



ASIO Legislation Amendment Bill 2006

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Law and Bills Digest Section

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ASIO Legislation Amendment Bill 2006

Date introduced: 29 March 2006

House: House of Representatives

Portfolio: Attorney-General

Commencement: The Bill's formal provisions commence on Royal Assent. The remainder commence on the day after Royal Assent.

Purpose

To respond to recommendations made by the Parliamentary Joint Committee on ASIO, ASIS and DSD ('the PJC').¹ The PJC recently reviewed ASIO's terrorism-related questioning and detention powers. These powers are found in Division 3, Part III of the *Australian Security Intelligence Organisation Act 1979* ('the ASIO Act').

Background

The legislative history of Division 3, Part III—a brief summary

Division 3, Part III was inserted into the ASIO Act by the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*. The division adds to the suite of exceptional powers that Parliament has entrusted to ASIO.²

A Bill to add Division 3, Part III to the ASIO Act—the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 ('the 2002 Bill')—was first introduced into the House of Representatives on 21 March 2002 as part of a package of anti-terrorism legislation.³ As introduced, the 2002 Bill enabled incommunicado detention of non-suspects (both adults and children) for up to 48 hours, with potential for indefinite renewal of the warrants under which they were held. Detention warrants were to be issued by the Executive not a judicial officer. Contact with a lawyer was not guaranteed. There was no provision for the legislation to be subject to review or sunset. In 2002, the PJC described the Bill as 'the most controversial piece of legislation ever reviewed by the Committee.'⁴

The 2002 Bill was referred to the PJC. Together with the other anti-terrorism bills, it was also referred to the Senate Committee on Legal and Constitutional Affairs. Numerous legislative amendments were recommended by both committees.⁵ An amended 2002 Bill passed the House of Representatives and was further amended in the Senate. The House of Representatives accepted some of the Senate's amendments but negated others that the

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Senate continued to press. As a result the Bill was laid aside (becoming one of a number of potential double dissolution triggers at that time).

A second Bill—the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No. 2]—was introduced into the House of Representatives on 20 March 2003.⁶ This Bill was finally passed after further amendment on 26 June 2003 and commenced operation on 23 July 2003.

During the course of its passage through Parliament, amendments were made that, to an extent, refined and clarified the legislation and ameliorated some of its more draconian aspects. Among other things, amendments were made affecting the legislation's application to children. The maximum period of detention was set at 168 hours;⁷ provision was made for protocols to govern the custody, detention and interview process; criminal penalties were introduced for officials who breach safeguards; ASIO was required to include warrant statistics in its annual report; warrants are issued by judicial officers;⁸ the PJC was tasked with reviewing the legislation and Division 3, Part III was sunsetted 3 years after its commencement. A requirement that a subject's lawyer be approved by the Attorney-General and security cleared was also removed.

Division 3, Part III has been amended five times since the passage of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*.⁹ Major amendments were effected by the *ASIO Legislation Amendment Act 2003*. This Act extended the maximum period of questioning when a subject uses an interpreter from 24 hours to 48 hours and inserted new non-disclosure offences that operate during the currency of a Division 3 warrant and for two years after the warrant has expired.

As things stand

With the above provisions in mind, Division 3, Part III can be summarised as follows. It enables ASIO to obtain a warrant from an issuing authority¹⁰ that allows adults who are not suspected of a terrorism offence but may have information about terrorist activities to be *questioned* for extended periods. They can be *detained* if there are reasonable grounds for believing that they may alert someone involved in a terrorism offence, may not appear for questioning or may destroy or damage evidence. The statutory regime also applies to children aged between 16 and 18 years if they are suspected of involvement in a terrorism offence. Questioning takes place before a prescribed authority who oversees the process.¹¹

The regime is unprecedented in Australia and, arguably, in the common law democracies with which Australia is often compared (the United Kingdom, Canada, New Zealand and the United States).¹²

Division 3, Part III contains oversight, complaint and other provisions designed to protect the subjects of Division 3 warrants. Of particular importance are provisions relating to prescribed authorities, the Inspector-General of Intelligence and Security (IGIS) and the

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Commonwealth Ombudsman. The prescribed authority oversees questioning and the IGIS may be present at questioning and communicate any concerns about impropriety or illegality to the prescribed authority. Both the IGIS and the Ombudsman can investigate complaints from the subjects of warrants. Further details about the roles of the prescribed authority, IGIS and Ombudsman can be found in the Main Provisions section of this Digest.

However, some Division 3, Part III protections have significant limitations. For instance, while undergoing questioning or when in detention a person is not assured of being able to contact a lawyer. And even if present when questioning occurs, a lawyer is unable to represent his or her client in any meaningful way. Further, the subject of a warrant is liable to criminal penalties for failing to answer questions or produce documents; neither derivative use immunity or immunity from civil proceedings apply to information they are compelled to give;¹³ and they face criminal penalties if they breach the non-disclosure provisions of the legislation (for instance, if they disclose that they are the subject of a Division 3 warrant while that warrant is still in force).

PJC Review

The PJC is established under the *Intelligence Services Act 2001*. Its functions are set out in section 29 of that Act. They include reviewing the administration and expenditure of Australia's intelligence agencies,¹⁴ reporting on matters relating to the intelligence agencies that are referred by the responsible Minister or either House of Parliament, reviewing the 2002 package of anti-terrorism legislation and reviewing Division 3, Part III. The PJC's functions do not include reviewing the operations or operational methods of the intelligence agencies or inquiring into individual complaints about those agencies.

At the time of its inquiry into Division 3, Part III the PJC had seven members appointed by the Prime Minister.¹⁵ Three of these members came from the Senate and four from the House of Representatives. Four members were appointed from Government ranks and three from the Opposition. Opposition members are appointed on the advice of the Leader of the Opposition. PJC staff are security-cleared to Australian Secret Intelligence Service officer level TSPV.¹⁶

The *Australian Security Organisation Legislation Amendment (Terrorism) Act 2003* requires the PJC to review the operations, effectiveness and implications of Division 3, Part III by 22 January 2006 and report its findings to the Attorney-General and Parliament.

In the course of its review, the PJC held four public hearings, five in camera hearings and considered 113 submissions. Six of the submissions are labelled secret, confidential or security-in-confidence. ASIO, the Attorney-General's Department, the Australian Federal Police (AFP) appeared at both public and in camera hearings. Lawyers for the subjects of warrants, one issuing authority and one prescribed authority attended in camera hearings. The Committee did not hear evidence from any subjects of Division 3 warrants. However,

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it was provided with copies of video tapes and transcripts of questioning for the *first eight Division 3 warrants*. The PJC's report notes that its request to see tapes and transcripts of *a further six warrants* was refused.

The Committee's report was completed in November 2005. It was tabled in the Senate on 30 November 2005 and in the House of Representatives on 5 December 2005.

In brief, the PJC concluded that the Division 3, Part III has been useful in monitoring people who might be inclined or induced to participate in terrorist activities. It found that Division 3, Part III powers had been used lawfully and administered professionally. However, it considered that these extraordinary powers should not be regarded as a 'permanent part of the Australian legal landscape.'¹⁷ And it recommended 'a range of additional measures [set out in 19 recommendations] if Division 3 of Part III of the ASIO Act is to continue to have effect beyond 23 July 2006.'¹⁸

The Government's response to the PJC's recommendations was tabled on 29 March 2005 during the first reading stage of the ASIO Legislation Amendment Bill 2006. It agreed to six recommendations, agreed in part to a further six recommendations and rejected seven recommendations. PJC recommendations and Government responses to them can also be broken down according to their classification in the PJC's report:

- *recommendations relating to the questioning and detention regime*—3 recommendations—1 rejected; 2 accepted
- *legal representation and access to complaints mechanisms*—11 recommendations—4 accepted, 5 accepted in part, 2 rejected
- *implications for democratic and liberal processes*—4 recommendations—none accepted
- *continuation of the legislation*—1 recommendation—accepted in part.

