

A Judge in the Interrogation Room

Judicial Independance and ASIO'S Counter-Terrorism Questioning and Detention Warrant Regime

By Rebecca Welsh

Since 9/11 the Australian government has enacted some 44 pieces of counter-terrorism legislation.¹ One of the Acts included in the government's initial counter-terrorism legislative package endowed the Australian Security Intelligence Organisation (ASIO) with 'Special Powers Relating to Terrorism Offences'.² Former High Court Chief Justice, Sir Gerard Brennan summarised the 'Special Powers' provisions as follows:³

[A] person may be detained in custody, virtually incommunicado without even being accused of involvement in terrorist activity, on grounds which are kept secret and without effective opportunity to challenge the basis of his or her detention.

In its review of the provisions prior to their enactment one Parliamentary Joint Committee called it 'the most controversial piece of legislation ever reviewed by the Committee'.⁴ Serving members of the State and federal judiciaries play a significant role in the Special Powers regime, albeit in their 'personal capacity' (that is, as 'personae designata').⁵ Federal Judges may issue Special Powers warrants and State and

Territory Judges oversee the exercise of powers under a warrant. This article briefly considers whether the conferral of these roles on judges would be likely to withstand constitutional challenge and concludes that under the technical constitutional rules developed over the last 15 years it is likely the roles would do so; but, the question remains whether, under a more substantive or purposive approach, the involvement of judges in such a regime actually does damage the integrity of the judiciary and thus infringe the separation of judicial power.


'Special Powers'

The 'Special Powers' provisions enable ASIO to seek two warrants for the purpose of collecting intelligence in relation to a terrorism offence.⁶ A 'questioning warrant' allows ASIO to question adult persons not suspected of any wrongdoing for up-to a total of 24 hours (over the course of up to 28 days)⁷ and require them to produce records or other things.⁸ Children over 16 years-of-age may also be subject to a questioning warrant if they are suspected of involvement in a terrorism offence.⁹ A 'questioning and detention warrant' warrant is identical

to a questioning warrant, with the additional allowance that the person may be detained for up to seven days. This is a substantially greater maximum period than the 24-hours that applies in relation to persons arrested for a terrorism offence, or the 12-hours that applies to suspects or to persons arrested for serious non-terrorism offences.¹⁰ During questioning the person has no right to silence, no privilege against self-incrimination and may be subjected to body and strip searches.¹¹ The person's rights to contact third parties, including legal representatives, are severely circumscribed.¹² The Special Powers provisions also create a number of disclosure and non-compliance offences punishable by imprisonment.¹³ At June 2009 a total of 15 questioning warrants had been requested by the Director General of ASIO; no requests have been made since July 2006; all requests have been granted. No requests for questioning and detention warrants have yet been made.¹⁴

A Judge to Issue Warrants

Special Powers warrants are issued by federal judges as personae designata,¹⁵ on application by the Director General,



on the basis that there are reasonable grounds to believe the questioning will ‘substantially assist the collection of intelligence that is important in relation to a terrorism offence’.¹⁶ The issuing of Special Powers warrants, that facilitate the gathering of intelligence, is clearly outside the ‘judicial power’ of the Commonwealth and hence would generally be unconstitutional if conferred on a federal judge. However, under the *persona designata* doctrine, non-judicial roles may be given to judges in their personal capacity. This doctrine is subject to the incompatibility condition, which precludes this conferral of non-judicial functions when those functions are ‘incompatible’ with judicial independence.¹⁷ Incompatibility will be established when the non-judicial role compromises the actual performance of the judge’s judicial functions; the personal integrity of the judge;¹⁸ or public confidence in the judicial institution as a whole. High thresholds have been applied to each form of incompatibility. The application of ‘public confidence’ incompatibility to invalidate Justice Mathews’ appointment as ‘reporter’ to the Minister for Aboriginal and Torres Strait Islander Affairs in 1995 is the only instance of the incompatibility condition being successfully invoked to invalidate the conferral of non-judicial tasks on a Judge.¹⁹

The touchstone for compatibility is the independence of the function. When it comes to issuing Special Powers warrants the issuing authority is embroiled in a covert, secretive, intelligence regime in which he or she is reliant on executive advice in reaching a determination. On the other hand, there is a certain degree of independence in the role. The issuing authority’s assessment of objective, apolitical criteria is performed without interference. The issuing authority may request further information from the Director General and he or she retains an ultimate discretion whether to issue the warrant. Thus, the issuing authority exercises his or her discretion in a relatively judicial manner based on clear and discernable standards, suggesting that the high standard of ‘incompatibility’ would not be met in this case.


