, Sydney, 29 April 2004) 4.

112 Carnell and Bryan, above n 108, 44; Thom, 'Balancing Security and Individual Rights', above n 88.

113 *IGIS Act* s 17; IGIS, *Annual Report 2010–2011* (2011) vii.

114 *IGIS Act* s 15(1).

115 Ibid ss 15(2)–(3).

- give the Director-General a hearing and a reasonable opportunity to make submissions (unless the IGIS believes this would prejudice security, defence or international relations);[116] and
- discuss its proposed report with the Attorney-General.[117]

The IGIS must also discuss a proposed report with the Attorney-General and the Director-General if it believes there is evidence a member of ASIO has been guilty of a breach of duty or serious misconduct.[118]

Thirdly, when the IGIS completes its report it must give ASIO a draft copy. If the report sets out conclusions and recommendations in respect of a matter that relates directly to the Director-General, the IGIS need only give a draft report to the Attorney-General.[119] The Director-General and Attorney-General can comment on the draft and those comments *must* be included in the final report.[120] Finally, the IGIS's report can be censored by the Prime Minister 'in order to avoid prejudice to security, the defence of Australia, Australia's relations with other countries or the privacy of individuals'.[121]

These requirements — in particular, the requirement to include the comments of the Director-General and Attorney-General in the final report — diminish the IGIS's independence from the entities it is appointed to supervise. This poses problems, to be discussed further below.

Four complaints have been made to the IGIS about the Special Powers Regime. These complaints were all made by lawyers representing persons subject to warrants: one about the lack of specificity in a warrant, one about the lawyer's inability to object to ASIO's questioning, one about the general 'approach of the … lawyer acting on behalf of ASIO and of the prescribed authority' and one about the potentially prejudicial impact of media coverage on the person's interests. All these complaints have been addressed and remedies introduced where necessary.[122]

C *Ombudsman*

Like the IGIS, the Ombudsman is an independent executive office created by statute.[123] The Ombudsman is empowered to investigate and report on any 'action that relates to a matter of administration' on its own initiative or in response to a

116 Ibid s 17(4). Note, this is a privilege conferred on all persons whom the IGIS proposes to expressly or impliedly criticise in its reports: at s 17(5).

117 Ibid s 17(9). Note the IGIS has a general power to consult with the Attorney-General at any time during the course of an inquiry: at s 17(7).

118 Ibid s 17(10).

119 Ibid ss 21(1A)–(1B).

120 Ibid s 21(2).

121 Ibid s 35(5).

122 Parliamentary Joint Committee on ASIO, ASIS and DSD, above n 72, 21–2. The IGIS's annual reports do not indicate that any complaints have been made about the (one) use of the Special Powers since.

123 Established by the *Ombudsman Act 1976* (Cth) ('*Ombudsman Act*').

complaint made by an individual.[124] However, the Ombudsman has no jurisdiction over ASIO or the Attorney-General. In this context, it can only investigate the actions of the AFP in executing a Special Powers Warrant.[125]

Subjects must be permitted to contact the Ombudsman to lodge a complaint about the AFP and given the facilities necessary to do so.[126] This complements the powers of the IGIS, who can receive complaints from subjects about the actions of ASIO, its lawyers and the Prescribed Authority. A Memorandum of Understanding between the IGIS and the Ombudsman states that the IGIS 'will ensure' the Ombudsman is aware a warrant has been issued and will notify the Ombudsman 'of any instance where concerns have arise about the actions of AFP officers' from its observation of the questioning (or detention) process.[127] This is important as the *ASIO Act* does not require the Ombudsman to be notified if a warrant is issued or permit the Ombudsman to attend questioning or enter places of detention.

The Ombudsman reports the results of its investigations to Parliament. The Ombudsman must table an annual report and can also submit a special report if it chooses.[128] For example, the Ombudsman can table a special report if it is of the opinion that an administrative policy or piece of legislation is 'unreasonable, unjust, oppressive or improperly discriminatory'.[129]

The Ombudsman is the oldest member of the supervisory framework and has an 'established public profile'.[130] This enables the Ombudsman to play a valuable role in enhancing public confidence in the Special Powers Regime. In 2005, then Commonwealth Ombudsman John McMillan stated:

> This office believes that there is always likely to be public unease about the conferral upon security and intelligence bodies of the power to detain and question or, at the margins, to interrogate those suspected of being a threat to security. This office is mindful of its role in providing the public with assurances that there is an integrated, effective and visible accountability mechanism associated with the *ASIO Act* powers.[131]

124 Ibid s 5.

125 Ibid s 5(2)(a); *Ombudsman Regulations 1977* (Cth) regs 4, 6; schs 1, 3. The AFP's conduct can also be reviewed by the Law Enforcement Integrity Commissioner and the AFP Commissioner. The Law Enforcement Integrity Commissioner is primarily concerned with investigating allegations of police corruption: *Law Enforcement Integrity Commissioner Act 2006* (Cth) ss 6–7, 15. The *Ombudsman Act* allows the Ombudsman and AFP Commissioner to cooperate and conduct joint investigations into certain police-related matters: *Ombudsman Act* s 8D.

126 *ASIO Act* ss 34E(1), 34F(8).

127 *Memorandum of Understanding between the IGIS and Ombudsman*, 14 December 2005, [20] <http://www.igis.gov.au/annual_report/05-06/pdf/Annex_4_Memorandum_of_Understanding.pdf>.

128 *Ombudsman Act* s 16.

129 Ibid s 15(1)(a)(iii).

130 Commonwealth Ombudsman, Submission No 49 to the Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO's Questioning and Detention Powers: Review of the Operation, Effectiveness and Implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979*, 2005, 2.

131 Ibid 2.

The Ombudsman has also emphasised the importance of its role in protecting human rights, particularly in the absence of a judicially enforceable bill of rights.[132]

The Ombudsman is generally credited with exerting a strong positive influence over the behaviour of executive agencies.[133] Though its powers are advisory only, the Ombudsman's reports are respected and often followed.[134] McMillan has emphasised how this can be used to advocate law reform where it becomes evident to the Ombudsman that legislation is unfair.[135] In 2005, the Ombudsman made submissions to the Parliamentary Joint Committee on ASIO, ASIS and DSD ('PJCAAD', the predecessor of the PJCIS), recommending changes to the Special Powers Regime. At that time the *ASIO Act* did not give a subject the right to make a complaint to a state Ombudsman or state police complaints authority. This produced an 'accountability gap' as subjects could be arrested or detained by state police officers but the Commonwealth Ombudsman would have no jurisdiction to investigate their treatment. The Ombudsman's recommendation of enshrining such a right in the legislation was accepted and the *ASIO Act* amended in 2006.[136]

D *Monitor*

The Monitor is a relatively new statutory office created by the *Independent National Security Legislation Monitor Act 2010* (Cth). It is a part-time position[137] currently held by Bret Walker SC. The office was formed in response to concerns that there needed to be an independent and impartial mechanism, in addition to the usual process of parliamentary review, 'to monitor whether the balance between individual and community rights was still proportionate and being maintained over time'.[138] The office is roughly modelled on the Independent Reviewer of Terrorism Legislation in the UK.[139]

The Monitor reviews Australia's anti-terrorism laws, including the legislation establishing the Special Powers Regime. Specifically, the Monitor considers whether the legislation 'contains appropriate safeguards for protecting the rights of individuals', 'remains proportionate to any threat of terrorism or threat to national security', 'remains necessary', is consistent with Australia's international

132 McMillan, above n 4, 7, 14–15.

133 Carnell and Bryan, above n 108, 37–8.

134 Commonwealth Ombudsman and IGIS, *Response of Commonwealth Ombudsman and Inspector-General of Intelligence Security to Questions Taken on Notice,* Senate Legal and Constitutional Affairs Committee, 17 November 2005, 2; McMillan, above n 4, 11.

135 McMillan, above n 4, 7, 14–15.

136 *ASIO Amendment Act 2006* (Cth) sch 2.

137 *Independent National Security Legislation Monitor Act 2010* (Cth) s 11(1)

138 Robert Cornall and Rufus Black, *2011 Independent Review of the Intelligence Community Report* (2011) 36.

139 Ibid.

human rights and security obligations,[140] and is being used for proper purposes.[141] The Monitor can also investigate matters 'relating to counter-terrorism or national security' referred to it by the Prime Minister or PJCIS.[142] The Monitor does not receive or respond to complaints by individuals,[143] but can call for public submissions, hold hearings and summons witnesses to gather information.[144] The Monitor can consult with government agencies in order to conduct its inquiries, but is not required to do so.[145]

The Monitor must provide an annual report to the Prime Minister. The Prime Minister then tables that report in Parliament.[146] The Monitor must ensure certain security sensitive information is classified and will not be in the version tabled in Parliament by the Prime Minister. The Monitor may consult with Attorney-General to determine whether the report contains information of this kind. However, the Monitor retains ultimate discretion to decide what is disclosed; its reports cannot be censored by ASIO or the Attorney-General.[147]

The Monitor has tabled one report for 2011 that considers the Special Powers Regime and other counter-terrorism laws.[148] The next report is due in December 2012. The 2011 Report takes a cautious and measured approach. It does not express a conclusive opinion on many provisions due to an absence of adequate evidence about how they have been used.[149] The report also often 'poses questions rather than suggests answers',[150] reflecting the fact this was the Monitor's first report and he had been in office for less than a year.[151] Provisions which the Monitor suggested lacked prima facie justification — such as the grounds for issuing a Detention Warrant and the length of detention permitted — were marked out for further investigation and are to appear at 'the forefront of next year's review'.[152] The Monitor made it clear that some provisions pose no cause for concern. For example, he accepted the need for coercive questioning overriding the right to silence.[153] The Monitor also found no evidence that the powers were being used for improper purposes or that the legislation was not being complied with.[154] The Monitor's reports have no legal consequences; its powers are advisory only.

140 *Independent National Security Legislation Monitor Act 2010* (Cth) ss 6, 8.

141 Ibid s 6(1)(d).

142 Ibid s 7.

143 Ibid s 6(2)(b).

144 Ibid pt 3.

145 Ibid s 10(2).

146 Ibid s 29.

147 Ibid s 29.

148 Walker, above n 5.

149 For example, the requirement that a warrant only be granted when other forms of intelligence gathering would be inadequate (which the Monitor suggested may be too stringent) and the time limits imposed on questioning and detention (which the Monitor suggested may be too long): ibid ch IV.

150 Ibid 'Introduction'.

151 Ibid.

152 Ibid ch IV.

153 Ibid.

154 Ibid 'Introduction'.

E *Parliament, the Attorney-General and the PJCIS*

It has long been recognised that:

> Parliament does much more than pass statutes. The traditional role of ministerial responsibility in a Westminster system — or in contemporary argot, 'accountability' — can be understood, in part, as the performance of an integrity function. The institutional manifestations of such responsibility: the existence of a formal Opposition, the significance of daily question time and inquiries by parliamentary committees, perform the integrity function of government.[155]

Many of these parliamentary integrity mechanisms operate in respect of the Special Powers Regime.

The Attorney-General performs a dual function, supervising the Regime from within and without. First, the Attorney-General is a key player in the Special Powers Regime in that his or her consent is a pivotal (and often determinative) step in the issuing process. The Attorney-General must not consent to any application for a warrant unless satisfied that the relevant legal criteria are satisfied. The Attorney-General continues to play a role in the questioning and detention process. For example, the Attorney-General can authorise the Prescribed Authority to make directions which are inconsistent (and thus override) the initial terms of the warrant.[156]

The Attorney-General is also responsible to Parliament for his or her actions and the actions of ASIO. ASIO must provide the Attorney-General a written report on the extent to which the action taken under each Special Powers warrant assisted it in its operations.[157] ASIO will also give the Attorney-General a classified annual report outlining its activities for that year. This report is also provided to the Prime Minister and Leader of the Opposition.[158] The report must contain certain information, such as the number of warrants applied for and issued and the number of hours for which persons have been questioned or detained.[159] The Attorney-General then removes sensitive information from this report and tables an unclassified version in Parliament. The Attorney-General may also be required to answer questions about ASIO and its activities in Parliament as part of his or her ministerial responsibilities.

