



Australian
Human Rights
Commission

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Independent Review of the Intelligence Community

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Australian Human Rights Commission Submission

April 2011

Introduction

The Australian Human Rights Commission welcomes the opportunity to make a submission to the Independent Review of the Intelligence Community.

The Australian intelligence community plays a key role in ensuring national safety and security. The Commission recognises the efforts of various agencies to protect our community and appreciates the attendant challenges. However, many of the activities of intelligence agencies have an impact on the enjoyment of fundamental human rights. Consequently, it is important that there is external periodic review of the intelligence community.

This submission will focus on an issue about which the Commission holds serious concerns: the conduct of Australian Security Intelligence Organisation (ASIO) security assessments for people seeking asylum in Australia, particularly for people who are held in immigration detention. This submission will make comments relevant to the following terms of reference:

- how well the intelligence community is positioned to support Australia's national interests, now and into the future
- working arrangements and relationships between the intelligence agencies and policy and operational areas of government
- level of resourcing dedicated to the intelligence community and apportionment of resources across the community.

The Commission holds a number of concerns about the conduct of ASIO security assessments for people in immigration detention who arrived in Australia without authorisation, particularly for people in respect of whom Australia has been assessed as owing protection obligations under the *Convention Relating to the Status of Refugees* 1951¹ as applied in accordance with the *Protocol Relating to the Status of Refugees* 1967.² The Commission's primary concerns include:

- the significant delays in finalising ASIO security assessments for a large number of people in immigration detention
- the level of resources allocated for the conduct of security assessments
- the working relationship between ASIO and the Department of Immigration and Citizenship (DIAC)
- the lack of transparency regarding the ASIO security assessment process and the limited access to merits review and judicial review of security assessments for some people, including asylum seekers in immigration detention.

¹ Opened for signature 28 July 1951, [1954] ATS 5, (entered into force for Australia 22 April 1954).

² Opened for signature on 31 January 1967, [1973] ATS 37, (entered into force for Australia 13 December 1973).

Overview of the ASIO security assessment process

In order to obtain a permanent visa, including a protection visa, an applicant must satisfy Public Interest Criterion 4002 of the *Migration Regulations 1994* (Cth) which states: '[t]he applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*' (ASIO Act). If a person in detention is not referred to ASIO for security assessment until after they have been assessed to be a refugee, they may face a prolonged period of detention. This is because current government policy generally requires that a person remains in immigration detention until their ASIO security assessment is finalised. However, the continued detention of people who are awaiting ASIO security assessments is not a requirement of either the *Migration Act 1958* (Cth) or the ASIO Act.

Under the Australian Government's *New Directions in Detention* policy, detention of unauthorised arrivals is for the purpose of conducting 'health, identity and security checks'. Once those checks have been successfully completed, 'continued detention while immigration status is resolved is unwarranted'. The 'security check' required prior to release from immigration detention should not be interpreted as requiring a full ASIO security assessment. Rather, the 'security check' should consist of a summary assessment of whether there is reason to believe that the individual concerned would pose an unacceptable risk to the Australian community were they given authority to live in the community. That assessment should be made at the time of the individual being taken into immigration detention, or as soon as possible thereafter. An individual should only be held in an immigration detention facility if they are individually assessed as posing an unacceptable risk to the Australian community and that risk cannot be met in a less restrictive way. Otherwise, they should be permitted to reside in the community while their immigration status is resolved. An ASIO security assessment, if necessary, can be done while a person is living in the community.

Significant delays in finalising ASIO security assessments for a large number of people in immigration detention

The Commission holds serious concerns about the length of time that many people, particularly those already recognised to be refugees, are spending in immigration detention awaiting the outcome of ASIO security assessments. For example, during our recent visit to the Villawood Immigration Detention Centre, Commission staff met with people who had been held in detention awaiting ASIO security assessments for up to ten months after being recognised as refugees.

In February 2011, DIAC reported that there were 900 people held in immigration detention who had been assessed as being owed protection obligations who were awaiting release pending the outcome of ASIO security assessments.³ The Commission welcomes the announcement of 17 March 2011 that the ASIO security assessments of people who at that time had been recognised to be refugees would

³ Evidence to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 21 February 2011, 92 (Garry Fleming).

be completed by the end of April 2011.⁴ The Commission hopes that this commitment is fully implemented.

