

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

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

I INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

II THE SPECIAL POWERS REGIME

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

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

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

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

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

9 *Ibid* ss 34D, 34F.

10 *Ibid* ss 34E, 34G.

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

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

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

that there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person:

- (a) may alert a person involved in a terrorism offence that the offence is being investigated;
- (b) may not appear before the prescribed authority [at the time required for questioning]; or

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

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

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

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

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

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

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

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

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

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

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

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

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

20 Ibid s 34L(2).

21 Ibid s 34L(8).

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

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

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

25 *ASIO Act* s 34K.

26 *Ibid* s 34K(2).

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

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

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

The *ASIO Act* and a Protocol developed by the Director-General in consultation with the IGIS and AFP³⁹ stipulate additional conditions of questioning and detention. For example, the Protocol states that a person in detention must be given adequate food, water, light, space, sleep and sanitary facilities.⁴⁰ The *ASIO Act* states that all subjects ‘must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment’.⁴¹ The Protocol is not legally binding, but a subject may make a complaint to the IGIS, Ombudsman or AFP if the subject believes the Protocol has not been followed.⁴² A person executing a warrant who breaches one of the

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

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

30 *Ibid* s 34K(11).

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

32 *Ibid* s 34D(5).

33 *Ibid* s 34ZO.

34 *Ibid* s 34ZP(1).

35 *Ibid* s 34ZQ(6).

36 *Ibid* s 34ZQ(9).

37 *Ibid* s 34ZQ.

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

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

40 *Protocol* cl 9.

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

42 *Ibid* s 34ZG.

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

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

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

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

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

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

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

43 Ibid s 34ZF.

44 Ibid s 34ZS.

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

46 *ASIO Act* s 34ZS.

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

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

49 *Ibid* s 34ZS(5).

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

51 *Ibid* s 34ZS(13).

52 *Ibid* s 92.

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

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

III THE SUPERVISORY FRAMEWORK

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

A The Courts

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

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

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

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

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

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

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

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

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

60 *Ibid* s 34ZW.

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

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

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

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

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

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

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

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

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

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

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

69 (2007) 233 CLR 307.

70 [2005] FCA 1576.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

at [26]–[27].

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

82 *ASIO Act* s 34ZP.

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

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

B IGIS

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

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

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

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

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

86 Ibid 3–4.

87 *IGIS Act* s 8.

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

89 *IGIS Act* s 8.

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

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

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

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

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

92 *ASIO Act* s 34ZL.

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

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

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

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

97 *ASIO Act* s 34P.

98 Drawn from IGIS's Annual Reports.

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

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

101 *ASIO Act* s 34Q(1)–(2).

102 *Ibid* s 34Q(3).

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

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

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

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

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

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

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

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

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

107 *IGIS Act* ss 8, 9.

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

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

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

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

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

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

114 *IGIS Act* s 15(1).

115 *Ibid* ss 15(2)–(3).

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

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

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

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

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

C Ombudsman

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

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

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

118 Ibid s 17(10).

119 Ibid ss 21(1A)–(1B).

120 Ibid s 21(2).

121 Ibid s 35(5).

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

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

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

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

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

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

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

124 Ibid s 5.

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

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

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

128 *Ombudsman Act* s 16.

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

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

131 Ibid 2.

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

The Ombudsman is generally credited with exerting a strong positive influence over the behaviour of executive agencies.¹³³ Though its powers are advisory only, the Ombudsman's reports are respected and often followed.¹³⁴ McMillan has emphasised how this can be used to advocate law reform where it becomes evident to the Ombudsman that legislation is unfair.¹³⁵ In 2005, the Ombudsman made submissions to the Parliamentary Joint Committee on ASIO, ASIS and DSD ('PJCAAD', the predecessor of the PJCIS), recommending changes to the Special Powers Regime. At that time the *ASIO Act* did not give a subject the right to make a complaint to a state Ombudsman or state police complaints authority. This produced an 'accountability gap' as subjects could be arrested or detained by state police officers but the Commonwealth Ombudsman would have no jurisdiction to investigate their treatment. The Ombudsman's recommendation of enshrining such a right in the legislation was accepted and the *ASIO Act* amended in 2006.¹³⁶

D Monitor

The Monitor is a relatively new statutory office created by the *Independent National Security Legislation Monitor Act 2010* (Cth). It is a part-time position¹³⁷ currently held by Bret Walker SC. The office was formed in response to concerns that there needed to be an independent and impartial mechanism, in addition to the usual process of parliamentary review, 'to monitor whether the balance between individual and community rights was still proportionate and being maintained over time'.¹³⁸ The office is roughly modelled on the Independent Reviewer of Terrorism Legislation in the UK.¹³⁹

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

132 McMillan, above n 4, 7, 14–15.

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

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

135 McMillan, above n 4, 7, 14–15.

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

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

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

139 *Ibid.*

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

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

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

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

141 *Ibid* s 6(1)(d).