The characteristics of the warrant regime that give the provisions a ‘non-judicial flavour’,²⁰ such as the warrant’s severe interference with the personal and property rights of an innocent citizen, are also not determinative of incompatibility. Similarly rights infringing schemes involving *personae designata* were upheld in respect of counter-terrorism Control Orders²¹ and telephone-tapping warrants.²² Unlike either of those scenarios, Special Powers warrants are issued absent of any consideration of the proportionality

of the infringement; however, this is arguably counterbalanced by the issuing authority’s ultimate discretion whether to issue the warrant.

A Judge to Oversee the Powers

Once the warrant has been issued the person is immediately brought before a ‘prescribed authority’ whose broad function is to oversee and supervise all exercises of power under the warrant.²³ The prescribed authority may be a serving State or Territory judge (or a retired judge or AAT President or Deputy President).²⁴ There is no other role in Australia similar to that of the prescribed authority. The prescribed authority supervises, witnesses and directs the entire questioning process and arrangements for the person’s detention without being actively involved in, or guiding, the interrogation itself. Thus, the prescribed authority is a kind of ‘master of ceremonies’ for the interrogation.

State and Territory *personae designata* may be appointed as prescribed authorities. No case has yet considered the validity of functions bestowed on a State or Territory judge as a *persona designata*. In effect, constitutional restrictions on the conferral of non-judicial functions on State and Territory *personae designata* are extremely weak.²⁵ In *Kable*,²⁶ McHugh J offered some guidance by acknowledging that an invalid



conferral of non-judicial power of a State or Territory judge as persona designata would be rare, but that the appointment of a Chief Justice of the Supreme Court to Cabinet may breach Chapter III.²⁷ Many examples of valid State or Territory persona designata appointments have been suggested or confirmed in the case-law. As the list of valid appointments grows, it seems that only functions that present an extreme offence to judicial independence, such as those presenting a clear conflict of interest or perhaps those completely dictated by the executive, may be invalid. The role of prescribed authority is defined so broadly that it is highly unlikely an argument that the role was dictated by the executive government or presented a direct conflict with the judge's judicial functions would succeed.

Judicial Integrity in an Age of Many Hats

If put to constitutional challenge, the roles of issuing authority and prescribed authority would likely be upheld. By implication, these roles are not incompatible with the separation of judicial power or the maintenance of judicial integrity enshrined in the Commonwealth Constitution. But do the prevailing tests for incompatibility truly test whether persona designata appointments risk judicial integrity and independence, or has the persona designata doctrine provided the

legislature with an effective means of circumventing the separation of judicial power? Do the Special Powers provisions of the ASIO Act actually compromise judicial independence?

Certain qualities stand at the core of judicial power. These qualities include judicial process and adherence to the rule of law.²⁸ An understanding of the court's inherent jurisdiction, and of judicial power, that lends significant weight to process considerations is therefore justified.²⁹ The purposive nature of the separation of powers doctrine, which demands a substantive consideration of the challenged provisions,³⁰ also warrants a broader understanding of incompatibility, looking for compatibility with the qualities of judicial power, including the fundamental conditions of judicial process, as much as independence of functions. If judges are involved in executive schemes that are divorced from or at odds with judicial power the integrity of the judicial institution will be weakened. By confining a consideration of incompatibility to a technical analysis of the independence of specific functions, the greater scheme that the judge is involved in is overlooked and its effect on judicial integrity is subjugated. At the State and Territory level, the 'more relaxed' approach to incompatibility has also been criticised.³¹

The Special Powers regime is wholly executive and is neither part of nor ancillary to judicial proceedings. Accordingly, a person subject to a Special Powers warrant is not entitled to the benefits of due process and may be stripped of many of their rights, including: the right to legal representation; the right to know the case against you, and; the privilege against self-incrimination. Moreover, Special Powers warrants are issued and directions are made in relation to non-suspects without any submissions from the person or consideration of the proportionality of the warrant's impositions. The Special Powers scheme presents the most significant offence to the rights of innocent non-suspects on the Australian law books.³² The issuing authority and the prescribed authority are each responsible for ordering the questioning and/or detention of a person in a secretive, unreviewable manner absent any kind of balancing exercise.

The appointment of judges as issuing authorities or prescribed authorities associates the judiciary with covert, rights-offensive intelligence gathering executive actions. Taking these factors as a whole reveals that the Special Powers provisions as they stand pose a significant risk to judicial integrity by involving judges in a regime that is offensive to the central tenants of the judicial institution. Therefore, the

conclusion that the Special Powers provisions would likely withstand constitutional challenge, demonstrates that the constitutional doctrine is in fact not coextensive with good policy regarding the continued separation of judicial power in Australia.