Currently, there is no obligation upon ASIO to complete a security assessment with respect to asylum seekers who arrived in Australia without authorisation (largely Irregular Maritime Arrivals (IMAs)) within a specified time frame.⁵ The Commission believes that ASIO should be required, by legislation, to complete security assessments for people in immigration detention within a specific time-frame. In the event that the time-frame is not met, ASIO should be required to provide information regarding the delay and an expected time-frame for completion to the individual concerned.

The resources allocated for the conduct of ASIO security assessments

The Commission is concerned that the level of resourcing dedicated for the conduct of ASIO security assessments may be insufficient.

The Commission understands that the number of people seeking asylum in Australia has increased the ASIO workload in regard to processing these security assessments and that ASIO has had to re-assess its resource allocation as a result. ASIO has reported ‘[i]n 2009-10, ASIO diverted resources to undertaking security assessments of IMAs for DIAC. Consequently, the resources available to assess protection visa and other refugee referrals were limited and this caseload experienced delays’.⁶ The Inspector-General of Intelligence and Security (IGIS) has also identified that there have been increasing delays with the ASIO processing of security assessments for other protection visa applicants including those living in the community on bridging visas.⁷ Although the Commission is pleased that attention is directed towards the processing of security assessments for IMAs, this should not be done at the expense of processing security assessments for protection visa applicants who are not in detention.

It is of concern that there are significant delays despite ASIO having recorded a budget surplus of \$39 million in 2009-10, apparently due to several reasons including lower than anticipated staffing levels.⁸ In the view of the Commission, Australia’s human rights obligations to people in immigration detention, combined with the considerable financial expenditure incurred as a result of detaining those awaiting

⁴ Department of Immigration and Citizenship *Christmas Island: a notice to immigration detention clients from the Australian Government* (17 March 2011), http://www.newsroom.immi.gov.au/media_releases/914 (viewed 15 April 2011); Department of Immigration and Citizenship *Mainland detention centres: a notice to immigration detention clients from the Australian Government* (17 March 2011), http://www.newsroom.immi.gov.au/media_releases/913 (viewed 15 April 2011); and Department of Immigration and Citizenship *Alternative places of detention: a notice to immigration detention clients from the Australian Government* (17 March 2011), http://www.newsroom.immi.gov.au/media_releases/912 (viewed 15 April 2011).

⁵ Evidence to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 21 February 2011, 92 (Garry Fleming).

⁶ Australian Security Intelligence Organisation *Submission to the Parliamentary Joint Committee on Intelligence and Security – Review of Administration and Expenditure No. 9: 2009-10* (undated), p 41.

⁷ Inspector-General of Intelligence and Security *Annual Report 2009-2010* (2010). At http://www.igis.gov.au/annual_report/index.cfm p 29.

⁸ Australian Security Intelligence Organisation *Submission to the Parliamentary Joint Committee on Intelligence and Security – Review of Administration and Expenditure No. 9: 2009-10* (undated), p 20.

security assessment, should mean that sufficient resources are dedicated to the task of processing security assessments for refugees in immigration detention as quickly as possible.

The Commission therefore recommends that the resourcing of the conduct of ASIO security assessments be reviewed and potentially increased in order to make the security assessment process more timely. The Commission also recommends investigation of whether there are factors other than resource limitations contributing to delays in finalising ASIO security assessments for people in immigration detention.

The working relationship between ASIO and DIAC

It is essential that there is a good working relationship between ASIO and DIAC. The Commission understands that there are clear processes for the referral of cases by DIAC to ASIO and for the escalation of priority cases. However, given the serious consequences for individuals of any breakdown in the relationship between DIAC and ASIO, the Commission recommends that this inquiry consider whether any steps could be taken to improve this relationship.

Transparency and oversight of ASIO security assessments for certain non-citizens

The Commission has serious concerns about the lack of transparency of the ASIO security assessment process and the limited access to independent oversight of security assessments for IMAs. The Commission is concerned that currently:

- there is inadequate information available about the ASIO security assessment process
- people who have received an adverse assessment are not provided with information about the basis of that assessment
- there is no merits review and limited judicial review of security assessments available to IMAs
- there is limited independent oversight of ASIO security assessment processes.