142 *Ibid* s 7.

143 *Ibid* s 6(2)(b).

144 *Ibid* pt 3.

145 *Ibid* s 10(2).

146 *Ibid* s 29.

147 *Ibid* s 29.

148 Walker, above n 5.

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

150 *Ibid* ‘Introduction’.

151 *Ibid*.

152 *Ibid* ch IV.

153 *Ibid*.

154 *Ibid* ‘Introduction’.

E Parliament, the Attorney-General and the PJCS

It has long been recognised that:

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

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

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

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

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

155 Spigelman, ‘The Integrity Branch of Government’, above n 111, 3.

156 *ASIO Act* s 34K(2).

157 *Ibid* s 34ZH.

158 *Ibid* s 94.

159 *Ibid* s 94.

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

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

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

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

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

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

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

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

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

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

166 *Ibid* s 29(3)(g).

167 *Ibid* s 29(3).

168 *Ibid* sch 1 pt 1 cl 2.

169 *Ibid* s 30.

170 *Ibid* s 31.

Regime was set to expire in 2006.¹⁷¹ It was reviewed by the PJCAAD in 2005.¹⁷² This produced one of the few comprehensive overviews of the Regime as the PJCAAD gathered a wide range of information about how the Powers had been used. Much of this information was critical. The PJCAAD accepted that the Special Powers had been 'useful'. However, it emphasised that the Powers were rarely used and so there was inadequate information from which to definitively conclude that they were 'constitutionally valid' or 'reasonable'.¹⁷³ On this basis, the PJCAAD recommended that the Regime be renewed for a further five years.¹⁷⁴ Parliament instead renewed the Regime, with some amendments,¹⁷⁵ for 10 years.¹⁷⁶ The PICIS will repeat this process in order 'to review, by 22 January 2016, the operation, effectiveness and implications' of the Special Powers Regime.¹⁷⁷

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

The Committee must not disclose in a report to a House of the Parliament:

- (a) the identity of a person who is or has been a staff member of ASIO ...;
- (b) any information from which the identity of such a person could reasonably be inferred; or
- (c) operationally sensitive information or information that would or might prejudice:
 - (i) Australia's national security or the conduct of Australia's foreign relations; or
 - (ii) the performance by an agency (including ASIO) of its functions.¹⁷⁸

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

172 PJCAAD, above n 72.

173 *Ibid* 107.

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

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

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

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

178 *Ibid* sch 1 cl 7.

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

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

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

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

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

IV THE INTEGRITY FUNCTION

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

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

180 PJCAAD, above n 72, 12.

181 *Ibid* viii–ix.

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

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

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

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

How then can this framework be assessed? The concept of 'integrity' is a new way of conceptualising the standards expected of those exercising public power. The idea that there should be an 'integrity branch' of government, existing somewhere between the traditional three arms and dedicated to supervising the use of public power, was suggested by Bruce Ackerman in the US in 2000.¹⁸⁵ The concept was taken up in Australia by former New South Wales Chief Justice James Spigelman in 2004. He used integrity to describe both a desirable state of government and to explain the scope of judicial review and functions of other government entities.¹⁸⁶ The idea has now firmly taken root. There is a growing body of academic literature on the concept of integrity,¹⁸⁷ as well as concrete applications of the term. For example, integrity has been used as a rubric to assess the comparative health of government systems.¹⁸⁸ Various new 'integrity commissioners' have also been created in recent years to supervise all manner of public power.¹⁸⁹ At the same time, pre-existing bodies which have always sat somewhat uncomfortably in the orthodox tripartite conceptualisation of government have adopted the concept to explain their role. The Ombudsman and Auditor-General, for example, are now frequently referred to as integrity agencies.¹⁹⁰

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

183 Walker, above n 5, ch IV.

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

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

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

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

188 See above n 3.

189 See McMillan, above n 4.

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

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

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

A Components of the Integrity Function

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

191 Ackerman, above n 185, 694–6.

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

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

194 Brown, above n 192, 34.

195 Ibid 33, 52.

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

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

198 Ibid; Brown, above n 192, 33.

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

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

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

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

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

200 Brown, above n 192, 33.

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

202 *Ibid* 1.

203 *Ibid* 2.

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

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

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

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

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

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

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

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

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

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

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

B Further Components of the Integrity Function?

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

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

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

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

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

213 Ackerman, above n 185, 694.

214 Brown and Head, above n 210, 84.

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

216 *Ibid.*

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

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

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

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

217 Brown and Head, above n 210, 92.

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

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

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

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

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

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

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

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

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

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

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

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

224 Walker, ‘The National Security Legislation Monitor’, above n 222.

225 Ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

230 Carnell and Bryan, above n 108, 44.

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

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

V CONCLUSION

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

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

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

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

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

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

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