The course of the Special Powers provisions, and the counter-terrorism laws more generally, demonstrates that legislative drafters tend toward a policy position of involving judges in controversial executive regimes.³³ The legislature has heralded its use of judges and/or judicial process in the most controversial and rights-offensive legislative regimes, touting this involvement as an inbuilt 'safeguard' from improper use of executive power.³⁴ This approach makes political sense. It quells fears and controversies without compromising the extent of powers under the legislation. This political tactic has particular value in the counter-terrorism context, but is also evident more broadly: Wilson concerned the Hindmarsh Island Bridge Grollo and Hilton involved telephone-tapping, each a highly controversial political scenario in which the legislature involved judges in an integral respect. In the absence of a stronger limit on the use of judges for non-judicial functions, it is likely that judges will be increasingly involved in rights-offensive, controversial

regimes to fulfil an executive policy of providing internal 'safeguards' to these regimes. This is at odds with the basic constitutional precept that the judiciary provides the best safeguard against improper exercises of non-judicial power by being segregated from the exercise of those powers. It is by isolation from, not fusion into, non-judicial regimes that the judicial arm of government maintains its reputation for impartiality and non-partisanship³⁵ that 'may not be borrowed by the political branches to cloak their work in the neutral colours of judicial action'.³⁶ As observed by Denise Meyerson:

'In the long run, the use of the courts to restrict the liberty of individuals for the purpose of protecting the public may therefore kill the goose that lays the golden egg'. ■

References

- [1] Human Rights Law Resource Centre, *Submission to Senate Legal and Constitutional Committee Inquiry into the Anti-Terrorism Laws Reform Bill 2009* (11 September 2009) 1; see also, *Terrorism Law Internet Resource Guide* (2009) Parliament of Australia Parliamentary Library <<http://www.aph.gov.au/library/INTGUIDE/law/terrorism.htm>> at 14 December 2009.
- [2] *Australian Security Intelligence Organisation Act 1979* (Cth) pt 3 div 3.
- [3] Sir Gerard Brennan, 'The Law and Justice Address' (speech delivered at the Justice Awards, Parliament House, Sydney, 31 October 2007).
- [4] Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002) 1.
- [5] *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZM(2).
- [6] A 'terrorism offence' is defined to be an offence against subdivision A of Division 72 of the *Criminal Code*, or against Part 5.3 of the *Criminal Code*: *Australian Security Intelligence Organisation Act 1979* (Cth) s 4.
- [7] *Australian Security Intelligence Organisation (ASIO) Act 1979* (Cth) s 34E(5)(b).
- [8] *ASIO Act 1979* (Cth) ss 34D and 34E.
- [9] *ASIO Act 1979* (Cth) s 34ZE.
- [10] Michael McHugh, *Terrorism and the Constitution* Maurice Byers Chambers <<http://www.mauricebyers.com/mchughpaper.pdf>> at 1 December 2009.
- [11] Jude McCulloch and Joo Cheong Tham, 'Secret State, Transparent Subject: The Australian Security Intelligence Organisation in the Age of Terror' (2005) 38 *The Australian and New Zealand Journal of Criminology* 400, 402.
- [12] *ASIO Act 1979* (Cth) ss 34J(1)(e), 34K(1) & (9)-(11), 34G(5)-(6), 34E(3), 34ZO, 34C(3B), 34D(4A), 34TA, 34U, 34CU. See also, Jude McCulloch and Joo Cheong Tham, *ibid*; Andrew Palmer, 'Investigating and Prosecuting Terrorism: The Counter-Terrorism Legislation and the Law of Evidence' (2004) 27 *University of New South Wales Law Journal* 373, 381.