Information about the ASIO security assessment process

The Commission is concerned that there is little transparency about the conduct of the ASIO security assessment process. People who are undergoing a security assessment are provided with very little information about how the security assessment will be conducted, or the timeframe within which it will be conducted. The Commission believes that ASIO should be required to provide DIAC with information about the processes involved, and the expected timeframes, that can be passed onto the individual concerned.

The Commission is very concerned about the impact of the lack of information about security clearance processes for people in immigration detention. During its recent visit to Villawood Immigration Detention Centre, the Commission spoke with people who expressed extreme frustration about the delay with their security assessment prolonging their time in detention, and about the lack of information provided to them

about the security assessment process, expected timeframes involved or progress with their assessment.

Information about the basis of an adverse assessment for people who do not hold a valid visa

Under the ASIO Act, a person who is the subject of an adverse security assessment is ordinarily provided with a statement that sets out information that ASIO has relied upon to make the determination. However, section 36 of the ASIO Act excludes this requirement from applying to a person who is not an Australian citizen or a permanent resident or who is not the holder of either a valid permanent visa or a special purpose visa. Accordingly, the vast majority of people in immigration detention are not entitled to any information regarding the basis on which an adverse assessment is made. This means that an affected person is not provided with the information necessary to contest an adverse security assessment. The Commission is concerned that this could amount to a lack of procedural fairness and could prevent a blatant error, such as an error of identification, being identified.

The lack of information regarding the basis on which an adverse assessment is made is particularly concerning because of the consequences for the individuals concerned, which may include indefinite detention, potential removal from Australia, and separation from family members who may be released from detention into the community.

Review of adverse security assessments

Merits review

While the Administrative Appeals Tribunal (AAT) has the power to review adverse ASIO assessments, access to the AAT is denied to people who are not citizens or holders of either a valid permanent visa or a special purpose visa.⁹ In the view of the Commission, this is contrary to basic principles of due process and natural justice. The Commission supports the recommendations of the Inspector-General of Intelligence and Security that access to AAT review should be extended to refugee applicants.¹⁰

Judicial review

There is very little practical opportunity for substantive judicial review of adverse security assessments. Although the High Court of Australia has held that ASIO decisions are subject to judicial review,¹¹ the ability of ASIO to withhold from an applicant and the court the information on which it has relied means that challenging

⁹ Although s 54 of the *Australian Security Intelligence Organisation Act 1979* (Cth) allows for an application to be made to the Administrative Appeals Tribunal, the operation of s 36 excludes people who are not Australian citizens, or the holders of a valid permanent visa or a special purpose visa from making such an application.

¹⁰ Inspector-General of Intelligence and Security *Annual Report 2006-2007* (2007). At http://www.igis.gov.au/annual_report/index.cfm, p 12 and Inspector-General of Intelligence and Security *Annual Report 1998-1999* (1999). At http://www.igis.gov.au/annual_report/98-99/asio.cfm, paras 89-91.

¹¹ *Church of Scientology Inc v Woodward* (1982)154 CLR 25.

that information is virtually impossible. The case of *Parkin v O'Sullivan* is illustrative of this difficulty.¹² Although an order of discovery was made against ASIO, production of the relevant documents was refused on the basis that it would prejudice national security and would be contrary to the public interest.¹³ Accordingly, none of the relevant documents was admitted into evidence for the substantial hearing. In *Sagar v O'Sullivan*, Justice Tracey found that 'in some rare cases, such as the present, no jurisdictional error is made if sensitive security information is withheld from an applicant and the applicant is not, as a result, alerted to prejudicial material on which the information has been based'.¹⁴ Consequently, the practical difficulties in obtaining the necessary evidence and the restricted scope of procedural fairness in the context of security assessments by ASIO as interpreted by Australian courts make judicial review an ineffective appeal avenue.

Independent oversight of ASIO security assessment processes

The Commission cannot entertain complaints about security related matters. Complaints about the conduct of ASIO security assessments can be made to the Inspector-General of Intelligence and Security. However, the Inspector-General can only investigate the legality, propriety and procedural efficacy of the security assessment process conducted by ASIO. The Inspector-General's jurisdiction does not extend to the actual merits of an individual assessment. The Commission is concerned that this oversight may not be able to address the reasons for delay in security assessment processes. The Commission has heard people in detention express frustration at having complained to the Commission, the Commonwealth Ombudsman and to IGIS without result.