The operation of the regime

Given the criminal penalties that apply to breaches of the secrecy provisions of Division 3, Part III, it is not surprising that there is little publicly available information about how the regime operates. Non-disclosure offences and legislation governing the PJC's operations raised a number of issues for the Committee, its inquiry and its reporting processes. These included:

- the dearth of publicly available information about the regime's operation
- whether the secrecy provisions restricted or inhibited the evidence that could be presented to the PJC
- what information could be published by the PJC.

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A Background Paper issued by the PJC listed a number of matters the committee might wish to examine. These included how the legislation operates, who has been subjected to ASIO's special powers and what was achieved through their questioning, what problems have been encountered with the legislation, what aspects of the legislation have not been used, and what complaints have been made about the legislation. In his submission to the PJC, Dr Greg Carne from the University of Tasmania wrote that the effect of the non-disclosure offences is that:

... literacy about case and policy issues is diminished and information not threatening national security is withheld from public and professional groups necessary to make comprehensive submissions to this inquiry.¹⁹

Some statistical information about warrants is published in ASIO's annual report. Subject to the non-disclosure requirements of Division 3, Part III comments about the operation of the regime can be found in annual reports and other public commentary made by the IGIS. On occasion, leaks appear to have alerted the media to planned ASIO raids.²⁰

Concerned that the non-disclosure offences in Division 3, Part III might inhibit or prevent the subjects of warrants and their lawyers making submissions to the Committee, the PJC sought legal advice. That legal opinion concluded that witnesses could give evidence to the inquiry without contravening Division 3's secrecy provisions and that such witnesses are protected by the *Parliamentary Privileges Act 1987*.²¹ As stated above, the PJC obtained evidence from one prescribed authority, one issuing authority and three lawyers for the subjects of warrants as well as from ASIO, the IGIS, AFP and Attorney-General's Department. It viewed tapes and transcripts of questioning for the first eight Division 3 warrants.

Nevertheless, there are limits on the information that can be made publicly available by the PJC. Subsection 20(2) of the *Intelligence Services Act 2001* requires the Attorney-General to approve the holding of any public hearings. Clause 6 of Schedule 1 of the *Intelligence Services Act* provides that evidence or documents produced in private session cannot be disclosed without the permission of the agency head (where the evidence is given by a staff member of an intelligence agency) or, in any other case, without the permission of the person who gave the evidence or produced the document.

Further, clause 7 sets out restrictions on disclosures to Parliament. Its effect is that PJC reports must be cleared by the responsible Minister before they are tabled in Parliament. In the case of the PJC's report, there were two instances where agreement could not be reached about whether material should be omitted or included. As a result, one sentence in the report was removed under protest from the Committee and a table was also deleted. In the PJC's view neither constituted a national security concern.

Aside from ASIO statistics and reporting by the IGIS, what can be disclosed about the operation of the regime is described in Chapter 1 of the PJC's report. At the time of the PJC's inquiry, no-one had been detained under a Division 3 warrant and no children aged

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between 16 and 18 years had been the subject of warrants. As at August 2005, 14 questioning warrants had been issued applying to 13 subjects (one of whom was the subject of two warrants), the total questioning time for the 14 warrants being 137 hours and 38 minutes.

In all, more than 10 people may be present during questioning. This includes ASIO officers and/or officers from the Australian Government Solicitor's Office who conduct questioning, the prescribed authority, IGIS, police, ASIO advisers, the subject and their lawyer, and transcription and audio-visual service personnel.²²

At the time the PJC's report was written 25 people, all former judges, had been appointed as prescribed authorities. Six issuing authorities had been appointed. The Attorney-General had not rejected any request that an application be made for a warrant and no issuing authority had refused to issue a warrant.

Division 3, Part III enables the IGIS or his staff to be present when a person is being questioned or taken into custody. The practice of the IGIS appears to be that either he or one of his senior staff attends on the first day of questioning. A decision is then made about whether to attend on subsequent days. In his submission to the PJC, the IGIS suggested a number of amendments to Division 3, Part III but emphasised that he did 'not wish to convey a negative impression of its use to date.' In relation to what he and his officers witnessed, the IGIS has said:

The subjects of the warrants have, in the experience of this office to date, all been treated humanely (as required by section 34J). The questioning has been conducted in an appropriate manner and the individuals who have been the subject of questioning have been accorded dignity and respect. On some occasions this has been in the face of abusive or evasive comments—nonetheless professionalism was maintained by ASIO and Australian Government Solicitor staff involved.²³

While not disputing that their clients were treated appropriately, lawyers who gave evidence to the PJC said they doubted that questioning was directed at determining whether their clients had information relevant to a terrorism offence or planned attacks. Rather, they believed that the Division 3, Part III regime is being used to supplement police powers 'made possible by the lack of a derivative use immunity and by the presence at the questioning of police who seemed to be investigating police, on one occasion State police apparently concerned with a non-terrorist related matter.'²⁴ Other complaints made by lawyers related to the length of questioning (despite the fact that it was within legal limits) and inability to object to questions and adequately represent or advise their clients. There were also some complaints of requests for interpreters being refused.²⁵

Commenting on the outcomes and usefulness of the Division 3, Part III regime, the PJC revealed that at the time of writing 15 charges had been laid in relation to 4 people as a result of questioning warrants being issued.²⁶ As stated earlier, a table of charges laid was removed from the PJC's report at the request of ASIO, although the PJC 'did not accept

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that the information contained in the table constituted a national security concern or was prejudicial to prospective trials.’²⁷

This Digest examines the ASIO Legislation Amendment Bill 2006 in the light of the PJC’s recommendations. The Main Provisions section includes commentary on PJC recommendations that were wholly or partly accepted by the Government. Recommendations that were rejected by the Government are described in the Concluding Comments section.

The expression, ‘Division 3 warrant’, is used to describe warrants issued under Division 3, Part III of the ASIO Act. The term, ‘section 34D warrant’, is also used in the PJC’s report and submissions to the PJC inquiry.

Main provisions

Schedule 1—Restructuring amendments

Part 1—Main amendments

Schedule 1 restructures most of existing Division 3, Part III of the ASIO Act and re-numbers some provisions. The restructure is designed to give effect to a PJC recommendation that a clear distinction should be made between *questioning-only warrants* and *warrants* that allow for both *questioning and detention* (recommendation 2).

There appear to be few differences between existing Division 3, Part III and **Schedule 1**. Some minor changes are as follows:

- current legislation provides for a statement of procedures (or ‘Protocol’) that sets conditions for the treatment of detainees.²⁸ The Bill makes the statement of procedures a legislative instrument. It must be registered and tabled in Parliament.²⁹ However, it is not subject to disallowance or sunseting (**new section 34C**).
- current legislation provides that the PJC must be briefed orally or in writing about the statement of procedures ‘whether before or after presentation of the statement to each House of Parliament’. The Bill provides that the Director-General must brief the PJC on the statement ‘after it is approved by the Minister’ (**new subsection 34C(6)**). However, it is silent about whether the briefing needs to occur before or after the statement is tabled in Parliament.
- **Schedule 1** clarifies that a person cannot be detained after someone exercising authority under the warrant informs the prescribed authority that ASIO does not have any further questions (**new paragraph 34K(5)(i)**).

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Part 2—Consequential amendments

Part 2 of Schedule 1 amends relevant references in the ASIO Act, *Crimes Act 1914* and *Foreign Evidence Act 1994* so that they reflect the changes in numbering and terminology effected by Part 1.

Part 3—Savings and transitional provisions

Item 16 provides that Division 3, Part III as it currently exists will continue to apply in specified circumstances. Examples include where a request for a warrant has been made to an issuing authority or a warrant has been issued before the commencement of the Bill as an Act.

Items 17-20 are transitional items and provide that existing ASIO regulations, relevant rules of court, approvals for people to exercise authority under Division 3 warrants, and the Protocol will continue in force when the ASIO Legislation Amendment Bill 2006 is enacted. **Item 21** is also a transitional item. It applies to ASIO annual reports.

Schedule 2—Other amendments

PJC recommendations accepted by the Government in whole or in part

Schedule 2 contains the Government's responses to the PJC's recommendations. The PJC's recommendations and the Government's responses to them are described below.