In theory, this makes the Attorney-General accountable for his or her actions and portfolio. As a member of Parliament, the Attorney-General will be 'punished at the ballot box' if the public disapproves. However, the clout of responsible government is substantially diminished by the reality of party politics. Further, it is unclear whether 'ministerial responsibility' is tantamount to accountability (in

155 Spigelman, 'The Integrity Branch of Government', above n 111, 3.
156 *ASIO Act* s 34K(2).
157 Ibid s 34ZH.
158 Ibid s 94.
159 Ibid s 94.

the sense that, if the Special Powers were misused, the Attorney-General should resign) or whether it only requires the Attorney-General to explain how or why the Special Powers were (mis)used.[160] Further, the Attorney-General will often have to rely heavily on the intelligence he or she receives from ASIO in order to assess what measures are necessary to protect national security. This makes it inherently difficult for the Attorney-General to rigorously supervise ASIO's actions.[161]

Parliament also supervises the Special Powers Regime via a dedicated parliamentary committee, the PJCIS (formerly the PJCAAD).[162] The PJCIS is a standing parliamentary committee established by statute to supervise the actions of ASIO and the other members of Australia's intelligence community. It has 11 members: 5 from the Senate and 6 from the House of Representatives.[163] Currently, 6 of these members belong to the Government, 4 members are from the opposition parties and 1 member is an independent.[164]

The PJCIS cannot initiate its own inquiries. Instead, it reviews matters related to ASIO that are referred to it by the Attorney-General or a house of Parliament.[165] The PJCIS cannot receive or investigate individual complaints.[166] There is also an express list of matters the PJCIS cannot consider, such as ASIO's intelligence gathering and operational methods.[167] Otherwise, the PJCIS has broad investigative powers. It can summon witnesses, receive public submissions, hold public hearings,[168] and request a briefing from the Director-General and IGIS.[169] The PJCIS provides Parliament with an annual report of its activities as well as any specially commissioned reports.[170]

The PJCIS will play an important role in the lead up to the July 2016 expiry of the sunset clause attaching to the Special Powers Regime. When first enacted, the

160 See also Hugh Emy and Owen Hughes, *Australian Politics: Realities in Conflict* (Macmillan, 2nd ed, 1991) 339–40.

161 A statement made by former Attorney-General Daryl Williams during parliamentary debate on the introduction of the Special Powers Regime encapsulates this point. Williams said '[t]hose at the front line in meeting this threat tell us that, in order to protect the community from (terrorism), they need the power to hold a person incommunicado, subject to strict safeguards, while questioning for the purpose of intelligence gathering. We accept this need.' Commonwealth, *Parliamentary Debates,* House of Representatives, 12 December 2002, 10427 (Daryl Williams).

162 The intelligence community is also scrutinised by ad hoc parliamentary committees, such as the Security Legislation Review Committee established pursuant to the *Security Legislation Amendment (Terrorism) Act 2002* (Cth).

163 *Intelligence Services Act 2001* (Cth) s 28(2).

164 *Parliamentary Joint Committee on Intelligence and Security: Committee Members — 43rd Parliament,* Parliament of Australia <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/members.htm>.

165 The PJCIS may itself request the Attorney-General to refer a matter relating to ASIO to the PJCIS to consider: *Intelligence Services Act 2001* (Cth) s 29(2).

166 Ibid s 29(3)(g).

167 Ibid s 29(3).

168 Ibid sch 1 pt 1 cl 2.

169 Ibid s 30.

170 Ibid s 31.

Regime was set to expire in 2006.[171] It was reviewed by the PJCAAD in 2005.[172] This produced one of the few comprehensive overviews of the Regime as the PJCAAD gathered a wide range of information about how the Powers had been used. Much of this information was critical. The PJCAAD accepted that the Special Powers had been 'useful'. However, it emphasised that the Powers were rarely used and so there was inadequate information from which to definitively conclude that they were 'constitutionally valid' or 'reasonable'.[173] On this basis, the PJCAAD recommended that the Regime be renewed for a further five years.[174] Parliament instead renewed the Regime, with some amendments,[175] for 10 years.[176] The PJCIS will repeat this process in order 'to review, by 22 January 2016, the operation, effectiveness and implications' of the Special Powers Regime.[177]

Given their importance, it is concerning that the PJCIS's reports can be censored. The *Intelligence Services Act 2001* (Cth) states:

> The Committee must not disclose in a report to a House of the Parliament:
>
> (a) the identity of a person who is or has been a staff member of ASIO …;
>
> (b) any information from which the identity of such a person could reasonably be inferred; or
>
> (c) operationally sensitive information or information that would or might prejudice:
>
> (i) Australia's national security or the conduct of Australia's foreign relations; or
>
> (ii) the performance by an agency (including ASIO) of its functions.[178]

171 *ASIO Amendment Act 2006* s 24, inserting then *ASIO Act* s 34Y.

172 PJCAAD, above n 72.

173 Ibid 107.

174 This recommendation was made on the basis that there was a continuing terrorist threat against Australia and the Regime had proved useful in countering that threat. However, as the Regime had been in existence for 'only a very short time' and the 'whole range of the powers [had] not yet been exercised', the Committee was unwilling to conclude whether the Regime was 'workable', 'reasonable' or 'constitutionally valid': ibid.

175 The *ASIO Legislation Amendment Act 2006* (Cth) amended the *ASIO Act* to include: an explicit right to access a lawyer; provisions to facilitate the rights of review and complaint given to a person subject to a warrant; and clarification of the role of a person's lawyer in the questioning process.

176 *ASIO Legislation Amendment Act 2006* (Cth) s 32. The then Coalition government justified the length of the renewed sunset clause on the basis that there was still a threat of terrorist attack and it was undesirable to distract ASIO from its operations any more frequently than necessary: Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 2006, 57 (Philip Ruddock). Similarly, the Director-General of ASIO insisted that the threat of terrorism 'is a long-term, generational threat' and 'it is inevitable that we will have future attacks': PJCAAD, above n 72, Public Hearing, 19 May 2005, Canberra, 2 (Dennis Richardson). For a detailed discussion of the debates regarding the inclusion of the sunset clause in 2003 and its renewal in 2006, see Nicola McGarrity, Rishi Gulati and George Williams, 'Sunset Clauses in Australian Anti-Terror Laws' (2012) 33 *Adelaide Law Review* 307.

177 *Intelligence Services Act 2001* (Cth) s 29(1)(bb).

178 Ibid sch 1 cl 7.

This is an obligation imposed on the PJCIS. However, the decision is ultimately made by the Attorney-General. The PJCIS must consult with the Attorney-General and if the Attorney-General advises that the report contains information of this kind, the PJCIS *must* redact it from the report.[179] The Attorney-General has used this power. The following appears in the PJCAAD's 2005 report on the Regime:

> [A sentence has been removed here under protest at the request of ASIO. The Committee did not accept that the content of this sentence constituted a national security concern. The Committee has a statutory responsibility to report to the Parliament on the operations of this provision and regards required deletions that cannot be justified as a violation of that duty.] [180]

From this, it is clear that the Attorney-General censored information which the PJCAAD did not believe posed a security risk. It also appears that the Attorney-General censored the information 'at the request of ASIO'. This poses clear problems, discussed further below.

The PJCIS's functions may also be affected by the Secrecy Provisions. In 2005, the PJCAAD reported that fear of prosecution had prevented some people from disclosing evidence to the Committee about the use of the Special Powers Regime.[181] Disclosures made to the PJCIS to assist its inquiries might be characterised as political communication and if so would be exempt from the Secrecy Provisions. However, this possibility may not be fully appreciated. The implied freedom of political communication is a difficult and contested concept, the ultimate content of which depends on a balancing exercise undertaken by a court. Many people may be unwilling to make a disclosure — and risk five years imprisonment — on the hope that this would be protected by the implied freedom.

The PJCIS has limited scope to act as an effective supervisor and check upon the use of the Special Powers Regime. This reflects the fact that the PJCIS's powers are advisory only. More broadly, it reflects the possibility that, in the highly charged national security context, concerns about the scope of executive power can be overborne by the political impetus to take a strong stance against terrorism.[182]

IV THE INTEGRITY FUNCTION

It is clear from the preceding discussion that the federal government and Parliament has sought to provide an appropriate framework to supervise the

179 Ibid sch 1 cl 7(3), (4). ASIO can also advise that a report does *not* contain information of this kind, and this advice is conclusive.

180 PJCAAD, above n 72, 12.

181 Ibid viii–ix.

182 See generally David Dyzenhaus, *The Constitution of Law — Legality in a Time of Emergency* (Cambridge University Press, 2006); Mark Tushnet, 'Controlling Executive Power in the War on Terrorism' (2005) 118 *Harvard Law Review* 2673. See also Hocking, above n 11, ch 12, commenting specifically on the passage of the Special Powers Regime.

Special Powers Regime. The Monitor described this framework as an 'elaborate scheme, which has a degree of commendable redundancy'.[183] Even before the creation of the Monitor, the IGIS stated: 'Having worked in the public sector for a lengthy period, I can say that the scrutiny of [Australia's intelligence agencies] is no less, and in some ways greater, than that of other public sector agencies'.[184]

The creation of the Monitor is a particularly important and novel development that demonstrates a willingness to reconsider the very existence of the Special Powers, as well as the way in which they are used.

However, breadth must not be mistaken for depth. The fact there are numerous entities appointed to supervise the Special Powers Regime does not necessarily mean the framework is effective or sufficient. In any event, one would expect that extraordinary powers of this kind are subjected to greater scrutiny than most other public powers.

How then can this framework be assessed? The concept of 'integrity' is a new way of conceptualising the standards expected of those exercising public power. The idea that there should be an 'integrity branch' of government, existing somewhere between the traditional three arms and dedicated to supervising the use of public power, was suggested by Bruce Ackerman in the US in 2000.[185] The concept was taken up in Australia by former New South Wales Chief Justice James Spigelman in 2004. He used integrity to describe both a desirable state of government and to explain the scope of judicial review and functions of other government entities.[186] The idea has now firmly taken root. There is a growing body of academic literature on the concept of integrity,[187] as well as concrete applications of the term. For example, integrity has been used as a rubric to assess the comparative health of government systems.[188] Various new 'integrity commissioners' have also been created in recent years to supervise all manner of public power.[189] At the same time, pre-existing bodies which have always sat somewhat uncomfortably in the orthodox tripartite conceptualisation of government have adopted the concept to explain their role. The Ombudsman and Auditor-General, for example, are now frequently referred to as integrity agencies.[190]

The idea of integrity therefore offers a means of explaining and assessing the efficacy of the framework put in place to supervise the Special Powers Regime. However, despite all the recent attention, the meaning of integrity is still very

183 Walker, above n 5, ch IV.

184 Thom, 'Address to Supreme and Federal Court Judges' Conference', above n 85, 8.

185 Bruce Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633.

186 Spigelman, 'The Integrity Branch of Government', above n 111.

187 Various examples of this literature are referred to throughout this paper. The Australian Institute of Administrative Law's 2012 National Conference was dedicated to the topic of 'integrity in administrative decision making': Australian Institute of Administrative Law, *2012 National Administrative Law Conference Program* <http://150.203.86.5/aial/NationalForum/webdocuments/AIAL2012ConferenceProgram.pdf>.

188 See above n 3.

189 See McMillan, above n 4.

190 See, eg, ibid 14; Spigelman, 'The Integrity Branch of Government', above n 111, 5; Australasian Council of Auditors-General, *Role of the Auditor-General* <http://www.acag.org.au/roag.htm>.

unclear. In its simplest form, it refers to the absence of corruption, in the sense of using public powers for personal advantage or taking bribes.[191] However, most commentators use the term integrity to mean far more than this. For example, AJ Brown describes integrity as a state of government in which 'power is exercised in a manner that is true to the values, purposes and duties for which that power is entrusted to, or held by, the institutions and individual office-holders concerned'.[192] Spigelman also clearly had more in mind for the concept, framing his exposition of integrity with the story of an ancient Chinese office responsible for keeping all other arms of government 'healthy'.[193] Integrity thus supports other fundamental principles of liberal democracy, such as the rule of law.[194] A well functioning integrity branch ought also to foster trust in government.[195]

It is important to break down this 'amorphous, complex and value-laden concept' if it is to be of some practical use, rather than just a broad aspirational standard.[196] Building on the work of Spigelman and others, integrity can be seen to comprise at least four components: legality, fidelity to purpose, fidelity to public values and accountability. These components are examined below. We then consider whether the integrity function requires further elaboration — in particular, whether it encompasses independence and a law reform aspect.

A *Components of the Integrity Function*

The first component of integrity is legality. This requires that public power is exercised lawfully; that is, within the legal bounds of the source which confers it. This component encompasses the grounds of judicial review. However, it is clear that integrity transcends mere legality.[197] The 'extra-legal' components of integrity are discussed below. The fact that integrity encompasses but transcends legality poses important problems. Legality is arguably the most concrete and essential component of integrity. It is also the only aspect of the integrity function that courts can perform due to the separation of powers and the consequent rule that courts may review the legality of a decision but not its merits.[198] Supervision of the 'extra-legal' components of integrity therefore falls to other integrity agencies, such as Ombudsmen or other statutory watchdogs. Yet, the power of these agencies is also limited; they can investigate and reveal instances of illegality, but they cannot impose any legal sanctions for the very

191 Ackerman, above n 185, 694–6.

192 AJ Brown, 'Putting Administrative Law Back into Integrity and Putting Integrity Back into Administrative Law' (Paper presented at Australian Institute of Administrative Law Forum No 53, Gold Coast, June 2006), 33; Spigelman's definition is very similar: Spigelman, 'The Integrity Branch of Government', above n 111, 2.

