

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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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 proceedings⁴ 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 powers²¹ 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 Warrants⁶³ 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 'vener' 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 attacks¹¹⁰ 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 warrant¹³⁸ 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 Authority¹⁷¹ or at the request of the person being questioned¹⁷² — 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 day²²⁵ 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 PJCAD, *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 PJCAD, *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 34ZE.

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	69.05
				10:32	
				42:36	
2005	11	11	10	15:50	69.04
				5:17	
				7:37	
				12:49	
				2:38	
				5:24	
				4:05	
				4:05	
2006	1	1	1	4:20	4.20
				6:02	
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 year²⁹⁴ 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.