Complaints to State and Territory complaints agencies

Division 3, Part III of the ASIO Act gives a number of powers to the police (federal, State and Territory). These powers include:

- power to conduct an ordinary search or a strip search of a person detained under a warrant³⁰
- the use of necessary and reasonable force when taking a person into custody under a warrant, preventing their escape and detaining such a person³¹
- entering premises in order to take a person into custody under a warrant,³² and
- making arrangements for a person taken into custody under a warrant to be immediately brought before a prescribed authority for questioning³³

Division 3, Part III allows complaints to be made to the Commonwealth Ombudsman in relation to the actions of the AFP. Additionally, it requires a person to be told of their right to complain to the Commonwealth Ombudsman.³⁴ It also provides that the general

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prohibition on contacting anyone while in custody or detention does not apply to contact with the Ombudsman.³⁵

In practice, roles performed by State and Territory police under Division 3, Part III include the provision of ‘watchhouse or custodial services.’³⁶ State police may also be present during questioning.³⁷ However, despite the roles that State and Territory police can and do play, there is no statutory right of complaint to State and Territory bodies that investigate complaints against State and Territory police.

The PJC recommended that:

... an explicit right of access to the State Ombudsman, or other relevant State body, with jurisdiction to receive and investigate complaints against individuals about the conduct of State police officers be provided. (**recommendation 12**)³⁸

The Government *accepted* this recommendation. Recommendation 12 is implemented by **items 4 and 14 of Schedule 10**.³⁹ Additionally:

- **item 9** requires a prescribed authority to inform the subject of a warrant of their right to complain to a State or Territory agency that deals with complaints against the police
- **item 25** adds to the list of ‘permitted disclosures’ under Division 3. ‘Permitted disclosures’ are exceptions to the regime’s secrecy obligations. The effect of **item 25** is that making a complaint to a State or Territory complaints agency and investigating that complaint will be ‘permitted disclosures.’
- **item 28** makes an amendment similar to **item 25** in relation to complaints by children to State or Territory complaints agencies and the investigation of those complaints.

Distinguishing periods of detention from the allowable period of questioning

The PJC recommended that Division 3 be amended to ‘achieve a clearer understanding of the connection between the period of detention and the allowable period of questioning’ (**recommendation 3**).⁴⁰

The Government *accepted* recommendation 3, agreeing to amend the legislation to ‘clarify how the time periods under each of the warrants operate to remove any confusion between periods of detention and questioning, and to set out how time involving questioning or detention under the warrant is recorded.’⁴¹

Items 7 and 8 give effect to the Government’s response.

The role of the prescribed authority

As the Attorney-General’s Department’s submission points out:

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The main role of the prescribed authority is to supervise the questioning of the subject of a warrant, inform the person of their rights, and ensure that the terms of the warrant, the ASIO Act and the Protocol are complied with.⁴²

Examples of the prescribed authority's functions and powers include:

- explaining the warrant to the subject of the warrant, informing them of what the warrant authorises ASIO to do, their avenues of complaint and judicial review, and who they are permitted to contact⁴³
- directing that a person be detained
- deciding that an interpreter should be provided to a person who is appearing for questioning⁴⁴
- deciding whether questioning is to continue under the warrant⁴⁵ and setting breaks between periods of questioning⁴⁶
- directing that a person be released from detention once further questioning is statutorily prohibited⁴⁷
- authorising the police to conduct a strip search on a detainee⁴⁸
- providing a reasonable opportunity for a person's lawyer to advise them during breaks in questioning,⁴⁹ and
- directing that a person's lawyer be removed if they are disrupting questioning.⁵⁰

The PJC recommended that:

- 'the supervisory role of the prescribed authority be clearly expressed', and
- 'ASIO be required to provide a copy of the statement of facts and grounds on which the warrant was issued to the prescribed authority before questioning commences' (**recommendation 10**).⁵¹

The Government *accepted* recommendation 10 *in part*.

Item 10 of Schedule 2 gives effect to the *first* part of recommendation 10 by providing that the prescribed authority must tell the person that their role includes:

- supervising the questioning of the person, and
- giving appropriate directions under **new section 34K**.⁵²

The *second* part of recommendation 10 arose from the PJC's view that access to ASIO's statement of facts and grounds supporting the issuing of a warrant would assist the *prescribed authority* to exercise their statutory responsibilities. This information is already made available to the *issuing authority* when ASIO requests a Division 3 warrant. However, the Government rejected the *second* part of recommendation 10 as 'inappropriate.' It said that prescribed authorities have sufficient information to fulfil their role in supervising proceedings because they are provided with a copy of the warrant.⁵³

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Complaints to the IGIS and Ombudsman

As stated above, the prescribed authority has general oversight of the questioning process. Division 3, Part III also provides additional layers of oversight and complaint mechanisms through the IGIS and the Commonwealth Ombudsman.

The *IGIS* is an independent statutory authority whose mandate includes ensuring that Australia's intelligence agencies (including ASIO) comply with the law and Ministerial guidelines, and act with propriety and respect for human rights.

The IGIS plays a particularly important role under Division 3, Part III of the ASIO Act because he or she can attend questioning sessions, communicate any concerns about impropriety or illegality to the prescribed authority, and investigate complaints from the subjects of warrants. Further, ASIO must provide the IGIS with draft requests for warrants, any warrants issued, copies of any video recordings of questioning and statements detailing any seizures, taking into custody or detention.

As stated earlier, police (including the AFP) have a variety of powers and functions under Division 3, Part III. A person who wants to make a complaint about the conduct of the AFP (as distinct from ASIO) can go to the *Commonwealth Ombudsman*.

Division 3, Part III currently provides that a person who is *detained* under a warrant must be given facilities for contacting the IGIS or the Ombudsman should they wish to do so.⁵⁴ A person who is subject to a *questioning-only warrant* can contact the IGIS or Ombudsman *outside* the questioning procedure.

Evidence was given to the PJC that a person who had been the subject of a *questioning-only warrant* had requested that questioning cease so they could contact the IGIS but this request was denied, as was their request for a telephone. As a result, the PJC recommended that:

- subjects of questioning-only warrants have a clear right of access to the IGIS or Ombudsman and be provided with reasonable facilities to do so
- there be explicit provision for a prescribed authority to suspend questioning to facilitate access to the IGIS or Ombudsman (**recommendation 11**).

The Government *accepted* recommendation 11. It commented:

While there are already clear provisions in the legislation relating to the making of complaints in the case of detention, the Government considers that provisions could be inserted into the ASIO Act to further clarify the ability to make complaints. These provisions would enhance the requirements to inform a subject of their capacity to make, and facilitate the making of, complaints particularly in the questioning-only warrant context.⁵⁵

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Item 13 of Schedule 2 provides that if a person who is appearing for questioning before a prescribed authority under a Division 3 warrant indicates that they want to make a complaint to the IGIS or the Commonwealth Ombudsman and requests facilities for making the complaint, then the prescribed authority can defer questioning and the person must be given facilities for making the complaint.

Consulting a lawyer of choice and having that lawyer present during questioning

As things stand, a person held under a *detention warrant* must be allowed to contact their lawyer of choice, *unless* such contact would alert a person involved in a terrorism offence that the offence is being investigated or would result in records being destroyed. If a person is denied contact with their first lawyer of choice, they must be permitted to contact another lawyer of choice, who can be excluded on the same grounds. If a person does not identify a lawyer of choice, there is no requirement that one be provided for them.

If a person is the subject of a *questioning-only warrant* or is the subject of a *questioning-only warrant but is later detained* by order of a prescribed authority, there is no statutory 'right' to contact a lawyer of choice.