193 Spigelman, 'The Integrity Branch of Government', above n 111, 1.

194 Brown, above n 192, 34.

195 Ibid 33, 52.

196 The need to practically apply integrity and the difficulties of using it as a standard of assessment are developed further by Brown, above n 192, 53; Brian Head, AJ Brown and Carmel Connors (eds), *Promoting Integrity: Evaluating and Improving Public Institutions* (Ashgate Publishing, 2008).

197 Spigelman, 'The Integrity Branch of Government', above n 111, 2.

198 Ibid; Brown, above n 192, 33.

reason that they are not courts. Therefore, an integrity framework which relies entirely or predominantly on non-judicial integrity agencies will lack the ability to effectively police legality, the foundation of integrity.

More broadly, integrity requires fidelity to purpose and fidelity to public values. Fidelity to purpose requires that public powers are used for the purpose for which they were conferred. This will sometimes overlap with the requirement of legality. Using a power for an improper purpose — be that a purpose other than which the power was intended to be used, or to achieve some personal advantage — may constitute administrative illegality. However, both Spigelman and Brown suggest fidelity to purpose also requires fidelity to the public purpose of the *institution* exercising the powers.[199] This may require broader consideration of the proper place the institution exercising the power occupies in the governmental structure.

Spigelman and Brown also describe integrity as requiring fidelity to public values.[200] This might crudely be described as the 'smell test' like that performed by the Chinese Censorate's Hsieh-Chih, 'the mythical animal that could smell an immoral character from a distance and would thereupon tear him or her apart'.[201] It clearly requires fairness and the absence of corruption. More broadly, it requires adherence to 'public procedural values', such as giving a person notice of the reason action is being taken against them and giving them a chance to put forward their side of the case.[202] More broadly still, it may require consideration of which values the institution exercising the power is expected to obey.[203]

If this is the case, then the concept of 'public values' is inherently dynamic, and with it the meaning of integrity. For example, recent years have seen increased focus on the concept of human rights. The commissioning of the National Human Rights Consultation in 2010, the proliferation of human rights legislation (including, most recently, the *Parliamentary Scrutiny (Human Rights) Act 2011* (Cth)), the indication that international human rights treaties may create legitimate expectations that attract the rules of procedural fairness,[204] or otherwise be taken into account in interpreting domestic legislation, and the existence and work of Australia's various human rights commissions suggests that government is increasingly expected to respect human rights in the exercise of public power. This was certainly a live issue in the creation of the Special Powers Regime, where much parliamentary debate focused on the impact of the Powers on human rights.[205] This suggests compliance with human rights has become a 'public value' that those exercising public power must respect.

199 Spigelman, 'The Integrity Branch of Government', above n 111, 2; Brown, above n 192, 33.

200 Brown, above n 192, 33.

201 Spigelman, 'The Integrity Branch of Government', above n 111, 11.

202 Ibid 1.

203 Ibid 2.

204 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. This decision has proved contentious, and its scope and operation remains unclear: see generally Matthew Groves, 'Unincorporated Treaties and Expectations — The Rise and Fall of *Teoh* in Australia' (2010) 15(4) *Judicial Review 323*.

205 See, eg, Burton, McGarrity and Williams, above n 2.

The fourth component of integrity is accountability. This is both a substantive and procedural component. No public official is above the law, no public power is unlimited and all uses of public power (including all expenditure of public money) must be justified if called to account.[206] Further, accountability is the means by which compliance with the other components of integrity can be scrutinised and if necessary sanctioned. This introduces a requirement of transparency; public power cannot be scrutinised unless there is evidence about how and why it was used.

Accountability may be 'soft' — in the form of reporting on government action, criticising government action where appropriate, and requiring those responsible to explain themselves — or 'hard' — in the sense of producing binding consequences, such as a court order declaring action illegal and prohibiting its continuance, or a political convention that the person guilty of misconduct must resign.[207] Each has their role to play. The success of the Ombudsman's office demonstrates that an advisory role can have a significant (positive) influence on government. However, this obviously requires that reports of this kind are made public and are treated with respect. Spigelman's reference to the 'squawkings' of the integrity branch presumes that the branch is not silent.[208] Further, it is arguable that these 'soft' forms of accountability cannot work alone. A system which relies entirely on 'soft' forms of accountability may not sufficiently deter misconduct. 'Hard' forms of accountability such as legal sanction, are sometimes the most — if not the only — appropriate response to instances of illegality. This emphasises the point made above, that an effective integrity framework must include the courts.

The theoretical requirement of transparency is difficult to apply when the information in question is security sensitive. This is the crux of the difficulty in designing a framework capable of ensuring the integrity of the Special Powers Regime. Can security sensitive information be scrutinised in a transparent manner by the integrity branch?

The answer to this question may be changing. Since 9/11, the powers and budget of ASIO have expanded exponentially.[209] At the same time, the reach of Australia's integrity branch appears to be expanding and public tolerance for immunity waning. We have already noted the proliferation of 'integrity commissioners' to investigate all kinds of public power. While integrity agencies created some time ago, such as the Commonwealth Ombudsman, were denied jurisdiction over high-level political officers, 'more recently created anti-corruption bodies … are

206 Robin Creyke and John McMillan, *Control of Government Action* (Butterworths, 2nd ed, 2009) 3–4. For example, Spigelman describes ministerial accountability as an integrity function performed by Parliament: Spigelman, 'The Integrity Branch of Government', above n 111, 3.

207 The distinction between 'hard' and 'soft' is borrowed from Jo Cribb, who used these categories to describe different forms of government accountability: Jo Cribb, *Being Accountable: Voluntary Organisation, Government Agencies and Contracted Social Services in New Zealand* (Institute of Policy Studies, 2006).

208 Spigelman, 'The Integrity Branch of Government', above n 111, 11.

209 See Cornall and Black, above n 138, 16.

usually empowered to investigate any public official'.[210] This corresponds with other developments of public law, such as the apparent demise of the prerogative immunity.[211] Recent calls to extend rights of judicial review to persons subject to an adverse security assessment by ASIO,[212] and the creation of the PJCIS, IGIS and Monitor, demonstrate that ASIO is not immune from these developments. As its powers grow, blurring the traditional lines between security intelligence and law enforcement, the scrutiny applied to ASIO must intensify. Blanket claims that all of ASIO's information must be kept secret are no longer tenable. The requirements of transparency and with it, accountability, may have to be compromised, but only if it is demonstrably necessary to protect national security.

B *Further Components of the Integrity Function?*

If we were designing a constitutional structure from scratch, we could create an integrity branch which was a truly independent arm of government entirely 'insulated' from the other arms it would supervise and protected by security of tenure and remuneration.[213] However, in Australia the picture is obviously more complicated. Public power is often supervised by members of the same arm of government as the entities that exercise it. Bodies which have been described as 'core integrity agencies',[214] such as the Ombudsman, are responsible for scrutinising the executive government but are, strictly speaking, 'emanations of the executive'.[215] They can only be described as members of an integrity branch if they have a 'functional specialisation' and a degree of independence that justifies their recognition as a quasi-separate arm of government.[216] If they are not sufficiently independent, the attractive concept of an 'integrity branch' collapses into supervision of the executive by itself.

A lack of independence does not just produce problems of taxonomy. It produces a lesser standard of scrutiny. The integrity branch must be able to act impartially and free from influence. A lack of independence would detract from these qualities, either in appearance or fact. This in turn would diminish public confidence in the integrity system and ultimately in the powers in question. It

210 AJ Brown and Brian Head, 'Institutional Capacity and Design in Australia's Integrity Systems' (2005) 64(2) *Australian Journal of Public Administration* 84, 93.

211 Spigelman, 'The Integrity Branch of Government', above n 111, 7.

212 The Joint Select Committee on Australia's Immigration Detention Network recommended that the *ASIO Act* be amended to permit the Security Appeals Division of the AAT to review adverse security assessments of refugees and asylum seekers, as well as other changes which would enhance the transparency of the assessment process: Joint Select Committee on Australia's Immigration Detention Network, Parliament of Australia, *Final Report* (2012) xxii, <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=immigration_detention_ctte/immigration_detention/report/index.htm>. The question of whether the Director-General of ASIO is required to accord procedural fairness to persons subject to a security assessment and the constitutional validity of the indefinite detention which flows from a non-reviewable adverse security assessment is currently before the High Court: *Plaintiff M47/2012 v Director General of Security*.

213 Ackerman, above n 185, 694.

214 Brown and Head, above n 210, 84.

215 Spigelman, 'The Integrity Branch of Government', above n 111, 4.

216 Ibid.

may be satisfactory — and desirable — to create specialist review bodies who are sensitive to the particular needs of the body under supervision, or have expertise in the relevant field of public power. However, an integrity framework must avoid excusing certain forms of public power from external scrutiny and subjecting it only to a (lesser) form of 'peer review'. For these reasons, independence is a crucial feature of the integrity function. This may mean an integrity framework must include forms of internal and external review.[217]

Integrity is typically assumed to mean integrity *in the exercise of* public power. Spigelman began his exposition of the concept of integrity as a way of keeping *all* arms of government healthy.[218] Yet, he also described 'legislative reform' as part of the 'legislative process' and appeared to confine the integrity function to scrutinising the way powers are exercised.[219] Indeed, the focus of most integrity agencies is the executive — not the legislature. However, integrity can require scrutiny of the laws which confer public power, as well as the way that public powers are exercised. Properly enacted and constitutionally valid laws may permit the government to act in a way which is incompatible with public values or minimum standards of accountability. Powers of this kind would lack integrity, even if exercised in strict compliance with the letter of the law. An integrity function for such a law may thus require a 'law reform' component.

As a matter of practice, the integrity branch does perform this law reform function. For example, the Commonwealth Ombudsman is empowered to prepare a special report if it believes a particular piece of legislation is 'unreasonable, unjust, oppressive or improperly discriminatory'.[220] In 2004, then Ombudsman John McMillan gave examples of legislation which his office had advised was unfair, prompting legislative change.[221] There is no constitutional impediment to integrity agencies like the Ombudsman scrutinising legislation and recommending legislative change, provided it does not usurp the democratic mandate of Parliament.

In light of this, the Monitor can be described as a novel integrity agency concerned primarily with scrutinising legislation which confers public power. The Monitor has itself described the office as a 'fourth arm agency' similar to the IGIS and Ombudsman that exists in a space between the three traditional arms of government.[222] Indeed, it was originally proposed that the Monitor would be attached to the office of the IGIS or Ombudsman, demonstrating the similarities between the three.[223] The Monitor effectively performs a top-down integrity

217 Brown and Head, above n 210, 92.

218 Spigelman, 'The Integrity Branch of Government', above n 111, 1.

219 James Spigelman, 'Jurisdiction and Integrity' (Speech delivered at the National Lecture Series for the Australian Institute of Administrative Law, Adelaide, 5 August 2004) 1.

220 *Ombudsman Act 1976* (Cth) s 15(1)(a)(iii). The Australian Human Rights Commission is another example of an integrity agency that can recommend legislative change.

221 See, eg, McMillan, above n 4, 6–7.

222 Bret Walker, 'The National Security Legislation Monitor' (Speech delivered at the Australian National University, Canberra, 30 May 2012).

223 Security Legislation Review Committee, Commonwealth of Australia, *Report of the Security Legislation Review Committee* (2006) 203.

function, reviewing whether legislation is faithful to its purpose and public values (including respect for individual rights) in light of the way it has been used. Though this may sit somewhat closer to the legislative function than other agencies we have considered, it is still best categorised as an integrity function. The Monitor has acknowledged that the creation of the office is a 'special approach' which blurs the boundaries between the traditional three arms of government.[224]

This 'law reform' component may be an inherent aspect of the integrity function (as the work of the Ombudsman suggests), but it is particularly pertinent in circumstances where legislation is justified as an extraordinary or time-limited response to a particular problem. In such circumstances, obvious questions arise about whether the powers themselves are, on an ongoing basis, faithful and proportionate to public values and the purpose for which they were created. Therefore, it becomes necessary to reconsider whether the powers should exist at all or only in a different form. As the Monitor has emphasised, the creation of its office was part of the political compromise which enabled the Special Powers to be enacted in the first place, despite significant misgivings about their breadth.[225]

C *How Does the Supervisory Framework for the Special Powers Regime Measure Up?*

In light of this discussion, how does the framework currently in place to supervise the Special Powers Regime measure up? As already noted, the integrity framework is extensive and effort has been made to subject the Special Powers to adequate supervision. The framework has several strengths.

First, it performs very well in the law reform component. Multiple entities in the framework — most notably the Monitor — are able and expected to regularly reconsider the nature of the Special Powers as well as the way they are used. This holistic jurisdiction will help ensure the integrity of the Regime in the broader sense. In particular, it will support the 'extra-legal' components of integrity by regularly assessing whether the Special Powers Regime is compatible with public values, including respect for human rights, and remains a proportionate and justified response to the threat of terrorism which prompted its creation.