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- [13] *ASIO Act 1979* (Cth) ss 34L, 34ZS. For further discussion on the non-disclosure aspects of the Special Powers provisions see, Joo Cheong Tham, 'Critique and Comment Casualties of the Domestic "War on Terror": A Review of Recent Counter-Terrorism Laws' (2004) 28 *Melbourne University Law Review* 512; Jude McCulloch and Joo Cheong Tham, *ibid*.
- [14] ASIO, *Report to Parliament 2003-04* (2004) 39-40; ASIO, *Report to Parliament 2004-05* (2005) 41; ASIO, *Report to Parliament 2005-06* (2006) 45; ASIO, *Report to Parliament 2006-07* (2007) 122; ASIO, *Report to Parliament 2007-08* (2008) 122; ASIO, *Report to Parliament 2008-09* (2009) 112.
- [15] *ASIO Act 1979* (Cth) s 34AB.
- [16] *ASIO Act 1979* (Cth) s 34ZE.
- [17] *Grollo v Palmer* (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ) (emphasis added).
- [18] *Ibid*.
- [19] *Wilson v The Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.
- [20] *Hussain v Minister for Foreign Affairs and Anor* (2008) 69 FCR 241, [102].
- [21] *Thomas v Mowbray* (2007) 233 CLR 307.
- [22] *Grollo v Palmer* (1995) 184 CLR 348; *Hilton v Wells* (1985) CLR 57
- [23] *ASIO Act 1979* (Cth) ss 34H and 34J(3).
- [24] *ASIO Act 1979* (Cth) s 34B.
- [25] Kristen Walker, 'Persona designata, Incompatibility and the Separation of Powers' (1997) 8 *Public Law Review* 153, 166; Peter Johnston and Rohan Hardcastle, 'State Courts: The Limits of Kable' (1998) 20 *Sydney Law Review* 216, 228-230.
- [26] (1996) CLR 51.
- [27] *Kable v Director of Public Prosecutions* (1996) CLR 51, [24] (McHugh J).
- [28] *Nicholas v R* (1998) CLR 173, 207-209 (Gaudron J); *Kable v Director of Public Prosecutions* (1996) CLR 51, 120 (McHugh J), 132 (Gummow J), 106 (Gaudron J), 96-97 (Toohey J); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 66-67 (McHugh J); *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, 109 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Polyukovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501, 703-704 (Gaudron J); *Leeth v The Commonwealth* (1992) 172 CLR 455, 501-503 (Gaudron J); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 359 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
- [29] Wendy Lacey, 'Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the Constitution' (2003) 31 *Federal Law Review* 57, 76.
- [30] *Wilson v The Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 47 (Kirby J) citing *Grollo v Palmer* (1995) 184 CLR 348, 384; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).
- [31] Peter Johnston and Rohan Hardcastle, above 25, 230.
- [32] Greg Carne, 'Detaining Questions or Compromising Constitutionality?: The ASIO Legislation Amendment (Terrorism) Act 2003 (Cth) (2004) 27 *University of New South Wales Law Journal* 524, 530.
- [33] Prior to their enactment, the Special Powers provisions were referred to both the Parliamentary Joint Committee on ASIO, ASIS and DSD and the Senate Legal and Constitutional References Committee. The involvement of serving judges was discussed in all of the Committees' reports as well as debated in Parliament. The constitutional issues were flagged by the Committees and in submissions: see, eg, See for example, the following *Submissions to the Senate Legal and Constitutional References Committee Inquiry into the ASIO Legislation Amendment (Terrorism) Bill 2002*: Greg Carne, (4 November 2002); George Williams, (30 April 2002); Law Council of Australia, (29 April 2002). However, politicians more regularly referred to the involvement of judges as a 'safeguard' or drew attention to this involvement to counter criticisms of the rights implications of the provisions: see, below n 140. This trend has continued throughout the enactment of Australia's counter-terrorism laws, such as the control order and preventative detention order regimes enacted in 2005 in Divisions 104 and 105 of the *Criminal Code*, respectively, which utilise judges; and in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) which manipulates court proceedings.
- [34] John Faulkner, Shadow Minister for Home Affairs, (speech delivered at the National Forum on the War on Terrorism and the Rule of Law, Sydney, 10 November 2003); Commonwealth, Parliamentary Debates, House of Representatives, 21 March 2002, 1936 (Daryl Williams, Attorney General); David Jull, Chairman of Parliamentary Joint Committee on ASIO, ASIS and DSD 'ASIO Counter Terrorism Legislation: Report' (Press Release, 5 June 2002); Daryl Williams, Attorney General, 'The War Against Terrorism, National Security and the Constitution: A response to Dr Renwick' (speech delivered at the Annual Dinner of the Constitutional Law Section of the NSW Bar Association, NSW Supreme Court, Sydney, 3 October 2002); Commonwealth, Parliamentary Debates, House of Representatives, 28 November 2005, 109 (Jason Wood).
- [35] Denise Meyerson, 'Using Judges to Mange Risk: The Case of *Thomas v Mowbray*' (2008) 36 *Federal Law Review* 209, 228.
- [36] *Mistretta v United States* (1989) 488 US 361, 407 quoted in *Grollo v Palmer* (1995) 184 CLR 348, 366 (Brennan CJ, Deane, Dawson and Toohey JJ).
- [37] Meyerson, above n 35, 228.



*“In Germany, they came first for the
Communists, and I didn’t speak up because I
wasn’t a Communist;*

*and then they came for the trade
unionists, and I didn’t speak up
because I wasn’t a trade unionist;*



*and then they came for the Jews, and I didn't
speak up because I wasn't a Jew;*

*and then ... they came for me ... and
by that time there was no one left to
speak up.”*

Martin Niemöller
German theologian