In its report on the 2002 Bill, the PJC recommended that a person's lawyers should be entitled to be present throughout questioning proceedings.⁵⁶ The PJC considered this issue again during its 2005 review. It found no evidence that the current practice of permitting contact with a lawyer had resulted in difficulties or frustrated the questioning process. The Committee also pointed to the examination regime in the *Australian Crime Commission Act 2002*, which provides that a person's lawyer cannot be excluded from proceedings. The PJC remarked that it was not aware of ACC proceedings being frustrated as a result. In this regard, Parliament may also wish to note the Law Enforcement Integrity Commissioner Bill 2006, which is currently before the House of Representatives. Like the Australian Crime Commission, the Integrity Commissioner will be able to exercise coercive powers. The Commissioner must allow the lawyer for a person giving evidence to be present when evidence is given.⁵⁷

The PJC recommended that:

- a person who is the subject of a *questioning-only warrant* have a statutory right to *consult* a lawyer of choice
- a lawyer be entitled to be present during the questioning process and only be excluded where there are substantial reasons to believe that the person or their conduct may pose a threat to national security (recommendation 4).

The Government accepted recommendation 4 *in part*, remarking that:

- the *limitations* that apply to *contacting* a lawyer under a *detention warrant* *should not apply* to a person who is the subject of a *questioning-only* warrant

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- *limitations on contact should apply* where a person is *detained* or where a person *originally subject to a questioning-only warrant is later detained* by order of a prescribed authority
- there should not be any *requirement* for a lawyer to be present during questioning because it might delay questioning in the face of an imminent terrorist attack and because not all subjects might want a lawyer present.

Item 5 of Schedule 2 provides that the Attorney-General must ensure that a *request for a questioning-only warrant* permits the person to contact a single lawyer of choice at any time that the person is appearing for questioning and at any time that the person is in detention. In relation to a person in detention, contact can only occur after the person has told the prescribed authority the identity of the lawyer they wish to contact and a person exercising authority under the warrant has had an opportunity to object (**new subsection 34D(4)**).

Item 6 similarly amends **new section 34E** in relation to questioning-only warrants that are *issued*.

The amendments made by **items 5 and 6** are subject to **new section 34ZO** (existing section 34TA) under which a person can be denied contact with their lawyer of choice if that might alert a person involved in a terrorism offence or result in evidence being destroyed.

Item 21 provides the prescribed authority may prevent the lawyer for the subject of a detention warrant attending questioning if satisfied that a person involved in terrorism may be alerted or evidence may be destroyed.

Allowing a lawyer to make representations to the prescribed authority

Division 3, Part III enables lawyers to advise their clients during breaks in questioning but prevents them taking an active part in the questioning process except to ask for clarification of an ambiguous question. Lawyers can be removed for unduly disrupting the questioning procedure by order of the prescribed authority.

The PJC heard evidence that lawyers and the subjects of warrants have been excluded when the prescribed authority is considering a request for an extension of questioning time. The IGIS's submission to the PJC also commented on the effects of current restrictions on legal representation:

The subjects of section 34D warrants, as opposed to their legal representatives, are able to raise questions directly with the Prescribed Authority, but not surprisingly can sometimes have difficulty in fully expressing their point.⁵⁸

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The IGIS concluded:

I would suggest that there should be clearer authority in the ASIO Act for legal representatives to address the Prescribed Authority, at least on some matters: and that in conjunction with another change [the separation of ‘questioning time’ and ‘procedural time’] this would not risk disruption to the questioning itself.

The PJC recommended that the Act be amended so that individuals can make representations through their lawyer to the prescribed authority (**recommendation 5**).

The Government accepted recommendation 5 *in part*. It agreed that a lawyer should be entitled to address the prescribed authority *during procedural time*. However, it took the view that lawyers *should not be able to intervene during questioning*. This, said the Government, would prevent the process becoming adversarial and ensure that questioning achieves its aim of gathering information.

Item 24 of Schedule 2 provides that, during breaks in questioning, a lawyer may ask to address the prescribed authority. It is then up to the prescribed authority to approve or refuse a request.

Distinguishing between procedural time and questioning time

In general, a person who is the subject of a Division 3, Part III warrant cannot be questioned for more than a total of 24 hours. An exception exists if the person has an interpreter. In this case, questioning cannot exceed a total of 48 hours. Within these limits, ‘questioning time’ can occur in blocks of up to eight hours in the case of adults and two hours in the case of children.

The PJC recommended an amendment to clearly distinguish procedural time from questioning time. Such an amendment, said the PJC would:

- clarify that certain things eg explaining the warrant, changing audio or video tapes or meeting the subject’s religious, personal or medical needs do not form part of ‘questioning time’
- ensure greater opportunity for lawyers to raise procedural and substantive issues during procedural time (**recommendation 6**)

The Government *accepted* recommendation 6. **Item 17 of Schedule 2** provides for the calculation of ‘procedural time’. This time includes time taken to explain the warrant to the subject, any time during which the prescribed authority has deferred questioning to enable recording equipment to be changed or a complaint to be made; and time that enables the subject to contact a lawyer, receive medical attention, engage in religious practices, rest or recuperate. It will also include any other time determined by the prescribed authority.

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Communications between client and lawyer

A number of submissions to the PJC criticised provisions in Division 3, Part III that enable ASIO and the AFP to monitor a detainee's contact with their lawyer. This, it was said, undermines lawyer-client confidentiality and affects lawyers' abilities to represent their clients.⁵⁹

The PJC recommended that communications between lawyers and their clients be recognised as confidential and that adequate facilities be provided to ensure confidentiality in all places of questioning and detention (**recommendation 7**).

The Government agreed to recommendation 7 *in part*. It:

- *agreed* that the legislation should be amended to clarify that communications between the subjects of *questioning-only warrants* and their lawyers are not required to be made in a way that can be monitored
- *did not agree* the amendment should apply to communications between subjects of *detention warrants* and their lawyers *or* to communications between lawyers and the subjects of *questioning-only warrants who are later detained* by order of a prescribed authority: 'This is because there is a serious potential that disclosure of any information could undermine the gathering of intelligence for a terrorism investigation.'⁶⁰

Item 22 of Schedule 2 gives effect to the Government's response.

Grounds for judicial review

In its submission to the PJC inquiry, the Law Institute of Victoria commented on the importance of access to judicial review by the subjects of Division 3 warrants:

In cases of preventive detention where detention is ordered by the Executive and a decision rests solely with administrative or ministerial authority alone, ... the most important right is for a person to be able to challenge the lawfulness of their detention.⁶¹

At present, Division 3, Part III simply requires a prescribed authority to inform the subject of a Division 3 warrant that they 'may seek from a federal court a remedy relating to the warrant or the treatment of the person in connection with the warrant.'⁶² The Law Institute of Victoria suggested that a specific reference to a person's legal remedies be included in Division 3, Part III and that it apply both to questioning and to detention.

The PJC recommended that:

... in the absence of separate statutory right of judicial review, ... a note to s34E be adopted as a signpost to existing legal bases for judicial review [recommendation 8].⁶³

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The Government *accepted* the recommendation. **Item 11 of Schedule 2** inserts a note at the end of **new section 34J** of the ASIO Act.⁶⁴ The note says that a person may be able to apply to the Federal Court or the High Court for a remedy in relation to a warrant or their treatment.

Financial assistance

The PJC agreed with comments made by the IGIS that it is important for the subjects of Division 3 warrants to be legally represented because of the complexity of proceedings and the potentially serious consequences of failure to comply with statutory requirements. It recommended that reasonable financial assistance for legal representation be provided automatically to all subjects of Division 3 warrants (**recommendation 13**).

The Government agreed *in part*. It responded:

At present all persons questioned or detained are automatically eligible to apply for financial assistance under the Special Circumstances Scheme of financial assistance. The Government does not agree to automatic provision of assistance, but is prepared to put forward an amendment to the Act to include a statutory right for a person who is questioned under a warrant to apply for financial assistance.⁶⁵

Item 30, Schedule 2 enables a person who is the subject of a warrant to apply to the Minister for financial assistance. However, such a person will not automatically be given reasonable financial assistance for legal representation.

Review and sunseting

Division 3, Part III ceases operation on 23 July 2006. Provisions for review and sunseting were inserted into Division 3, Part III as a result of the PJC's inquiry into the 2002 Bill. In proposing a sunset clause in 2002, the PJC said:

It will be up to the Government of the day to argue for the continuation of proposed Part III, Division 3 of the ASIO Act which will be inserted by the Bill. The timing of the Committee's review will ensure that the Government could, if necessary, prepare and introduce a replacement Bill when the relevant part of the Act expires.⁶⁶

In evidence given the PJC in 2005, ASIO, the Attorney-General's Department and the AFP argued against any further sunseting and recommended that the questioning and detention regime become a permanent part of Australia's counter-terrorism laws. According to these agencies, concerns about how the powers would be used have proved to be unfounded, valuable information has been obtained and concerns about terrorism are unlikely to abate.