Secondly, the fact the Monitor, IGIS, PJCIS and Ombudsman all consider the impact of the Special Powers Regime on human rights is a strength in its own right. This is particularly important given the potential impact of extraordinary anti-terrorism legislation on human rights, and the capacity for such considerations to be given inadequate weight at the time such laws are drafted. However, human rights review may be pointless where the powers conferred by statute are themselves fundamentally incompatible with human rights. This enhances the need for the 'law reform' integrity function described above.

224 Walker, 'The National Security Legislation Monitor', above n 222.
225 Ibid.

Thirdly, there is a clear and strong internal pathway that channels information about the Special Powers Regime to the IGIS and Ombudsman. This is created by the provisions of the *ASIO Act* and *IGIS Act* that require the Attorney-General to provide the IGIS all supporting documentation and permit the IGIS to be present during all questioning sessions and enter places of detention. It is assisted by the Memorandum of Understanding between the IGIS and Ombudsman which states the IGIS will notify the Ombudsman of any concerns about the conduct of the AFP. It is further assisted by the clear rights conferred on subjects to make complaints to the Ombudsman and IGIS, and the provisions which facilitate those rights. These will help ensure all four components of integrity, as any action taken by ASIO in connection with a warrant that is illegal or improper will be quickly detected.

However, there are also significant weaknesses in the integrity framework. First, there is an inadequate degree of transparency and therefore accountability. This is created in the first instance by the Secrecy Provisions which prohibit the disclosure of information about the Special Powers Regime. These provisions will have a chilling effect on public discussion of the Special Powers Regime and may dissuade people from communicating with the agencies appointed to supervise it, even though they may be strictly entitled to do so. This lack of transparency is then exacerbated by the provisions outlined above which enable the reports of integrity agencies to be censored.

The requirements of censorship imposed on the PJCIS are particularly problematic. We have explained that the PJCIS must redact information which the Attorney-General advises is security sensitive and that the Attorney-General used this power to censor the PJCAAD's 2005 report. This report makes clear that the PJCAAD did not believe the information in question posed a security risk. It also appears that the PJCAAD believed the Attorney-General used this power 'at the request of ASIO'. As a matter of law, the Attorney-General must exercise his or her statutory discretions independently, rather than at the dictation of ASIO.[226] The agency being supervised should also not be able to censor the reports of its supervisor. Even if the Attorney-General were to exercise this discretion independently of ASIO, the power is still problematic as the Attorney-General is him or herself a key participant in the Special Powers Regime.

It can be necessary to keep highly sensitive information secret if its disclosure could jeopardise national security. However, giving a broad power of censorship to the Attorney-General goes too far. It is unclear why the PJCAAD cannot simply be trusted to redact sensitive information from its reports, as the Monitor is. Alternatively, the Attorney-General could be required to obtain some sort of 'national security certificate' from an independent arbiter — perhaps in this context, the Prescribed Authority — in order to have the information censored. This is required in other comparable contexts, such as when the government claims

226 *Kendall v Telstra Corporation Ltd* (1994) 124 ALR 341; *Bread Manufacturers v Evans* (1981) 180 CLR 404, 411. This is also a ground of review under the *ADJR Act* ss 5(1)(e), (2)(e) though as discussed above, decisions made under the *Intelligence Security Act* cannot be reviewed under the *ADJR Act*.

that information cannot be disclosed in court on national security grounds.[227] Both of these alternatives would strike a better balance between transparency and national security and reduce the possibility of unnecessary censorship. It would also better preserve the independence of the PJCIS, a point we return to below.[228] It is also arguable that the grounds on which the PJCIS's reports can be censored are too broad. For example, the idea of information which might 'prejudice the performance of ASIO's functions' is vague and does not require that disclosure would jeopardise security.

It could be argued that, while certain information is kept secret from the Parliament and public, it is disclosed to and scrutinised by the members of the integrity framework (and the Prime Minister). We have already noted that there is a strong internal pathway for channelling relevant information to the agencies appointed to supervise the Regime. It could be further argued that (some of) these agencies are specialised and best placed to scrutinise that information. The IGIS and Monitor have both reported that the information they have received demonstrates that the Special Powers have been used properly and there is no cause for concern.[229] This is heartening, but it requires the public (and Parliament) to trust the unverifiable judgment of highly qualified and respected, but politically unaccountable, executive agencies. Further, this lack of information makes it difficult to test the Special Powers Regime in court. This situation may be unavoidable, but it must be recognised and accepted as a departure from the standards which would ordinarily be applied. Ordinarily, accountability is an open and transparent process.

Secondly, parts of the supervisory framework lack independence. As demonstrated, the framework relies most heavily on the IGIS, Monitor and Ombudsman. These entities are emanations of the executive. While their legitimacy depends on developing and maintaining a strong culture of independence from the bodies they supervise, this is hindered by provisions that grant ASIO and the Attorney-General power to add to the content of IGIS reports (and also to censor PJCIS reports).

As a matter of procedural fairness, it is appropriate for the IGIS to give the Director-General and Attorney-General a hearing and right to make submissions if the IGIS proposes to publish findings critical of them. However, this must be balanced against the need for actual and apparent independence which is vital to the integrity branch. Requiring the IGIS to include in its report the comments of the entities it is supposed to supervise transcends the needs of fairness and

227 This has long occurred at common law via the doctrine of state interest immunity: *Sankey v Whitlam* (1978) 142 CLR 1. Australia now has a statutory regime which enables the Attorney-General to apply to the court for an order that information should not be disclosed, or should only be disclosed in a certain from: *National Security Information* (*Civil and Criminal Proceedings) Act 2004* (Cth) ss 8–10, 31(8). See generally Nicola McGarrity and Edward Santow, 'Anti-Terrorism Laws: Balancing National Security and a Fair Hearing' in Ramraj et al (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) 122.

228 This is not to suggest that the certificate mechanism is perfect; indeed, no mechanism is likely to balance the countervailing needs for secrecy and accountability in an entirely satisfactory manner.

229 Thom, 'Address to Supreme and Federal Court Judges' Conference', above n 85, 4. David Irvine gave similar assurances, indicating that Special Powers Warrants are used with restraint: Senate Legal and Constitutional Affairs Legislation Committee, Senate, Estimates Hearing, 24 May 2012, 75–8.

detracts from the 'independent and apolitical'[230] nature of the IGIS. Once again, this can be contrasted with the position of the Monitor, who can consult with various government agencies but is not required to do so.

Thirdly, the integrity framework lacks forms of 'hard' accountability. For various reasons, judicial review of the Special Powers Regime is likely to be weak. This is perhaps inevitable given the inherent difficulties which arise in the national security context. It is nevertheless problematic. The courts are the only indisputably independent entity in the supervisory framework. Further, judicial review is the only form of supervision which produces binding legal consequences and is the most appropriate way of policing illegality. The other entities in this framework have a 'softer' impact limited to reporting their concerns and recommending change. This is unavoidable as these entities are not courts and so lack the constitutional capacity to impose legal sanctions. Nevertheless, it is insufficient to ensure the integrity of the Special Powers Regime, particularly if there is insufficient political cost attached to disregarding these recommendations or if these reports are censored. It means there is no effective 'backstop' to the extensive executive processes of investigation, review and report outlined above and it will be difficult to impose legal sanction for any instances of illegality that the IGIS, Ombudsman or Monitor uncover.

Further, the framework is set up in such a way to effectively leave the Attorney-General immune from external scrutiny. The Attorney-General's actions cannot be scrutinised by the Ombudsman, cannot be directly scrutinised by the IGIS, and will be very difficult to review in the courts. This is unsatisfactory given the Attorney-General plays a pivotal role in the issuing and execution of a Special Powers Warrant and solely determines key criteria, including whether there are grounds for detention.

These weaknesses compound each other. Several specialist integrity agencies have access to a great deal of information about the Special Powers Regime, but the public receives very little. This makes it difficult to test the Special Powers Regime in court and in public debate. The fact those integrity agencies 'in the know' are emanations of the executive also means the supervisory framework may be incapable of ensuring public confidence in the Special Powers Regime should doubts about its integrity arise in public. The Director-General and IGIS have criticised media reports and cartoons which portray ASIO as a clandestine operation sweeping innocent people off the streets or battering down doors.[231] Yet, if the public does not know what ASIO does or why, it is understandable that these mistaken impressions linger and proliferate.[232]

230 Carnell and Bryan, above n 108, 44.

231 See comments made at the 'Balancing National Security and Individual Rights' Conference: Thom, 'Balancing Security and Individual Rights', above n 88; see also Thom, 'Address to Supreme and Federal Court Judges' Conference', above n 85, 8.

232 See generally PJCAAD, above n 72, 72–80.

V CONCLUSION

The Special Powers Regime is an unprecedented piece of legislation that permits significant restrictions on the liberty and privacy of Australian citizens who may not be suspected of any crime. Powers of this kind must be held to the highest standards of transparency and accountability, of which integrity may now be regarded as the benchmark. However, it must also be recognised that ASIO has countervailing needs of secrecy and anonymity. An elaborate framework has been put in place to supervise the Special Powers Regime in a way that attempts to strike some balance between these conflicting needs. Unfortunately, we have found that the balance had been tilted too far in favour of secrecy to the detriment of integrity.

The task given to the integrity agencies supervising the Special Powers Regime is hindered by the Secrecy Provisions which prohibit the flow of key information. In addition, the powers of these bodies are circumscribed more than is necessary to protect national security. The unchecked power given to the Attorney-General to censor the reports of the PJCIS and the requirements imposed on the IGIS to consult with ASIO and the Attorney-General and to include their comments in its reports are significant examples of this. These restrictions create a lack of transparency and therefore, accountability. This may in turn act to compromise the other substantive components of integrity — legality, fidelity to purpose and fidelity to public values.

The integrity framework is further diminished by the lack of 'strong' accountability mechanisms such as effective judicial review. This means there is no hard backstop to the otherwise extensive processes of investigation, reviewing and reporting. This is another important reason why the supervisory framework is inadequate to ensure the integrity of the Special Powers Regime.

The conflict between integrity and secrecy which arises in this context could be better mediated. For example, the *ASIO Act* and legislation establishing the various supervisory entities could be amended to ensure that reports are only censored or disclosure only prohibited where this is a demonstrably proportionate and justified response to the needs of national security. However, there appears to be a more insoluble problem. The Special Powers Regime confers some of the most intrusive public powers in existence on a secretive intelligence agency that is notoriously difficult to supervise. The government has sought to design a supervisory framework that checks the extraordinary nature of these Powers, yet this has been found wanting. This raises questions about the appropriateness of conferring such extraordinary powers on ASIO in the first place.

More generally, this article reveals extant questions about the nature and scope of the integrity function. We have suggested that the integrity function may require a law reform component, at least in situations where powers are conferred as an extraordinary response to a particular threat, and so their proportionality and necessity is an ongoing question. We have suggested that the 'public values' component of integrity is dynamic and has come to encompass respect for human

rights. We have also demonstrated the weaknesses of an integrity framework in which courts play a limited role. Integrity agencies which are 'emanations of the executive' play a valuable role in supervising the extra-legal components of integrity which courts cannot. However, this separation of powers works both ways. Integrity agencies that are 'emanations of the executive' cannot impose binding legal sanctions for the illegal use of public power and so cannot entirely replace or substitute judicial review.

Finally, we have found that the integrity function must embody a clear degree of independence. It is imperative that integrity agencies that are, strictly speaking, 'emanations of the executive' are sufficiently insulated from the bodies they supervise. As part of this, they must be permitted to communicate their findings to the public unless there is good reason not to do so. Where this does not occur, the attractive concept of an integrity branch may collapse and appear tantamount to a case of the executive supervising itself.

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Coercive questioning and detention by domestic intelligence agencies

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In response to the terrorist attacks in Washington and New York, the Commonwealth Parliament bestowed new powers of coercive questioning and detention upon the Australian Security Intelligence Organisation in 2003. These powers were extremely controversial. They raise critical issues about the role of a domestic intelligence agency in a democratic nation and the safeguards that should attach to the exercise of its powers. This article will undertake a country survey to determine if similar powers of coercive questioning and detention have been given to domestic intelligence agencies in four comparable countries—the UK, Canada, the USA, Israel and India. This provides an important insight into whether the response of the Australian Parliament to the threat of terrorism is an exception or rather part of an international trend towards the vesting of coercive questioning and detention powers in domestic intelligence agencies.

Keywords: coercive powers; counter-terrorism; intelligence agencies

Introduction

The terrorist attacks of 11 September 2001, and subsequently in Bali, Madrid and London, prompted many nations to rethink their counter-terrorism strategies. Australia was no exception to this trend. The Commonwealth Parliament enacted a flurry of legislative measures—more than 50 in total—designed to bolster Australia's ability to respond to the threat of terrorism (Williams, 2011). Amongst other things, these laws bestowed on Australia's domestic intelligence agency, the Australian Security Intelligence Organisation (ASIO), powers to coercively question and detain non-suspect citizens (ASIO Special Powers Regime).