The number of complaints about security assessments made to IGIS has increased significantly. In 2009-10, IGIS received 1015 complaints in regard to ASIO security assessments in relation to people in immigration detention, a significant increase from the 153 complaints lodged in the previous year.¹⁵

Procedural safeguards available in other jurisdictions

The shortcomings in Australia's current arrangements are particularly evident when the procedural safeguards that exist in other jurisdictions are considered.

In comparative jurisdictions where an asylum seeker has been assessed as constituting a threat to security, procedural safeguards are in place which are not available to certain non-citizens in Australia, including:

- The obligation to provide the applicant with information sufficient for them to be reasonably informed of the basis of the adverse assessment and the opportunity to present further information on the issue. In the United Kingdom

¹² *Parkin v O'Sullivan* [2006] FCA 1413; *O'Sullivan v Parkin* [2006] FCA 1654; *O'Sullivan v Parkin* [2007] FCAFC 98; *O'Sullivan v Parkin* [2007] FCA 1647; *O'Sullivan v Parkin* [2008] FCR 283; *Parkin v O'Sullivan* (2009) 260 ALR 503.

¹³ *Parkin v O'Sullivan* (2009) 260 ALR 503.

¹⁴ *Sagar v O'Sullivan* [2011] FCA 182 at 73.

¹⁵ Inspector-General of Intelligence and Security *Annual Report 2009-2010* (2010). At http://www.igis.gov.au/annual_report/index.cfm p 28.

for example, if asylum is refused on the basis that the individual is considered a threat to security, he or she must be provided with the reasons for the refusal, both in fact and in law, and with information regarding how to lodge an appeal from the decision.¹⁶ Similarly, in Canada, where the relevant Minister has issued a certificate stating that a person is inadmissible on the grounds of security, he or she is required to ‘file with the Court the information and other evidence on which the certificate is based, and a summary of information and other evidence that enables the person who is named in the certificate to be *reasonably informed* of the case made by the Minister but that does not include anything that, in the Minister’s opinion, would be injurious to national security or endanger the safety of any person if disclosed’ (emphasis added).¹⁷

- Where an adverse security assessment is made, access to more substantive avenues of review. This is facilitated by the provision of a Special Advocate, who, in essence, is a security-cleared person who is able to view both and original and a redacted summary of an assessment to ensure, as far as is possible, unclassified material and reasons are disclosed. The United Kingdom, Canada and New Zealand all provide for the use of Special Advocates.¹⁸

The Commission believes that similar procedural safeguards should be introduced in Australia.

Conclusion

In summary, the Commission makes the following recommendations about the conduct of ASIO security assessments:

- Consideration be given to means by which the relationship between ASIO and DIAC could be improved.
- ASIO should be required by legislation to complete security assessments for people in detention within a specified timeframe. If the specified timeframe is not met, ASIO should be required to provide information regarding the delay and the expected time-frame for completion to the individual concerned. In order to ensure this is possible, the resourcing of the conduct of ASIO security assessments should be reviewed and potentially increased in order to make the security assessment process more timely.
- Information should be provided to people who are subject to security assessments about when referrals are made, about the processes involved in conducting security assessments and the time-frames involved.
- In the event that a person (including non-citizens or non-permanent residents, and people who do not hold a valid permanent visa or special purpose visa) is the subject of an adverse security assessment, they be provided with

¹⁶ *Immigration Rules* (United Kingdom), rule 336.

¹⁷ *Immigration and Refugee Protection Act* (2001) (Canada), s 77(2).

¹⁸ See, for example, *Special Immigration Appeals Commission Act 1997* (United Kingdom), s 6, *Immigration and Refugee Protection Act* (2001) (Canada), ss 83-85, and *Immigration Act 2009* (New Zealand), ss 263- 271.

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information to enable them to be reasonably informed of the information that ASIO has relied upon to make the determination.

- Australian Administrative Appeals Tribunal review should be extended to all people who are subject of an adverse ASIO security assessment, including people who are not Australian citizens or permanent residents, or the holder of a valid permanent visa or special purpose visa.
- The Australian government should explore options for strengthening substantive review of adverse security assessments, including through options to ensure the provision of greater information to applicants and the appointment of a Special Advocate.

Thank you again for giving the Commission the opportunity to share its views regarding the operations of the Intelligence Community. The Commission is acutely aware of the human impacts of delays in the completion of ASIO security assessments, and the limited opportunities to challenge adverse security assessments.