The Attorney-General's Department also raised questions about a 'sunset clause based review'. It regarded such a review as 'resource intensive' and as having the potential to

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distract resources from protecting the Australian community.⁶⁷ Its preference was to omit the sunset clause and ‘instead rely on ongoing reviews [for example, by the PJC] and reports to Parliament.’⁶⁸

On the other hand, many submissions argued against renewing the questioning and detention regime. For instance, it was said that the threat level to Australia does not justify the regime, existing powers of law enforcement agencies and existing criminal laws are sufficient, and that the legislation is inconsistent with democratic rights. Most agreed, however, that if Division 3, Part III is to be re-enacted, it must be sunsetted and provide for PJC review.

On balance, the IGIS supported further sunsetting. In a paper delivered in July 2005, he said:

The IGIS has also supported retention of a sunset clause - having regard to the role detention has played historically in oppression – but suggested that a six or even nine year point (with periodic reviews by the [PJC] in the meantime) would be appropriate. It is the view of the IGIS that current threats are not transitory, it can be very difficult to collect intelligence on terrorist planning by more conventional means and ASIO has been responsible in its use of the warrants to date.⁶⁹

The PJC recommended the insertion of a new sunset clause to come into effect on 22 November 2011. It also recommended that the legislation be amended to require it to review the operations, effectiveness and implications of Division 3, Part III and report to the Parliament by 22 June 2011 (**recommendation 19**). This is a longer cycle of review (5½ years) than the present cycle (3 years).

The Government *accepted* the recommendation *in part*. It agreed that there should be a sunset clause and further review by the PJC. However, it rejected the PJC’s recommendation of 2011 and opted instead for a date of 2016.

Item 32 of Schedule 2 provides that Division 3, Part III ceases to have effect on 22 July 2016. **Item 33** requires the PJC to review the operation, effectiveness and implications of Division 3, Part III by 22 January 2016. The Committee must report its findings to the Minister and, once cleared, to Parliament.

Concluding comments

The Concluding Comments section of this Digest deals with PJC recommendations that were rejected by the Government. It also revisits some of the PJC recommendations that were accepted in part by the Government and briefly describes some other suggestions for amendment that emerged during the course of the PJC’s inquiry.

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PJC recommendations rejected by the Government

Matters about which the issuing authority must be satisfied

Before agreeing that the Director-General of Security can seek a Division 3 warrant from an issuing authority, the *Attorney-General* must have reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence *and that relying on other methods of intelligence collection would be ineffective*.

In contrast, the *issuing authority* need only check that certain formalities have been satisfied and have reasonable grounds to believe that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence. ‘In practice, the issuing authority is provided with the same draft warrant material as the Attorney-General.’⁷⁰

Having considered the evidence before it, the PJC concluded:

...there is a persuasive argument that, in the context of extraordinary and coercive powers that are to be used as a measure of last resort, the issuing authority should be independently satisfied that other methods of collection would not be effective. This will require ASIO to provide a factual basis to their claim that other methods of intelligence gathering would not be effective. It will also act as a strong safeguard against misuse of coercive questioning powers ...⁷¹

The PJC recommended that the issuing authority be required to be satisfied that other methods of intelligence gathering would not be effective before issuing a warrant (**recommendation 1**).

The Government *rejected* the recommendation. It said that issuing authorities are not in a position to make such an assessment. This role, the Government said, is best fulfilled by the Attorney-General who is briefed by the intelligence agencies. The Government said that existing requirements for issuing a warrant were sufficient.

Parliament may wish to note that two Commonwealth statutes, which authorise covert and intrusive activities require the issuing officer to make the sort of assessment contemplated by the PJC. The *Telecommunications (Interception) Act 1979* permits *law enforcement agencies* to obtain a telecommunications interception warrant from a judge or AAT member. Among the things that the issuing officer needs to be satisfied of before issuing the warrant is whether the information sought could be obtained by alternative methods.⁷² Under the *Surveillance Devices Act 2004*, when deciding an application for a surveillance device warrant from a *law enforcement officer*, the judge or AAT member must have regard to ‘the existence of any alternative means of obtaining the evidence or information sought to be obtained.’⁷³

Further, ASIO has a range of covert and other methods of obtaining information. Under Division 2 of the ASIO Act it can obtain warrants to use tracking devices in relation to persons and objects, use listening devices, remotely access computers, inspect postal

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articles and execute search warrants on premises and computers. Under the *Crimes Act 1914*, ASIO officers can be authorised to use assumed (ie false) identities. Under the Telecommunications (Interception) Act, ASIO can obtain telecommunications interception warrants, warrants for the collection of foreign intelligence, and can access stored communications.⁷⁴ ASIO is also able to obtain warrants to tap the phones of B-parties (ie non-suspects).⁷⁵

Payment of reasonable witness expenses

The IGIS's submission to the PJC raised the issue of expenses that can be incurred by the subject of a Division 3 warrant. The IGIS drew attention to the fact that the subjects of warrants may have difficulties in obtaining leave from their employment given secrecy requirements in the Act and because they will not know how long they will be absent. He added that this situation may be compounded where a subject does not have leave entitlements. The PJC identified other financial costs that may flow to the subject of a warrant—such as loss of leave entitlements, and costs associated with travel, child care etc.

The PJC recommended that the Commonwealth establish a scheme for the payment of reasonable witness expenses (**recommendation 14**).

The Government *rejected* the recommendation 'at this stage'.⁷⁶ It said that there was 'limited evidence of any significant practical impact of questioning to date' and noted the existence of *ex gratia* payments.

Penalties for the disclosure of 'operational information'

Division 3, Part III contains two categories of non-disclosure offence:

- *while a warrant is in force*, it is an offence to disclose information indicating that a warrant has been issued or to disclose a fact relating to the content of the warrant or the questioning or detention of a person under the warrant. It is also an offence to disclose 'operational information.'
- *in the two years following the expiry of a warrant*, it is an offence to disclose 'operational information.'

These offences will not be committed if the disclosure is a 'permitted disclosure.' The maximum penalty for committing a non-disclosure offence is 5 years imprisonment.

Division 3, Part III also contains criminal sanctions for officials who contravene statutory safeguards (section 34NB). For instance, it is an offence to refuse a detainee facilities for contacting the IGIS or Ombudsman when the detainee requests them. Refusal to defer questioning, as required, until an interpreter is present is also an offence, as is refusal to release a person aged under 16 when ordered to do so by a prescribed authority. The maximum penalty for these offences is 2 years imprisonment.

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Some submissions to the PJC noted discrepancies in penalties that apply to officials breaking statutory safeguards and others (like journalists) who disclose ‘operational information’—up to 2 years imprisonment for the former and up to 5 years imprisonment in the case of the latter.

The PJC recommended that the penalty for disclosure of ‘operational information’ be similar to the maximum penalty for an official who contravenes safeguards (**recommendation 15**).

The Government *rejected* this recommendation. It stated:

... it would not be appropriate to arbitrarily equate the penalties for officials and subjects questioned under a warrant (and other persons who disclosed information in contravention of the non-disclosure obligations). The provisions are directed at entirely different circumstances.

Definition of ‘operational information’

A key element in the disclosure offences is that the information is ‘operational information.’ ‘Operational information’ is defined as:

- (a) information that ... [ASIO] has or had;
- (b) a source of information ... that ... [ASIO] has or had;
- (c) an operational capability, method or plan of ... [ASIO].

Fairfax Holdings and the Media, Entertainment and Arts Alliance (MEAA) argued that the definition of ‘operational information’ is too broad. In its submission, the MEAA suggested that the definition encompasses:

... almost anything that ASIO has done or is doing, or has known or knows. It is hard to see what information or plans that ASIO has that would not fall under this definition of “operational information”. Thus this section effectively gags any debate about ASIO’s activities.⁷⁷

The PJC recommended that consideration be given to redefining ‘operational information’ to reflect more clearly the operational concerns and needs of ASIO (**recommendation 16**).