The ASIO Special Powers Regime has been described by scholars as "unique" amongst democratic countries (Carne, 2004, p. 528; Carne, 2006, p. 1, 56; Lynch & Williams, 2007, pp. 39–40; Michaelsen, 2005a, p. 326). Successive Commonwealth Governments and government agencies have not disputed this point. In submissions to the Parliamentary Joint Committee on ASIO, ASIS and DSD (PJCAAD) in 2002, then Director-General of ASIO, Dennis Richardson, stated that "the initiative … solely resided with Australia" (Parliamentary Joint Committee on ASIO, ASIS and DSD [PJCAAD], 2002, p. 25). However, to date, no attempt has been made to place the ASIO Special Powers Regime in its international context. This article will start by providing an overview of the Regime. It will then undertake a country survey to determine whether similar powers of coercive questioning and detention have been given to domestic intelligence agencies in other democratic countries. This will

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provide an insight into whether Australia is part of an international trend towards the vesting of coercive questioning and detention powers in domestic intelligence agencies.

It is obviously not possible to survey every jurisdiction that might be described as democratic in nature. This article will therefore examine five representative jurisdictions. The first three of these—the UK, Canada and the USA—have been chosen because of their close political and legal ties to Australia. These are the 'usual suspects' to which scholars have reference when conducting comparative studies that involve Australia (see, e.g. Roach 2011). These countries have also had a strong influence on the development of large chunks of Australia's anti-terrorism legislation. They were referred to—albeit ultimately dismissed—by the Attorney-General's Department in drafting the ASIO Special Powers Regime (Senate Legal and Constitutional Affairs Committee, 2002). The remaining two jurisdictions are more unusual. These are Israel and India. These jurisdictions have been selected because of their considerable experience with terrorism (Roach, 2011). An examination of these jurisdictions will assist in determining whether countries facing a greater threat of terrorism have responded in a different—or more extreme—manner to the threat of terrorism.

In addition to the examination of five jurisdictions only, there are two other respects in which this country survey is limited. First, it is limited geographically. This country survey will examine only the powers of domestic intelligence agencies and only those powers with respect to the collection of intelligence on domestic soil. Second, it will concentrate on the power to gather intelligence about citizens; the powers of intelligence agencies with respect to non-citizens have historically been much wider.

This country survey is important not simply for the reason that it will tell us whether Australia has adopted an exceptional position in the 'war on terror' (Carne, 2006). The decade since the 9/11 terrorist attacks in New York and Washington has seen a significant blurring of the lines between what constitutes intelligence and evidence. This is manifested in the new terrorism offences, which criminalise preparatory acts and association with suspect organisations, as well as the civil alternatives to criminal prosecutions, such as executive detention, control orders and deportation of non-citizens (Roach, 2010). In moving away from the traditional reactionary approach to criminal activity, anti-terrorism law and policy has placed intelligence collection "centre-stage in the panoply of counter-terrorist measures available to governments" (Eminent Jurists Panel, 2009, p. 67).

The blurring of the lines between intelligence and evidence has also resulted in institutional and operational changes. The shift towards 'intelligence-led policing' has been the subject of a large body of academic literature (see, e.g. Cope, 2004; McGarrell, Freilich, & Chermak, 2007). Scholars have especially commented upon the difficulties faced by inexperienced law enforcement officers in analysing intelligence about potential risks (Roach, 2010). On the flip side, intelligence officers are just as inexperienced in collecting evidence for trial. Prosecutions in Australia and overseas have collapsed as a result of the failure of intelligence officers to respect the rules of evidence in collecting intelligence (Roach, 2010; Whealy, 2007). Furthermore, courts have been forced to find ways of balancing the competing demands of secrecy (one of the dominant values of intelligence) and open justice (one of the dominant values of evidence; Roach, 2010). Each of these matters represents part of a trend towards the increasing use of intelligence as evidence and intelligence

collection as a function of law enforcement agencies. Largely missing from the discussion to date, however, has been a consideration of whether there has been a simultaneous expansion of the tools available to intelligence agencies to collect intelligence. The ASIO Special Powers Regime is a clear example of this. Powers of coercive questioning and detention that would traditionally have been bestowed only on law enforcement agencies have been given to ASIO for the purpose of filling a gap in its ability to collect intelligence about terrorism (Senate Legal and Constitutional Affairs Committee, 2002).

The nature of the ASIO powers

ASIO has historically been given a broad range of intelligence gathering powers (see Cain, 2004; Hocking, 2004; McKnight, 1994). These include, for example, those in the Telecommunications (Interception and Access) Act 1979 (Cth). This part will concentrate on the ASIO Special Powers Regime in Part III Division 3 of the Australian Security Intelligence Organisation Act 1979 (Cth; ASIO Act). This Regime has been the subject of considerable academic attention (see Carne, 2004, 2006; Head, 2004; Hocking, 2003; Hocking & McKnight, 2004; McCulloch & Tham, 2005; McGarrity, 2010; McGarrity, Gulati, & Williams, 2012; Michaelsen, 2005b; Palmer, 2004; Welsh, 2011). This is unsurprising given that the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Cth), which introduced the Regime, is one of most controversial pieces of legislation ever enacted by the Australian Parliament. It empowers ASIO to apply for either a Questioning or a Detention Warrant. The latter type of warrant is more commonly referred to as a 'Questioning and Detention Warrant'. This reflects the fact that the main purpose of this type of warrant—like a Questioning Warrant—is to ensure that the subject is available for coercive questioning at a certain point in time. A person may be questioned for up to 24 hours or, if an interpreter is present, 48 hours (sections 34R(6) and 34R(11)). The questioning is conducted by ASIO officers under the supervision of a Prescribed Authority (usually a retired judge; section 34B). It is 'coercive' in the sense that there is a legal obligation on the person being questioned to comply with the warrant; that is, it is a criminal offence, carrying a lengthy term of imprisonment, to fail to attend for questioning, to refuse to answer questions or provide documents or things, or to give false or misleading information (section 34L). This is so even if the information might tend to incriminate the person subject to the Questioning Warrant (section 34L(8)). The prospect of a warrant being issued is not merely hypothetical. Over the last decade, 16 Questioning Warrants have been issued. In contrast, no Detention Warrant has even been requested by ASIO, let alone actually issued (see the Annual Reports prepared by ASIO under section 94 of the ASIO Act).

The ultimate decision as to whether to issue a Questioning Warrant is made by an Issuing Authority, who is generally a retired judge or magistrate (sections 34A and 34AB). However, before making an application for a Questioning Warrant, the Director-General of ASIO must obtain the consent of the Attorney-General. The substantive criteria of which the Attorney-General must be satisfied are: (1) there are reasonable grounds for believing that issuing the warrant will substantially assist in the collection of evidence that is important in relation to a terrorism offence; and (2) relying on other methods of collecting that evidence would be ineffective (section 34D(4)). If the person is a minor aged between 16 and 18 years, the

Attorney-General must also be satisfied that the person is likely to commit, is committing or has committed a terrorism offence (section 34ZE(4)). The only criterion of which the Issuing Authority must be satisfied before issuing a Questioning Warrant is (1) above (section 34E(1)). This is problematic because it means that the majority of decisions are being made by a member of the executive branch of government—which, through ASIO, is seeking the warrant—rather than the independent Issuing Authority.

Prior to the enactment of the ASIO Amendment Act, there was no power for ASIO to question persons unless they consented. An expansion in ASIO's investigatory powers was therefore said to serve two purposes. These were, first, the prevention of terrorism on Australian soil and, second, "to ensure that any perpetrators of [terrorism] offences are discovered and prosecuted" (House of Representatives, 2002, p. 1930). The disproportionate nature of the ASIO Special Powers Regime is evident in the fact that neither of these purposes is formally recognised in the legislative criteria for issuing a warrant. Neither the Attorney-General nor, more importantly, the Issuing Authority must be satisfied that coercive questioning is necessary to prevent an imminent terrorist attack or to identify and prosecute the perpetrator of a past terrorist act. Instead, the coercive questioning regime may be applied not only to suspects but to anyone who is thought to possess information 'that is important in relation to a terrorism offence'. This might include family, friends, innocent bystanders and academics.

These concerns about the disproportionate nature of the regime are amplified in respect of Detention Warrants. Such a warrant is significantly more intrusive than a Questioning Warrant; it enables the detention of a person for up to seven days (section 34S). In spite of this, the threshold for issuing a Detention Warrant is only *slightly* higher than for a Questioning Warrant. The Attorney-General must reasonably believe that, if the person is not immediately taken into custody and detained, he or she: (1) may alert a person involved in a terrorism offence that the offence is being investigated; (2) may not appear before the prescribed authority [for questioning]; or (3) may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce (section 34F(4)).

In Australia, detention has typically been permitted only as a result of a finding of criminal guilt (Nesbitt, 2007). Exceptions to this must be justified as being reasonably necessary to serve a non-punitive objective; for example, detention pending trial where the person is a flight risk or where a person's mental illness presents a danger to the community (Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs, 1992). The Special Powers Regime is different from these examples in two respects. First, the issuing criteria for Detention Warrants are not adequately tailored to the purpose of the prevention of terrorist acts. Second, most of these examples set out in *Chu Kheng Lim* allow for judicial supervision of the detention process. For example, a judge determines whether there are grounds for denying a person bail. In contrast, judges do not have a meaningful role to play in respect of the additional issuing criteria for a Detention Warrant. The Issuing Authority is not required to be satisfied of the merits of (1)–(3) above (section 34G(1)). He or she need only be satisfied of the same criteria as for the issue of a Questioning Warrant.

It is important to note that the ASIO Special Powers Regime does contain some safeguards. The possibility of human rights abuses is minimised by the supervisory role of the Prescribed Authority during the questioning of the person subject to the

warrant (section 34J(3)). The Prescribed Authority must, amongst other things, inform the subject of the Warrant of his or her rights; for example, to make a complaint to either the Inspector-General of Intelligence and Security ('IGIS') or the Commonwealth Ombudsman (section 34J(1); see also section 34K(9)). The IGIS may—and, in practice, does—attend all questioning sessions (section 34P). Annual reports must be prepared by both ASIO and the IGIS setting out details of the warrants issued in a particular year (sections 34, 34ZH, 34ZI, 34ZJ and 94). Operating against these safeguards, however, are significant deficiencies in the ASIO Special Powers Regime that may contribute to the likelihood of human rights abuses. First, the possibility under the ASIO Act of multiple warrants being issued undermines the ostensible time limits on coercive questioning and detention under the ASIO Special Powers Regime. Second, it is prohibited to disclose, during the period that a Questioning or Detention Warrant is in effect, even the fact that it has been issued (section 34ZS; see also McCulloch & Tham, 2005). Finally, there are serious restrictions on access to legal representation and advice. The Prescribed Authority may, for example, veto a particular lawyer and all communications between the subject of the warrant and his or her lawyer must be capable of being monitored by ASIO (section 34ZO).

Country survey

UK

The United Kingdom Security Service, or 'MI5', was founded in 1909 as the Secret Service Bureau (Chalk & Rosenau, 2004; Northcott, 2007, pp. 454–462). It was not until 80 years later, with the enactment of the Security Service Act 1989 (UK) (Security Service Act), that this organisation was put on a statutory footing (Chesterman, 2010). As set out in section 1 of the Security Service Act, the functions of MI5 are threefold. First, "the protection of national security, and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means." Since the 9/11 terrorist attacks, the vast majority of MI5's resources have been dedicated to the protection of the UK against international terrorism (Intelligence and Security Committee, 2011). Second, "to safeguard the economic well-being of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands." And, finally, "to act in support of the activities of police forces … and other law enforcement agencies in the prevention and detection of serious crime."

This final function suggests that there is some delineation between law enforcement and intelligence gathering activities in the UK. The "prevention and detection of serious crime" remains the primary business of the UK police forces, with MI5's role being to provide 'support' only. Chalk and Rosenau (2004, 12) state that:

> [T]he Security Service assists British law enforcement agencies as part of a national strategy to defeat serious crime. In these cases, MI5 mostly works through the National Criminal Intelligence Service (NCIS), which serves as the main interface between the intelligence community and police criminal investigation departments … Although MI5 is mandated to conduct surveillance operations, it has no independent arrest powers of

> its own. The service is thus obliged to work closely with the United Kingdom's local police forces

This arrangement had been advised by Lord Denning in 1963. His Lordship said that MI5 officers were "in the eye of the law, ordinary citizens with no powers greater than anyone else" (Denning, 1963, p. 91). This is obviously not entirely correct; MI5 officers—as will be discussed below—possess broad powers, such as those to conduct surveillance, which ordinary citizens do not. Nevertheless, Lord Denning's particular concern was that MI5 officers should "have no special powers of arrest such as the police have … We would rather have it so, than have anything in the nature of a 'secret police'" (at 91).

The intelligence gathering powers of MI5 are set out in the Intelligence Services Act 1994 (UK; ISA) and Regulation of Investigatory Powers Act 2000 (UK; RIPA). Section 5 of the ISA allows MI5 to apply for a warrant from the Secretary of State to enter onto property or to interfere with property or with wireless telegraphy. Such a warrant may only be granted where the Secretary of State is satisfied that: (1) the proposed action is necessary for the purpose of assisting MI5 to carry out its statutory functions; (2) the action is proportionate to what it seeks to achieve and (3) the agency has in place satisfactory arrangements for securing that it shall not obtain or disclose information except insofar as necessary for the proper discharge of its statutory functions. In deciding whether requirements (1) and (2) are satisfied, the Secretary of State must take into account whether the goals sought to be achieved by the action could reasonably be achieved by other means.

There are three additional categories of surveillance dealt with in RIPA. The first is intrusive surveillance (section 32). This is covert surveillance undertaken for the purpose of a specific investigation in a manner likely to reveal private information about a person. This type of surveillance will generally involve the covert installation of a surveillance device in private premises or a vehicle. The Secretary of State may only authorise intrusive surveillance if requirements (1) and (2) above are satisfied. As with property warrants, the Secretary of State must take into account whether the goals sought to be achieved by the intrusive surveillance could reasonably be achieved by other means. Requirements (1) and (2) also apply to the next two types of surveillance. However, the decision whether these requirements are satisfied is made by designated persons within MI5 (rather than the Secretary of State). Second, directed surveillance (section 28), namely, "covert monitoring of targets' movements, conversations and other activities in order to obtain intelligence about their organisations and the identities of those with whom they associate" (Northcott, 2007). Finally, covert human intelligence services (section 29); for example, the use of an undercover MI5 officer or informant to solicit information from a person who does not know that the information will reach MI5.

In recent years, MI5 has been criticised for overstepping the legal limits on its powers when seeking intelligence from overseas. Allegations have been made that MI5 colluded with the US Central Intelligence agency and other foreign agencies in the mistreatment and rendition of UK citizens suspected of committing terrorist acts (see, e.g. Cobain, 2008; Cobain & Bowcott, 2010). These activities are undoubtedly of great concern. However, for the purpose of drawing a comparison with the ASIO Special Powers Regime, it is important to make a distinction between the domestic and foreign intelligence gathering activities of MI5. This article is only concerned with the former. It is clear from the analysis of the statutory framework under which

MI5 has operated since 1989 that this agency does not possess any coercive questioning or detention powers.

Canada

The creation of a separate domestic intelligence agency is a relatively recent phenomenon in Canada. Until the early 1980s, law enforcement and intelligence gathering functions were performed by the one body, the Royal Canadian Mounted Police (RCMP; Cleroux, 1990; Commission of Inquiry, 2006). In 1969, the Royal Commission on Security recommended that these functions be separated (Royal Commission on Security, 1969). This recommendation was not adopted. However, the first step towards the creation of a separation of law enforcement and intelligence functions was taken, with the establishment of a distinct Security Service within the RCMP (Commission of Inquiry, 2006). In 1981, in response to allegations of significant abuses of power by the RCMP, a second inquiry was held. The Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police supported the recommendation of the earlier Royal Commission on Security (Commission of Inquiry, 1981; see also Gill, 1989). As a result, in 1984, the Canadian Security Intelligence Service (CSIS, 1985) was established by the Canadian Security Intelligence Service Act. To reinforce the separation between intelligence gathering and law enforcement functions, the Security Offences Act was enacted in the same year. Section 6 of this Act provides that RCMP officers "have the primary responsibility to perform the duties that are assigned to peace officers" in relation to offences that arise "out of conduct constituting a threat to the security of Canada."

The primary functions of the CSIS are set out in section 12 of the CSIS Act. These include to collect, analyse and retain information "respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada" and to provide advice on these activities to the Canadian Government. A threat to Canada's security is defined to mean espionage, foreign-influenced activities detrimental to national interests, and activities supporting violence for political objectives or any unlawful acts (including "lawful advocacy, protest or dissent" if carried on in conjunction with any of these activities; section 2; see also Vitkauskas, 1999).

For the purpose of investigating a threat to Canada's security, the CSIS is empowered to use a range of covert surveillance techniques. These are broadly similar to the powers of MI5 in the UK: it may enter private premises, search and seize documents or any other thing, install covert surveillance devices and intercept communications. Before the CSIS may exercise any of these powers, it must obtain a warrant from a judge of the Canadian Federal Court in accordance with the provisions of the CSIS Act. The judge must be satisfied that (1) a warrant is required to enable the CSIS to investigate a threat to Canada's security and (2) other investigative procedures have failed or would be impractical or, more generally, it is unlikely the information would be obtained without a warrant (section 21). The CSIS Act does not bestow upon the CSIS any powers equivalent to those under the ASIO Special Powers Regime; the CSIS cannot coercively question or detain a Canadian citizen. Furthermore, the hard-fought battle in Canada to separate law enforcement from intelligence gathering functions militates strongly against the possibility that such powers will ever be given to the CSIS.

Canada has, however, adopted a power of coercive questioning in the law enforcement context. This is the extremely controversial investigative hearing regime in the Canadian Criminal Code (1985; 'IH Regime'). The IH Regime was introduced in 2001 by the Anti-Terrorism Act. It was then allowed to lapse in 2007 before being reintroduced by the Combating Terrorism Act in 2013. In essence, the IH Regime empowers a judge to order a person to appear for questioning. Millard writes that the "greatest conceptual novelty [of investigative hearings] is that they allow the state to compel testimony from a witness during the fact-finding stage of an investigation, and thus *before* the state lays a charge" (2002, p. 79). In this sense, the IH Regime is quite similar to the ASIO Special Powers Regime. However, Roach has identified numerous differences between the two Regimes (Roach, 2007; see also Stewart, 2005).

The first, and most significant, difference is the absence of a power to detain under the former Regime; the similarities between the IH Regime and the ASIO Special Powers Regime relate only to the coercive questioning aspect of the latter. Second, the criteria for ordering an investigative hearing are considerably narrower in that they require a nexus with a past, present or future terrorist act. The issuing judge must be satisfied that there were reasonable grounds to: (1) conclude that a terrorism offence had been committed and the questioning would reveal information about the offence; or (2) believe that a terrorism offence would be committed, the person had direct and material information about the offence or the whereabouts of a suspect and reasonable attempts had been made to obtain information from the subject of the proposed investigative hearing. These criteria are far more tailored to the purposes of prosecuting terrorists (in relation to (1)) and preventing terrorism (in relation to (2)) than are the criteria for issuing a Questioning Warrant under the ASIO Special Powers Regime.

The third difference relates to the circumstances in which a person might refuse to provide information under the IH Regime. In general, the failure to appear, a refusal to provide information or the provision of false information was a criminal offence (Roach, 2007, p. 68). A person could, however, refuse to provide information on the basis that it "is protected by any law relating to non-disclosure of information or to privilege." No such exemption exists under the ASIO Special Powers Regime. Furthermore, it was held by the courts that a person was protected under the IH Regime by full use and derivative use immunities (Application under section 83.28 of the Criminal Code, 2004). A derivative use immunity is absent from the ASIO Special Powers Regime. Finally, the Canadian Supreme Court held in *Re Vancouver Sun* (2004) that the IH Regime was subject to the open court principle and non-publication orders must be made on a case-by-case basis. In contrast, the ASIO Special Powers Regime prohibits—as a blanket rule—even the disclosure of the mere fact that a Questioning or Detention Warrant has been issued.

The differences between the IH Regime and the ASIO Special Powers Regime are significant ones; the coercive questioning and detention powers bestowed on ASIO are far more intrusive than those under the IH Regime. This makes it clear that the ASIO Special Powers Regime is extraordinary not simply because of the type of agency in which the coercive questioning and detention powers are vested. Quite independently, the scope of the powers and the lack of safeguards attaching to these are also of great concern. These would be of concern, regardless of the nature of the agency—whether domestic intelligence, law enforcement or something else—upon which they were bestowed.

USA

The USA undoubtedly has the most complicated intelligence structure of any of the jurisdictions discussed in this article. There are 17 members of the US intelligence community (Office of the Director of National Intelligence, 2011). For the purposes of this article, it is only necessary to identify those agencies that are involved in the task of domestic intelligence gathering. However, this is far from a simple task. This is for three reasons. First, the USA does not have a dedicated domestic intelligence agency. Second, some foreign intelligence agencies are permitted to conduct intelligence gathering activities on domestic soil. For example, the official mission of the National Security Agency (NSA) under Executive Order 12333 is to collect intelligence that constitutes "foreign intelligence or counterintelligence," but not "information concerning the domestic activities of United States persons." However, in 2005, it was revealed that US President George W. Bush had authorised the NSA to intercept—without first obtaining a warrant from the Foreign Intelligence Surveillance Court—the international telecommunications of US citizens whom it reasonably believed had links to Al Qaeda or an affiliated terrorist organisation (Risen & Lichtblau, 2005). This executive regime was given a legislative foundation in the Protect America Act of 2007 and subsequently in the FISA Amendments Act of 2008.

The third reason that it is difficult to identify the agencies involved in domestic intelligence gathering is that there is no clear distinction between law enforcement and intelligence agencies in the USA. This is apparent from an analysis of the history and functions of the Federal Bureau of Investigation (FBI). The FBI was established in 1908; however, its official mandate is not, and has never been, clearly set out in legislation. Instead, Berman (2011, p. 5) writes that the last century has seen the FBI "vacillate … between a crime-solving and intelligence gathering focus":

> Originally created to investigate specific federal crimes, the Bureau expanded into the notorious Hoover-era domestic intelligence agency, famous for its excess and overreach. Revelations of Hoover-era abuses prompted the Bureau to refocus for a time on crime-solving, and a season of robust oversight and operational limitations on intelligence gathering followed.

In the aftermath of the 9/11 terrorist attacks, it was commonly believed that the wall between law enforcement and intelligence functions was, at least partially, to blame for the failure to identify and pre-empt the terrorist threat (National Commission on Terrorist Attacks upon the United States, 2004). For example, surveillance undertaken in accordance with the Foreign Intelligence Surveillance Act of 1978 could only be admitted for the purposes of a criminal prosecution if it was demonstrated that the primary purpose of the surveillance was to obtain foreign intelligence (Banks, 2012). The intelligence gathering function of the FBI has therefore assumed much greater prominence over the last decade. The FBI is—at least as far as this function is concerned—the closest comparator for ASIO amongst the agencies in the USA intelligence community.

The powers of the FBI to engage in intelligence gathering are currently outlined in the 2008 Attorney-General's Guidelines for Domestic FBI Operations (Mukasey, 2008). These Guidelines introduced a new category of FBI investigations, namely, 'assessments'. In contrast to the prior categories of 'preliminary', 'limited' and 'full' investigations, no factual predicates are required to commence an assessment. Instead, it requires only the existence of an 'authorised purpose'—for example, that

the FBI has determined it is acting to protect the USA against a national security threat. For the purposes of conducting an assessment, the FBI may examine publicly available information as well as use intrusive methods of surveillance, such as recruiting and tasking informants to covertly attend events (II.A.4e) and engaging in indefinite physical surveillance of homes, offices and individuals (II.A.4h). To this extent, the intelligence gathering powers of the FBI closely mirror those of MI5 and the CSIS.

Neither the FBI nor any other US intelligence agency operating on domestic soil has the direct power to coercively question or detain citizens. However, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (PATRIOT Act) has gone a considerable way towards establishing a regime which is arguably the substantive equivalent of the ASIO Special Powers Regime. This has been done by way of amendments to the US grand jury system. The Federal Rules of Criminal Procedure have historically allowed grand juries to compel a person to give evidence under oath (r 17(g)); a person might also be detained under a material witness warrant if it was 'impracticable' to secure his or her attendance by way of a subpoena (Material Witness Statute). However, in order to protect the civil liberties of the person, in particular the privilege against self-incrimination under the Fifth Amendment to the United States Constitution, rule 6(e) of the Federal Rules of Criminal Procedure prohibited the disclosure of any information given before a grand jury. It is this rule that has been significantly altered by section 203 of the PATRIOT Act. It is now permissible to disclose matters that "involve foreign intelligence or counter-intelligence … or foreign intelligence information" to "any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties". The definition of "foreign intelligence information" specifically states that this may include information "concerning a United States person" (see Collins, 2002).

The change effected by the PATRIOT Act does not mean that the FBI now has a power to coercively question or detain US citizens. It is far more limited than this. What it means is that the FBI may benefit from information that has been obtained from a person who has been coerced—possibly after being detained—to answer questions before a grand jury. There is also at least a theoretical possibility that prosecutors may be willing to manufacture grand jury proceedings purely in order to coerce a person to give information that would be useful for an FBI intelligence operation.