The Government *rejected* the recommendation. Among other things, the Government said that ‘Redrafting for greater specificity in the definition may adversely complicate and alter the scope of the secrecy provision, while providing little more guidance to make a disclosure.’⁷⁸

Disclosures and the role of the prescribed authority

A person will not commit a disclosure offence if the disclosure is a ‘permitted disclosure.’ ‘Permitted disclosures’ include disclosures that occur in the course making or investigating a complaint to the IGIS or Commonwealth Ombudsman and disclosures

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made to a lawyer for the purpose of obtaining legal advice in connection with a warrant. 'Permitted disclosures' also include disclosures permitted by the Director-General of Security or the Attorney-General and certain disclosures permitted by a prescribed authority.⁷⁹

The PJC heard evidence that the disclosure offences shield ASIO's operations from public scrutiny and accountability and intrude into freedom of speech and the press. Evidence was also given to the PJC of the subjects of ASIO warrants being unable to tell their employers and family where they were and of support organisations being unable to provide counselling or other assistance to the subject of ASIO warrants because of prohibitions on the subject disclosing the existence of a warrant or their treatment (while the warrant is in existence) or operational information (during the term of the warrant and for another two years).

The PJC accepted that in some circumstances, strict prohibitions on disclosure are necessary. However, it recommended the following changes to the secrecy regime:

- that disclosures be permitted about the existence of questioning warrants, and
- consideration be given to shifting the determination of the need for greater non-disclosure to the prescribed authority (**recommendation 17**).

The Government *rejected* recommendation 17. It considers that existing legislation is sufficiently flexible and that strict secrecy needs to be observed when a warrant is in force so ASIO can carry out its investigations effectively. It conceded, however, that in some situations disclosure of the existence of a warrant before it expires would not harm national security. It said that the ASIO Act could be amended so that under the existing permitted disclosure regime, relevant decision-makers are permitted to take certain factors into account (like a person's family and employment interests and the public interest) when deciding whether to permit a particular disclosure.

Item 29 of Schedule 2 provides that, in deciding whether to give permission for a disclosure, the prescribed authority, Minister or Director-General must take into account a person's family and employment interests (to the extent that these are known), the public interest and the risk to security if permission is given.

Reporting by ASIO

Section 94 of the ASIO Act places a number of reporting obligations on ASIO. For example, the Director-General must report annually to the Minister on the number of requests made for Division 3 warrants, the number of warrants issued, the total number of questioning warrants, the total number of detention warrants, the total number of hours each person appeared for questioning before a prescribed authority, the total number of hours each detainee spent in detention and the number of times each prescribed authority had persons appearing before him or her for questioning.

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The PJC reported community concern about ASIO's lack of accountability. It considered that 'with increased powers, especially powers which infringe significantly on individual liberties, there are increased responsibilities for public accounting. And it recommended that ASIO include in its Annual Report information about

- the number and length of questioning sessions within any total questioning time for each warrant
- the number of formal complaints made to the IGIS, the Ombudsman or appeals made to the Federal Court, and
- the number (if any) of charges laid as a result of warrants issued and the nature of those charges (**recommendation 18**).

The PJC considered that this information should be readily available without additional administrative burdens falling on ASIO. Indeed, examples of the number and length of questioning sessions for two warrants are provided on pages 17 and 18 of the PJC's report. They provide important information about the operation of the regime and whether the requirements of Division 3 and the Protocol are being observed.

The Government *rejected* recommendation 18. In relation to:

- the *number and length of questioning sessions*, the Government considered that the reporting requirements in section 94 already provide 'ample information'
- *complaints to the IGIS and Ombudsman and appeals to the Federal Court*, the Government said it was appropriate for those agencies, rather than ASIO to report, and
- *charges laid under the ASIO Act*, the Government responded that the purpose of Division 3, Part III is to gather intelligence not prosecute offences so it would be 'inappropriate and unnecessary' to include this information in ASIO's Annual Report.

Amendment of regulation 3B

Regulation 3B of the ASIO Regulations 1980 prohibits the disclosure of security information to a lawyer *in relation to legal proceedings* connected with a warrant unless a lawyer has been security cleared or the Secretary of the Attorney-General's Department is satisfied that giving access to the information would not prejudice national security interests.⁸⁰

During questioning under a Division 3 warrant, lawyers for the subjects of warrants are given a copy of the warrant but do not have access to material supporting the warrant. The PJC received evidence that lack of access to this material makes it difficult to assess the relevance of questions or test the reasonableness of directions given by the prescribed authority.

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The PJC recommended that regulation 3B be amended to allow the Secretary to consider disclosing information that is not prejudicial to national security to a lawyer *during the questioning procedure* (**recommendation 9**).

The Government *rejected* this recommendation stating:

The Government considers that there is no need to extend the Regulations to this situation. The Regulations assist in protecting sensitive material in court proceedings relating to a warrant. In the case of the questioning proceedings, if ASIO is requested to provide a document to the subject or their lawyer because it may be relevant to questioning, ASIO can already do so subject to national security considerations. Involvement in another decision-making process would unnecessarily slow and complicate the process.⁸¹

Other suggested amendments

Many submissions to the PJC inquiry contained suggestions for amending Division 3, Part III. Not all found favour with the Committee. It is not possible for this Digest to analyse or even describe all of them. However, Parliament may be interested in the following recommendations:

Removing the power to detain from Division 3, Part III.

Professor George Williams and Dr Ben Saul from the University of New South Wales argued that detention can only be justified when it is part of ‘a fair and independent judicial process resulting from allegations of criminal conduct.’ As well as being inconsistent with democratic and judicial principles, they also regarded the detention provisions as constitutionally insecure. And, in their view, the purposes of the detention regime (such as preventing a person alerting others) could be achieved by less drastic means.

Limiting Division 3, Part III powers to ‘serious terrorism offences’.

The Human Rights and Equal Opportunity Commission (HREOC) recommended that the use of Division 3 warrants should be limited to ‘serious terrorism offences.’ HREOC identified ‘lesser’ terrorism offences as offences that do not involve direct harm or threats to life or property. As an example, it pointed to the association offence in section 102.8 of the Commonwealth Criminal Code.⁸² Being a member of a proscribed organisation is another status offence found in the Criminal Code.⁸³ New offences of contravening control orders and preventative detention orders are also ‘terrorism offences’.

However, the PJC took the view that it would be difficult to define ‘serious terrorism offence.’ And the Attorney-General’s Department commented that ‘... there is no such

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thing as a non-serious terrorism offence', that all the offences are indictable and all carry heavy penalties.⁸⁴

On the other hand, as some submissions pointed out, many new terrorism offences have been added to the Criminal Code since the passage of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*. As a result, the potential reach of Division 3, Part III has been significantly expanded.⁸⁵ Parliament may also wish to note that a number of Commonwealth statutes use the expression 'serious offence'. For instance, section 477.1 of the Criminal Code defines 'serious offence' as an offence that is punishable by imprisonment for life or a period of 5 or more years. More relevantly, the Crimes Act uses and defines the expression, 'serious terrorism offence', in relation to certain special powers found in Part 4B of that Act. 'Serious terrorism offences' include 'a terrorism offence (*other than offence against section 102.8, Division 104 or Division 105 of the Criminal Code*).' Section 102.8 is the association offence. Division 104 and 105 contain offences relating to control orders and preventative detention orders.⁸⁶

Altering the criteria for applying for or issuing a Division 3 warrant

The Public Interest Advocacy Centre suggested a requirement for applying for or issuing a Division 3 warrant should be a reasonable suspicion of an imminent terrorism offence involving material risk of serious physical injury or serious property damage.⁸⁷

In relation to this recommendation, the Attorney-General's Department commented:

... such suggestions miss the point of the regime. ... ASIO needs to use the powers not just when it knows there is an imminent threat but also where it has reached a point where its capacity to penetrate has been foiled.⁸⁸

Review and sunseting

The PJC's recommendations for review and sunseting in 2011 were rejected by the Government. Instead, the PJC is required to report by 22 January 2016. The legislation will cease operation on 22 July 2016.

This leaves a considerable period during which ASIO's use of its exceptional and secret powers under Division 3, Part III may largely be beyond the reach of public scrutiny and systematic review of the sort that the PJC carries out. If the non-disclosure offences in Division 3 remain in their current form, it is true that they are 'time-limited.' However, warrant action within two years of the next PJC inquiry will not be in the public domain. And while the PJC has access to a wide range of classified and other material, even its review is circumscribed as a result of statutory restrictions on the Committee's inquiry, hearing and reporting powers. Additionally, the PJC relies on the willingness of intelligence agencies like ASIO to co-operate with it. A potentially worrying development

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in the course of its inquiry into Division 3, Part III was the denial of the Committee's request to access video tapes and transcripts of six Division 3 warrant questioning sessions.

It is also arguable that a sunset date of 2016 makes a fixture of legislation that the PJC says 'should not be seen as a permanent part of the Australian legal landscape.' Parliament may also wish to consider whether, if the sunset date of 2016 is to be retained, the PJC should be required to review the legislation more often than once in the period before sunset occurs—for example, at 5 year intervals. Review at five yearly intervals may also allay any concerns that ASIO's extraordinary and secret powers might 'slip, in practice, into investigative and policing powers to be simply part of ongoing policing operations.'⁸⁹ It would also take account of the fact that not all Division 3 powers—in particular the power to detain—had not been used at the time of the PJC's 2005 review and that Division 3 had only been in operation for two years prior to that review.

The re-enactment of Division 3, Part III

A fundamental issue raised by submissions to the PJC was whether Division 3, Part III should be re-enacted at all.⁹⁰ Intelligence and law enforcement agencies and the Attorney-General's Department argued that Division 3 powers were a valuable part of Australia's counter-terrorism armoury and had been used judiciously and carefully.

The Australian Federal Police commented that 'the questioning and detention powers have been used appropriately by ASIO, that the powers have worked well in practice and that ASIO still needs these powers to assist in the collection of intelligence that is important to terrorism offences.'⁹¹

In evidence to the PJC, Dennis Richardson, the former Director-General of Security, commented on the nature of the threat faced by Australia, the usefulness of Division 3, Part III and the quality of the legislation—particularly in terms of the balance between the powers conferred and individual rights and freedoms; and the usefulness of the legislation. He drew the Committee's attention to the lengthy Parliamentary scrutiny that Division 3, Part III had undergone, the fact that warrants are issued by an independent judicial officer, and to the safeguards that were built into the regime. In relation to safeguards, Mr Richardson pointed to subjects' access to lawyers, the use of an independent prescribed authority to supervise questioning, the existence of complaints mechanisms and requirements that questioning be videotaped. He described the terrorist threat to Australia as 'a long-term, generational threat', which requires legislation to be 'in place to deal with situations as they emerge and not to be reactive.'⁹²

On the other hand, Parliament may wish to note the PJC's statement that it recommended 'a range of additional measures if Division 3 of Part III of the ASIO Act is to continue to have effect beyond 23 July 2006.'⁹³ The Government did not accept PJC recommendations relating to 'democratic and liberal processes.' Nor did it accept all of the

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recommendations for additional safeguards for the subjects of Division 3 warrants. Should the re-enactment of Division 3, Part III be contingent on the acceptance of all the PJC's recommendations, should the continuation of the legislation be contingent on the acceptance of particular recommendations and if, so, which recommendations?

Those who opposed the retention of Division 3 argued that it is disproportionate to Australia's security environment (there is no threat to the life of the nation), that it violates the principle that non-suspects should not be subject to detention or placed in 'coercive circumstances', and that detention without trial is, arguably, unconstitutional. It was also suggested that Division 3 contains inadequate safeguards for the protection of fundamental liberties and inappropriately vests power in ASIO (a secret and largely unaccountable organisation). Concerns about the potential ramifications of anti-terrorism laws have also been expressed. Such concerns were succinctly reflected in a recent paper by Justice Michael Kirby. Writing in general terms about the response to terrorism in a number of democracies, His Honour commented:

Responses to terrorism there must be. But those responses should adhere to the rule of law and respect for fundamental human rights and freedoms. Otherwise the terrorists win in their attempts to change our societies. And that must not happen.⁹⁴

Endnotes

1. On 2 December 2005, the Parliamentary Joint Committee on ASIO, ASIS and DSD became the Parliamentary Joint Committee on Intelligence and Security.
2. ASIO also has special powers under Division 2 of the ASIO Act.
3. Other Bills in the package were the Security Legislation Amendment (Terrorism) Bill 2002, the Suppression of the Financing of Terrorism Bill 2002, the Border Security Legislation Amendment Bill 2002, the Criminal Code Amendment (Anti-hoax and Other Measures) Bill 2002 and the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002.
4. Parliamentary Joint Committee on ASIO, ASIS and DSD, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, 5 June 2002, p. 1.
5. Parliamentary Joint Committee on ASIO, ASIS and DSD:

Interim Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002, 3 May 2002 at <http://www.aph.gov.au/house/committee/pjcaad/terrorbill2002/interim-rpt.pdf>;

An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002, 5 June 2002 at <http://www.aph.gov.au/house/committee/pjcaad/terrorbill2002/terrorindex.htm>.

Senate Legal and Constitutional Legislation Committee:

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Inquiry into the Provisions of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, 18 June 2002

Senate Legal and Constitutional References Committee:

Inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002, 3 December 2002 at:

http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/asio_2/report/contents.htm

6. For a discussion of the features of each Bill and the matters of disagreement between the Houses see:
 - Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002]—Bills Digest No. 128 2001-02 at: <http://www.aph.gov.au/library/pubs/bd/2001-02/02bd128.pdf>
 - Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No. 2]—Bills Digest No. 133 2002-03 at: <http://www.aph.gov.au/library/pubs/bd/2002-03/03bd133.pdf> , and
 - Appendix C of the PJC's report into *ASIO's Questioning and Detention Powers* (November 2005).
7. New warrants can be obtained if they meet the conditions set out in subsection 34C(3D) and subsection 34D(1A) (**new subsections 34F(6) and 34G(2)**). A further warrant cannot be *issued* if the person is still being detained under an earlier warrant.
8. However, there is no guarantee that issuing authorities must be drawn from the ranks of the judiciary. See endnote 10.
9. The *Australian Passports (Transitionals and Consequential) Act 2005* and the *Intelligence Services Legislation Act 2005* made minor changes. The *Anti-terrorism Act (No. 3) 2004* requires a person who is the subject of a request for a Division 3 warrant to surrender all their passports (Australian and foreign) and makes it an offence for such a person to leave Australia without the permission of the Director-General of Security. The *Anti-terrorism Act (No. 2) 2005* provides that material seized under a Division 3 warrant or as the result of a detainee being strip-searched may be retained for a reasonable time and can be kept if returning the material would be prejudicial to national security. This Act also changes the wording of the offence in section 34G of the ASIO Act. Section 34G creates an offence of knowingly providing information that is false or misleading in a material particular during questioning under a Division 3 warrant. As a result of the 2005 amendments, this will not constitute an element of the offence, which must be proved by the prosecution. Instead, the defendant now bears an evidential burden in relation to whether the information is false or misleading in a material particular.
10. Issuing authorities are appointed from the ranks of consenting Federal Magistrates and judges. Other classes of issuing authority may be prescribed by regulation. See section 34AB, ASIO Act.