Israel

The General Security Service (GSS) was Israel's first intelligence agency (Doron, 1988, pp. 308–313). It was established less than six months after the formation of Israel on 14 May 1948. As with many of the other jurisdictions discussed in this article, there was a significant delay before the GSS was placed on a statutory footing. It was not until 2002 that the GSS Law was enacted (Shpiro, 2006, pp. 630–635). The GSS Law is supplemented by any regulations and rules made by the Prime Minister (with the approval of the Ministerial Committee and the Knesset Service Affairs Committee). Prior to this, the functions, powers and structure of the GSS were determined by the government in accordance with Israel's Basic Law: The

Government. This provided that "[t]he government is authorised to do on behalf of the State, under every law, every activity that its conduct is not ordered by law to any other authority" (see section 29 of the 1968 version of the Basic Law: The Government, section 40 of the 1992 version and section 32 of the 2001 version). The mission of the GSS is now set out in article 7 of the GSS Law:

> The Service shall be in charge of the protection of State security and the order and institutions of the democratic regime against threats of terrorism, sabotage, subversion, espionage and disclosure of State secrets, and the Service shall also act to safeguard and promote other State interests vital for national State security, all as prescribed by the Government and subject to every law.

Articles 8 to 11 of the GSS Law then set out the powers of the GSS. These include: receipt and collection of information; disclosing information to other bodies in accordance with any rules; investigation of suspects and suspicions in connection with the commission of offences or for the purpose of preventing offences; enlisting the assistance of non-GSS employees for the purpose of carrying out its tasks; searching a person's body, vehicle or possessions at an Israeli border station; conducting covert searches of vehicles and premises (with the permission of the Prime Minister or, in urgent circumstances, the Head of the GSS); and, in accordance with rules prescribed by the Prime Minister, requiring certain businesses to provide it with information and databases.

Most striking is that in carrying out certain functions, and with the approval of the relevant Minister, the GSS Law permits a GSS officer to exercise some of the powers of a police officer (article 8(b)). These functions include foiling and preventing illegal activities aimed at harming State security or the democratic order. Therefore, when conducting an investigation into terrorism-related activities, a GSS officer may, for example, arrest, detain and search an Israeli citizen (see Schedule to the GSS Law). This power is more limited than the detention power under the ASIO Special Powers Regime in that it extends only to suspects. However, it provides some indication that Australia is not on its own in regarding the prevention of terrorism as necessitating the granting of new coercive powers to domestic intelligence agencies.

The situation is more complicated as concerns the question of whether the GSS possesses a power to coercively question people. In *Public Committee against Torture in Israel v State of Israel* (*Public Committee Against Torture*, 1999), the Israeli High Court recognised the further power of GSS officers to interrogate people (see also Imseis, 2001; Roach, 2011). The High Court held that one of the implications of the rule of law is that any powers infringing individual liberties must be authorised by legislation. Article 2(1) of the Criminal Procedure Statute (Testimony) provided:

> A police officer, of or above the rank of inspector, or any other officer or class of officers generally or specifically authorised in writing by the Chief Secretary to the Government, to hold enquiries into the commission of offences, may examine orally any person supposed to be acquainted with the facts and circumstances of any offence in respect whereof such officer or police or other authorised officer as aforesaid is enquiring, and may reduce into writing any statement by a person so examined.

In accordance with an authorisation made by the Minister for Justice, GSS officers were permitted to conduct interrogations in respect of hostile terrorist activities.

The real question, however, is whether such interrogations by GSS officers might be coercive in nature. There is an obvious difference—both in practical terms and its effect on fundamental human rights—of an interrogation in which a person has a choice to cooperate and one in which he or she is coerced to do so, such as that under the ASIO Special Powers Regime. There is no statutory provision in Israel that imposes criminal sanctions on a person who fails to answer questions asked by a GSS officer or provides false information in response to those questions. This suggests that, unlike the ASIO Special Powers Regime, interrogations by GSS officers are not coercive in nature. A person might, for example, refuse to answer question on the ground that it would tend to incriminate him or her.

However, a further issue before the Israeli High Court in *Public Committee against Torture* was whether GSS officers were permitted to use torture, including shaking suspects, sleep-deprivation and excessively tight handcuffs, in the course of an interrogation. If so, such means could be used to force the subject of the interrogation to answer questions and thus render the interrogation coercive in nature. The Israeli High Court concluded that the interrogation power possessed by GSS officers "is the same interrogation power that the law bestows upon the ordinary police force investigator" (at [32]). In other words, a GSS officer "is subject to the same restrictions applicable to a police interrogation"; for example, that the interrogation be "free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever" (at [23] and [32]). The criminal defence of necessity could not, even in 'ticking time bomb' scenarios, excuse a GSS officer charged with criminal offences relating to the torture of a person (at [36]–[37]). Unfortunately, this finding was significantly watered down by the Israeli High Court's recognition that "[t]he Attorney-General can establish guidelines regarding circumstances in which investigators shall not stand trial, if they claim to have acted from 'necessity'" (at [38]). The Attorney-General established such guidelines in 1999 (Attorney-General, 1999). The GSS Act also reinforces the immunity of GSS investigators from prosecution where they are acting "in good faith and reasonably" (section 18). Of the 621 complaints of torture by GSS officers made between 2001 and 2009, not a single one was criminally investigated (Public Committee against Torture in Israel, 2010). In the absence of any real prospect of prospect of prosecution, there is effectively no obstacle to the use of torture in the course of GSS interrogations. The possibility of using physical or psychological tools to force a person to answer questions means that the GSS effectively possesses a power of coercive questioning.

India

The Intelligence Bureau (IB) is thought to be one of the world's oldest domestic intelligence agencies, being established in 1887 by an executive order of the British Secretary of State (Raman, 2002). The IB was originally charged with the collection of not only domestic but also foreign, intelligence. However, in the late 1960s, the collection of foreign intelligence was handed over to the newly created Research and Analysis Wing (Raman, 2002). The IB is now the "equivalent [of] MI5 in the UK and the Australian Security Intelligence Organisation in Australia" (Gordon, 2008, p. 118). The most significant difference between MI5 and ASIO, on one hand, and the IB, on the other, is that the mandate of the latter is not prescribed by statute (Vaughn, 1993). A retired IB officer stated of the IB that (Subramani, 2012):

> It has remained like a ghost, without a statute, all these 125 years. Even under the Government of India Act, 1935, the IB was not recognised as an intelligence agency in the Federal List … The IB continued to function under the rickety auspices of an administrative order. Intriguingly, even upon commencement of the Constitution of India on October 26, 1950, the IB continued to be sui generis and sans any constitution or statutory identity.

An Intelligence Services (Powers and Regulation) Bill 2011 was introduced into the Indian Parliament in early 2011. The purpose of this Bill was to establish a legal framework for Indian intelligence agencies. It was also announced in the media in July 2011 that Prime Minister Singh had commissioned a law be drafted that would make these intelligence organisations accountable to the Indian Parliament. However, none of these measures have eventuated. To date, the closest that India has come to putting the IB on a statutory basis is the enactment of the Intelligence Organisations (Restrictions of Rights) Act 1985 (India) (Intelligence Organisations Act). The Intelligence Organisations Act merely provides for the abrogation of certain rights of employees of the IB and other intelligence agencies; for example, to prevent them from disclosing information that might prejudice national security. It does not identify the authority under which the IB was established or its functions and powers relating to the collection and assessment of domestic intelligence. It is probably unsurprising, given the absence of a statutory basis for the IB, that this organisation has been criticised as 'politicised'. Vaughn writes that it "seems to be an extension of coercive power of not only the state but more specifically of the leadership of the ruling party" (1993, p. 5).

It is not necessary for the purposes of this article to explain in any detail the range of activities in which the IB engages. The more specific question is whether powers of coercive questioning and detention have been granted to this domestic intelligence agency. This must be answered in the negative (Burch, 2007). There has undoubtedly always been a close relationship between the IB and the Indian Police Service ('IPS'); for example, the Director of the IB is an IPS officer (Raman, 2002). However, the IB does not, and has never, possessed powers of coercive questioning and detention. This is in keeping with the Seventh Schedule, List II of the Indian Constitution, which bestows the primary responsibility for policing and public order matters upon the governments of the Indian states.

However, the future of the IB is more uncertain. The Indian Government announced in December 2009, as a response to the bombings in Mumbai in November 2008, that it would create a National Counter Terrorism Centre (NCTC) by the end of 2010 (Kumar, 2012). Following on from this, the NCTC (Organisation, Functions, Powers and Duties) Order was issued in February 2012. The preamble to the Order stated that "a review of the current architecture of counterterrorism has revealed several gaps and deficiencies" and "a need has been felt to have a single and effective point of control and coordination of all counter terrorism measures to be called the National Counter Terrorism Centre." The main functions of the NCTC were threefold: first, to collect, integrate, analyse and disseminate data, intelligence and assessments on terrorists and terrorist threats across India; second, to coordinate national and state agencies for counter-terrorism intelligence gathering and, third, to plan and coordinate counter-terrorism operations (South East Asian Human Rights Documentation Centre, 2012). To this extent, the NCTC is modelled upon the office of the same name in the USA (US

NCTC; see Executive Order 13354 of 2004 and Intelligence Reform and Terrorism Prevention Act of 2004). However, further details provided by the Indian government indicated one radical point of difference between the NCTC and the US NCTC. The Indian government explained that the NCTC would be empowered under section 43A of the Unlawful Activities (Prevention) Act 1967 to—and to requisition the Indian special forces to—undertake searches, seize property, demand information from other law enforcement and intelligence agencies and, most importantly, to make arrests.

There has been considerable opposition to this proposal (see, e.g. Chari, 2012; Kumar, 28 February 2012). Opponents have argued, first, that the NCTC would violate the constitutional division of powers between the federal government and the state government. Second, that intelligence agencies which are unconstrained by the rule of law should not be granted coercive powers (South East Asian Human Rights Documentation Centre, 2012). The IB, as already noted, does not have a statutory basis; it is also subject to very little parliamentary or other oversight. The Indian government has responded to these arguments by agreeing that the NCTC would not be established without the consent of the chief ministers of the Indian States. Furthermore, as recently as February 2013, it was noted that the "Indian Government has planned to draft a more transparent and accountable proposal of NCTC to pacify the opposition, that the NCTC is kept out of Intelligence Bureau … and states be given a major role in counterterrorism activities" (Kiran, 2013). The revised proposal has not yet been made public and, as a result, it is impossible to reach any conclusion as to whether India will, in the future, head down a similar path to Australia by vesting coercive powers in a domestic intelligence agency. The most that can be said is that it is not outside the realm of possibility.

Conclusion

The coercive questioning and detention powers bestowed upon ASIO have often been described as 'unique'. The implication is that Australia is some kind of outlier; it has ignored the precedents offered by other jurisdictions and instead followed its own, arguably disproportionate, path in responding to the threat of terrorism. This article has sought to test that description by examining the powers bestowed upon domestic intelligence agencies in five other democracies, being the UK, Canada, the USA, Israel and India. It revealed that there is nothing exactly the same as the ASIO Special Powers Regime in any of those jurisdictions. However, with the exception of the UK, all of the jurisdictions surveyed have taken steps—even if only tentative ones—in the same direction as Australia.

Canada has adopted similar coercive questioning powers, albeit in the law enforcement rather than the domestic intelligence context. In another North American country, the USA, the PATRIOT Act altered the grand jury process such that information given by a person under compulsion—and possibly also whilst he or she was in detention—could be disclosed to intelligence and other agencies. The FBI does not have powers to coercively question or detain US citizens; however, it may use information that has been obtained as a result of the exercise of such powers. There are some striking differences between the powers of the GSS in Israel and those under the ASIO Special Powers Regime: in particular, GSS officers may exercise a power of arrest and are also excused from prosecution when using torture

to extract information that is necessary to ensure the security of Israel. However, the essential point that must be made is that both the GSS and ASIO have been vested with powers of coercive questioning and detention in one form or another. Of the jurisdictions surveyed in this article, Israel bears the most resemblance to Australia. Finally, the Indian government has proposed the creation of a domestic intelligence body, the NCTC. This body would, like the GSS in Israel, be granted a power of arrest. This proposal has been extremely controversial and, at the time of writing, it appeared to have been put on the backburner by the Indian government.

The conclusion must therefore be reached that the ASIO Special Powers Regime is not as unique as has previously been claimed. Many liberal democracies—and not only Australia—have been prompted by the threat of terrorism to revisit the powers that domestic intelligence agencies require in order to conduct effective counter-terrorism operations. The USA, Israel and India have each demonstrated an interest in developing new means by which people may be forced to provide intelligence agencies with information. These means may be direct or indirect; they may or may not involve detention. However, the common thread is that each of these jurisdictions assumes that domestic intelligence agencies play an important role in protecting the state against terrorism and that effective counter-terrorism operations are only possible on the back of a large and accurate body of intelligence.

Of course, the fact that several jurisdictions have given powers of coercive questioning or detention to their domestic intelligence agencies is only a small part of the equation. Whether it is in fact necessary for domestic intelligence agencies to be given such powers is far from clear. The UK and Canada, for example, continue to maintain the position that it is preferable for domestic intelligence agencies to cooperate with law enforcement agencies rather than being given their own coercive powers. The shifting powers of domestic intelligence agencies also have implications for constitutionalist principles such as accountability and transparency. It might be argued, for example, that powers of coercive questioning and detention are inconsistent with the veil of secrecy under which domestic intelligence agencies have traditionally operated. This article does not engage with these issues in any detail; they are left for another day. Instead, what this article has done is to highlight a previously unexplored aspect of the blurring of the functions of law enforcement and intelligence agencies in response to the threat of terrorism, namely, the vesting of powers of coercive questioning and detention in domestic intelligence agencies.

References

Anti-Terrorism Act SC, c 41 (2001).

Application under section 83.28 of the Criminal Code, 2 SCR 248 (2004).

Attorney-General, Israeli Government. (1999). GSS Investigations and the Necessity Defence — Framework for Exercising the Attorney General's Discretion (Following the High Court Ruling) (1999).

Australian Security Intelligence Organisation Act, Cth (1979).

Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act, Cth (2003).

Banks, W. (2012). The United States a decade after 9/11. In V. Ramraj, M. Hor, K. Roach, & G. Williams (Eds.), *Global anti-terrorism law and policy* (pp. 449–480). Cambridge: Cambridge University Press.

Basic Law: The Government, 5728-1968 (1968).

Basic Law: The Government, 5752-1992 (1992).

Basic Law: The Government, 5761-2001 (2001).

Berman, E. (2011). *Domestic intelligence: New powers, new risks*. New York: Brennan Center for Justice.
Burch, J. (2007). A domestic intelligence agency for the United States? A comparative analysis of domestic intelligence agencies and their implications for homeland security. *Homeland Security Affairs*, *3*(2), article 1. Retrieved April 8, 2013, from http://www.hsaj.org/pages/volume3/issue2/pdfs/3.2.2.pdf
Cain, F. (2004). Australian intelligence organisations and the law: A brief history. *University of New South Wales Law Journal*, *27*(2), 296–318.
Canadian Criminal Code RSC, c C-46 (1985).
Canadian Security Intelligence Service Act RSC, c C-23 (1985).
Carne, G. (2004). Detaining questions or compromising constitutionality? The *ASIO legislation amendment (Terrorism) act 2003* (Cth). *University of New South Wales Law Journal*, *27*(2), 524–578.
Carne, G. (2006). Gathered intelligence or antipodean exceptionalism? Securing the development of ASIO's detention and questioning regime. *Adelaide Law Review*, *27*, 1–58.
Chalk, P., & Rosenau, W. (2004). *Confronting the 'enemy within': Security intelligence, the police and counterterrorism in four democracies*. Santa Monica: Rand Corporation.
Chari, P. R. (2012). National counter terrorism centre for India: Understanding the debate. *IPCS issue brief*, *181*, 1–4.
Chesterman, S. (2010). *Ordinary citizens or a license to kill? The turn to law in regulating Britain's intelligence services*. New York University Public Law and Legal Theory Working Papers, Paper 225. Retrieved from http://lsr.nellco.org/nyu_plltwp/225/
Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs, 176 CLR 1 (1992).
Cleroux, R. (1990). *Official secrets: The inside story of the Canadian security intelligence service*. Toronto: McGraw-Hill Ryerson.
Cobain, I. (2008, May 12). Revealed: Torture centre linked to MI5. *The Guardian*.
Cobain, I., & Bowcott, O. (2010, July 14). Classified documents reveal UK's role in abuse of its own citizens. *The Guardian*.
Collins, J. (2002). And the walls came tumbling down: Sharing grand Jury information with the intelligence community under the USA patriot act. *American Criminal Law Review*, *39*, 1261–1286.
Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, Canadian Government. (1981). *Second report: Freedom and security under the law*. Quebec: Canadian Government Publishing Centre.
Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. (2006). *A new review mechanism for the RCMP's national security activities*. Ottawa: Public Works and Government Services Canada.
Cope, N. (2004). 'Intelligence led policing or policing led intelligence?': Integrating volume crime analysis into policing. *British Journal of Criminology*, *44*(2), 188–203. doi:10.1093/bjc/44.2.188
Denning, Lord, United Kingdom Government. (1963). *Report on the profumo scandal*. London: The Stationary Office.
Doron, G. (1988). Israeli intelligence: Tactics, strategy and prediction. *International Journal of Intelligence and Counterintelligence*, *2*(3), 305–319. doi:10.1080/08850608808435067
Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, International Commission of Jurists. (2009). *Assessing damage, urging action*. Geneva: International Commission of Jurists.
Executive Order 13354 of August 27 (2004). Retrieved from http://www.gpo.gov/fdsys/pkg/WCPD-2004-08-30/html/WCPD-2004-08-30-Pg1696.htm
Federal Rules of Criminal Procedure. Retrieved from http://www.uscourts.gov/uscourts/rules/criminal-procedure.pdf
Foreign Intelligence Surveillance Act of 1978. Pub L 95-911, 92 Stat 1783 (1978).
Foreign Intelligence Surveillance Act of 1978. Amendments Act of 2008 Pub L 110-261, 122 Stat 2436 (2008).
General Security Service Law 5762-2002 (2002).

Gill, P. (1989). Symbolic or real? The impact of the Canadian security intelligence review committee, 1984–88. *Intelligence and National Security*, *4*(3), 550–575. doi:10.1080/02684528908432016

Gordon, S. (2008). Policing terrorism in India. *Crime, Law and Social Change*, *50*(1–2), 111–124. doi:10.1007/s10611-008-9123-7

Head, M. (2004). ASIO, secrecy and lack of accountability. *Murdoch University Electronic Journal of Law*, *11*(4), 1–16.

Hocking, J. (2003). Counter-terrorism and the criminalisation of politics: Australia's new security powers of detention, proscription and control. *Australian Journal of Politics and History*, *49*(3), 355–371. doi:10.1111/1467-8497.00291

Hocking, J. (2004). *Terror laws: ASIO, counter-terrorism and the threat to democracy*. Sydney: University of New South Wales Press.

Hocking, J., & McKnight, D. (2004). National security and democratic laws: Australian terror laws. *Sydney Papers*, *16*(1), 88–95.

House of Representatives, Australian Parliament. (2002, March 21). *Hansard*.

Imseis, A. (2001). 'Moderate' torture on trial: The Israeli supreme court judgment concerning the legality of the general security service interrogation methods. *Berkeley Journal of International Law*, *19*, 328–349.

Intelligence and Security Committee, United Kingdom Government. (2011). *Annual Report 2010–2011*. London: The Stationary Office.

Intelligence Reform and Terrorism Prevention Act of 2004. Pub L 108-458, 118 Stat 3638 (2004).

Intelligence Services Act, UK (1994).

Intelligence Services (Powers and Regulation) Bill (2011).

Kiran, R. (2013). *India needs national counter terrorism centre (NCTC)*. Society for the Study of Peace and Conflict. Retrieved from http://www.sspconline.org/opinion/India%20needsNationalCounterTerrorismCentre_11022013%20

Kumar, H. (2012, February 28). Does India need a national counter terrorism center?' *International Herald Tribune* (Global Edition).

Lynch, A., & Williams, G. (2007). *What price security? Taking stock of Australia's anti-terror laws*. Sydney: University of New South Wales Press.

Material Witness Statute, 18 U.S.C. § 3144.

McCulloch, J., & Tham, J.-C. (2005). Secret state, transparent subject: The Australian security intelligence organisation in the age of terror. *The Australian and New Zealand Journal of Criminology*, *38*(3), 400–415. doi:10.1375/acri.38.3.400

McGarrell, E. F., Freilich, J. D., & Chermak, S. (2007). Intelligence-led policing as a framework for responding to terrorism. *Journal of Contemporary Criminal Justice*, *23*(2), 142–158. doi:10.1177/1043986207301363

McGarrity, N. (2010). An example of 'worst practice'? The coercive counter-terrorism powers of the Australian security intelligence organisation. *Vienna Journal on International Constitutional Law*, *4*(3), 467–484.

McGarrity, N., Gulati, R., & Williams, G. (2012). Sunset clauses in Australian anti-terror laws. *Adelaide Law Review*, *33*, 307.

McKnight, D. (1994). *Australia's spies and their secrets*. St Leonards: Allen and Unwin.

Michaelsen, C. (2005a). Derogating from international human rights obligations in the 'war against terrorism'? A British-Australian perspective. *Terrorism and Political Violence*, *17*(1–2), 131–155. doi:10.1080/09546550590520636

Michaelsen, C. (2005b) Antiterrorism legislation in Australia: A proportionate response to the terrorist threat? *Studies in Conflict and Terrorism*, *28*(4), 321–339. doi:10.1080/10576100590950138

Mukasey, M., & United States Department of Justice. (2008). *Attorney-General's Guidelines for Domestic FBI Operations*. Retrieved from http://www.justice.gov/ag/readingroom/guidelines.pdf

National Commission on Terrorist Attacks upon the United States. (2004). *The 9/11 commission report: Final report of the national commission on terrorist attacks upon the United States*. Washington, DC: US Government Printing Office.

National Counter Terrorism Centre (Organisation, Functions, Powers and Duties) Order. Retrieved from http://www.satp.org/satporgtp/countries/india/document/papers/2012/NCTC_2012.pdf

Nesbitt, K. (2007). Preventative detention of terrorist suspects in Australia and the United States: A comparative constitutional analysis. *Boston University Public Interest Law Journal*, *17*, 39–98.

Northcott, C. (2007). The rRole, organisation and methods of MI 5. *International Journal of Intelligence and Counter Intelligence*, *20*(3), 453–479. doi:10.1080/08850600701249758

Office of the Director of National Intelligence. (2011). *US National intelligence: An overview 2011*. Washington, DC: US Government Printing Office.

Palmer, A. (2004). Investigating and prosecuting terrorism: The counter-terrorism legislation and the law of evidence. *University of New South Wales Law Journal*, *27*(2), 373–397.

Parliamentary Joint Committee on ASIO, ASIS and DSD, Australian Parliament (2002, April 30). *Hansard*.

Protect America Act of 2007. Pub L 110-55, 121 Stat 552 (2007).

Public Committee against Torture in Israel v State of Israel, HCJ Case 5100/94, PD 53(4) 817 (1999).

Public Committee against Torture in Israel. (2010). *Briefing to the human rights committee*. Jerusalem: Public Committee against Torture.

Raman, B. (2002) *Intelligence: Past, present and future*. New Dehli: Lancer.

Regulation of Investigatory Powers Act, UK (2000).

Re Vancouver Sun [2004] 2 SCR 332 (2004).

Risen, J., & Lichtblau, E. (2005, December 16). Bush Lets US Spy on Callers Without Courts. *The New York Times*.

Roach, K. (2007). A comparison of Australian and Canadian anti-terrorism laws. *University of New South Wales Law Journal*, *30*(1), 53–85.

Roach, K. (2010). The eroding distinction between intelligence and evidence in terrorism investigations. In N. McGarrity, A. Lynch, & G. Williams (Eds.), *Counter-terrorism and beyond: The culture of law and justice after 9/11* (pp. 48–68). Abingdon: Routledge.

Roach, K. (2011). *The 9/11 effect: Comparative counter-terrorism*. Cambridge: Cambridge University Press.

Royal Commission on Security, Canadian Government. (1969). *Report*. Ottawa: Information Canada.

Senate Legal and Constitutional Affairs Committee, Australian Parliament. (2002, November 12). *Hansard*.

Shpiro, S. (2006). No place to hide: Intelligence and civil liberties in Israel. *Cambridge Review of International Affairs*, *19*(4), 629–648. doi:10.1080/09557570601003361

South East Asian Human Rights Documentation Centre. (2012). The national counter terrorism centre: The creation of the Indian stasi. *Economic and Political Weekly*, *XLVII*(11), 12.

Stewart, H. (2005). Investigative hearings into terrorist offences: A challenge to the rule of law. *Criminal Law Quarterly*, *50*, 376–402.

Subramani, A. (2012, March 26). Ex-officer questions intelligence bureau's legal status'. *The Times of India*.

Telecommunications (Interception and Access) Act, Cth (1979).

Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001. Pub L No 107-56, 115 Stat 272 (2001).

Unlawful Activities (Prevention) Act (1967).

Vaughn, B. (1993). The use and abuse of intelligence services in India. *Intelligence and National Security*, *8*(1), 1–22. doi:10.1080/02684529308432188

Vitkauskas, D. (1999). *The role of a security intelligence service in a democracy*. Retrieved from http://www.nato.int/acad/fellow/97-99/vitkauskas.pdf

Welsh, R. (2011). A question of integrity: The role of judges in counter-terrorism questioning and detention by ASIO. *Public Law Review*, *22*, 138–152.

Whealy, A. (2007). Difficulty in obtaining a fair trial in terrorism cases. *Alternative Law Journal*, *81*, 743–759.

Williams, G. (2011). A decade of Australian anti-terror laws. *Melbourne University Law Review*, *35*, 1136–1176.