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11. Prescribed authorities are appointed from the ranks of former superior court judges. If insufficient numbers are available, appointments are made from the ranks of serving Supreme or District Court judges. If there are still insufficient numbers, AAT Presidents and Deputy Presidents can be appointed, so long as they are legally qualified. In all cases, consent to appointment is required. See section 34B, ASIO Act.
12. Division 3, Part III is not subject to statutory or constitutional Bills of Rights, which exist in those other nations). For a contrary view on whether the powers are unprecedented, see Submission No. 102 (Attorney-General's Department).
13. A person compelled to answer questions or produce documents under Division 3, Part III has 'use immunity'. This means that their evidence cannot be used in any future prosecution against them. However, they do not have 'derivative use immunity.' This means that any evidence *derived* from answers they are compelled to give or documents they are compelled to provide can be used to prosecute them.
14. At the time this Digest was written those agencies were ASIO, ASIS, the Defence Imagery and Geospatial Organisation, the Defence Intelligence Organisation, the Defence Signals Directorate and the Office of National Assessments.
15. The Committee now has nine members.
16. Margaret Swieringa, 'Intelligence oversight and the War on Terrorism', Paper presented to the 2005 Australasian Study of Parliament Group Conference. TSPV means 'Top Secret Positively Vetted.'
17. 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 of the Australian Security Intelligence Organisation Act 1979*, November 2005, p. 107.
18. PJC (2005), *op. cit.*, p. ix.
19. Submission No. 67 (Greg Carne), p. 3. See also Submission No. 90 (Public Interest Advocacy Centre).
20. See PJC (2005), *op. cit.*, pp. 90-92.
21. Bret Walker SC, *Opinion*, 29 April 2005 at:
http://www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/walker_opinion.pdf
22. PJC (2005), *op. cit.*, p. 13.
23. See Ian Carnell (IGIS) & Neville Bryan (Office of the IGIS), 'Watching the watchers. How the Inspector-General of Intelligence and Security helps safeguard the rule of law', modified version of a paper given at the Safeguarding Australia 2005 Conference, Canberra, July 2005, pp. 12-13. See also Submission No. 75, (Inspector-General of Intelligence and Security), paras. 66 and 67.
24. PJC (2005), *op. cit.*, p. 14.
25. 'In relation to the first eight questioning warrants, an interpreter was requested on four occasions and granted on one.' PJC (2005), *op. cit.*, p. 19.
26. Three of these people were the subject of questioning warrants. The fourth person was not.

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27. PJC (2005), op. cit., p. 24.
28. A copy of the Protocol can be found at:
http://www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/report/appendix.pdf
29. Legislative instruments must be registered on the Federal Register of Legislative Instruments, a publicly accessible online database.
30. Section 34L, ASIO Act (**new section 34ZB**). Strip searches can only be carried out with the permission of the prescribed authority and in accordance with the rules set out in section 34M (**new section 34ZC**).
31. Section 34JB, ASIO Act (**new section 34V**).
32. Section 34JA, ASIO Act (**new section 34U**).
33. Section 34DA, ASIO Act (**new section 34H**).
34. Sub-paragraph 34E(1)(e)(ii).
35. Paragraph 34F(9)(e).
36. See submission no. 49 (Commonwealth Ombudsman), p. 3.
37. Evidence to the PJC. See PJC (2005), op. cit., p. 14.
38. PJC (2005), op. cit., p. 63.
39. **Item 4 of Schedule 2** enables a person to complain to a ‘complaints agency’ in relation to the police force of the State or Territory. **Item 14** defines a ‘complaints agency’ as an Ombudsman, agency or body established under State or Territory law that can investigate complaints against State or Territory police.
40. PJC (2005), op. cit, p. 42.
41. Government Response, op. cit., p. 1.
42. Submission No. 84 (Attorney-General’s Department) p. 13.
43. Subsection 34J, ASIO Act. See section 34ZE, ASIO Act in relation to the prescribed authority’s role in relation to children.
44. Sections 34M and 34N, ASIO Act.
45. Section 34R, ASIO Act.
46. Paragraph 34K(1)(f), ASIO Act.
47. Section 34R, ASIO Act.
48. Section 34ZB, ASIO Act.
49. Subsection 34ZQ(5), ASIO Act.
50. Subsection 34ZQ(9), ASIO Act.
51. PJC (2005), op. cit., p. 60.

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52. New section 34K deals with directions made by the prescribed authority in relation to detention or further appearance and directions about communications while in custody or detention.
53. Government Response to the Parliamentary Joint Committee on Intelligence and Security, *Report on the Operation, Effectiveness and Implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979*, March 2006.
54. Paragraph 34F(9)(c), ASIO Act.
55. Government Response, op. cit., p. 4.
56. PJC (2002) op. cit., recommendation 6.
57. Paragraph 86(2)(a), Law Enforcement Integrity Commissioner Bill 2006.
58. Submission No. 75 (Inspector-General of Intelligence and Security), paras. 33 and 35.
59. See, for example, Submission No. 35 (Joo-Cheong Tham & Stephen Sempill); Submission No. 55 (Gilbert + Tobin Centre of Public Law); Submission No. 67 (Greg Carne).
60. Government Response, op. cit., p. 3.
61. Submission No. 82 (Law Institute of Victoria), p. 15.
62. The prescribed authority must so inform the subject of the warrant when they first appear for questioning and then at least once in every 24-hour period during which questioning occurs.
63. PJC (2005), op. cit., p. 57.
64. New section 34J sets out the information the prescribed authority must give to a person when they first appear for questioning.
65. Government Response, op. cit., p. 5.
66. PJC (2002), op. cit., p. 59.
67. Submission No. 102 (Attorney-General's Department), p. 10.
68. *ibid*, p. 11.
69. Carnell & Bryan, op. cit., p. 13.
70. Submission No. 102 (Attorney-General's Department), p. 20.
71. PJC (2005), op. cit., p. 37.
72. For example, paragraph 45(e), *Telecommunications (Interception) Act 1979*.
73. Paragraph 16(2)(d), *Surveillance Devices Act 2004*.
74. Such as emails, text messages and voicemail.
75. See *Telecommunications (Interception) Amendment Act 2006*, which received Royal Assent on 3 May 2006. Schedule 2 (B-party intercepts) commenced on 4 May 2006.
76. Government Response, op. cit., p. 5.
77. Submission No. 65 (Media, Entertainment and Arts Alliance), p. 3.

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78. Government Response, op. cit., p. 6.
79. The disclosures that can be permitted by a prescribed authority are specified in subsection 34VAA(6) (new subsection 34ZS(6)).
80. Section 34VA of the ASIO Act provides that regulations can prohibit or regulate access to security information by lawyers acting for the subject of a Division 3 warrant in legal proceedings (such as proceedings for a remedy relating to a warrant or the treatment of a person in connection with a warrant). Section 34VA is re-numbered as section 34ZT by the Bill).
81. Government Response, op. cit., p. 4.
82. This offence carries a maximum penalty of three years imprisonment.
83. This offence carries a maximum penalty of 10 years imprisonment.
84. Submission No. 102 (Attorney-General's Department), p. 12.
85. See Submission No. 67 (Greg Carne), pp. 2-3.
86. These provisions were inserted by the *Anti-terrorism Act (No. 2) 2005* and post-date the Attorney-General's Department submission.
87. Submission No. 90 (Public Interest Advocacy Centre).
88. Submission No. 102 (Attorney-General's Department), pp. 12-13.
89. PJC (2005), op. cit., p. 25.
90. See Submission No. 35 (Joo-Cheong Tham & Stephen Sempill); Submission No. 42 (National Human Rights Network, National Association of Community Legal Centres); Submission No. 47 (Victoria Legal Aid); Submission No. 55 (Gilbert + Tobin Centre of Public Law—recommending that if Division 3, Part III is re-enacted, the detention provision should not be included); Submission No. 65 (Media, Entertainment and Arts Alliance); Submission No. 79 (Liberty Victoria); Submission No. 81 (Amnesty International Australia); Submission No. 86 (Patrick Emerton); Submission No. 88 (Australian Muslim Civil Rights Advocacy Network); Submission No. 89 (Islamic Council of New South Wales); Submission No. 90 (Public Interest Advocacy Centre).
91. Submission No. 83 (Australian Federal Police), p. 2.
92. PJC, Public Hearing, 19 May 2005, pp. 2-3. Evidence given by Dennis Richardson (former Director-General of Security).
93. PJC, op. cit., p. ix.
94. Michael Kirby AC CMG, 'Terrorism and the democratic response 2004', (2005) 28(1) *University of New South Wales Law Journal*, pp. 221-244 at p. 244.

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