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THE ASIO NEGATIVE DILEMMA

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All research papers are available on our website:
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Introduction

In September last year Andrew Wilkie, Independent federal member for Denison, Tasmania (and former army officer and intelligence analyst) introduced the ASIO (Restoring Merits Review) Bill 2014. Unfortunately the bill was not taken seriously by the major parties and was "removed from the Notice Paper" on 2 March 2015. This is a great shame.

Successive governments have taken the view that Administrative Appeals Tribunal merits review is not the appropriate mechanism for reviewing adverse security assessments. This is the key issue and is of fundamental concern. That fact remains that:

> *"ASIO does not have to satisfy a high burden of proof and can issue an adverse assessment even if the risk of danger is relatively low. It does not have to fully disclose its reasons, which means that many refugees with an adverse assessment do not know why they are being detained."* (Professor Jane McAdam with Fiona Chong, "Refugees: Why Seeking Asylum in Australia is Legal and Australia's Policies are Not", page 76).

The alternative review mechanism provided by the Independent Reviewer of Adverse Security Assessments was better than nothing, but still far short of ensuring that justice is done. Professor Ben Saul (http://www.abc.net.au/radionational/programs/lawreport/high-court-scraps-asio-security-assessment-veto/4301664) has been highly critical of this mechanism because it cannot possibly deal with all the relevant facts. He says that:

> *"Only by exposing ASIO's allegations to open examination can their truth be tested. Allegations may be false, informants may bear grudges, conduct may have innocent explanations, and intelligence may be misinterpreted."*

Australia's security is certainly significant, but this must be balanced with the individual's right to a fair trial. Other countries do just that.

In their book cited above, McAdam and Chong state (page 78) that:

> *"Australia's blunt approach to security assessments is wholly out of step with that of comparable democratic countries, and arguably is facilitated by the absence of a domestic bill of rights. In the European Union, the United States, Canada and New Zealand, concerns about national security must be balanced on a case-by-case basis against human rights protections, which cannot automatically be overridden. For instance, in the United Kingdom, Canada and New Zealand, a 'special advocate' can be appointed to examine confidential, security-sensitive evidence on behalf of an affected person to allow the evidence against them to be tested. In some cases, it may be possible to prosecute the person and determine, through a legal process, whether or not they have committed a crime. These countries do not permit indefinite detention and have developed more humane alternatives."*

We would plead that urgent consideration be given to exploring such well tested alternatives.

Review of jurisdictional errors

Although a transparent merits review process is not available at present, on paper there is technically still a right of judicial review. However this is barely more than a dead letter. As Professor Saul has said (op.cit.): *"it's incredibly hard to seek review in the courts because if you don't know what the case is against you it's very hard to identify a legal error in order to commence legal proceedings".*

As stated by McAdam and Chong (op.cit. page 76):

> *"But judicial review is only available if 'jurisdictional error' can be established - in other words, if ASIO has made an error of law. Decisions are not reviewable simply because*

> *factual errors have been made. Moreover, in practice, seeking meaningful judicial review can be very difficult, since ASIO may withhold information upon which it has relied to make its security assessment - from the refugees and from the court."*

Clearly, such restriction of access to due process must be remedied.

Serious, irreversible psychological harm

In August 2013, the UN Human Rights Committee stated that *"refugees who had been the subject of adverse security assessments by ASIO and were therefore in detention indefinitely, the Committee found that the arbitrary and protracted nature of their detention, combined with the difficult living conditions in detention - including inadequate physical and mental health services and the refugees' exposure to unrest and violence (such as attempted suicides) - were 'cumulatively inflicting serious, irreversible psychological harm'. These factors, along with the government's refusal to provide them with procedural rights and information about the basis of their adverse security assessments, meant that the conditions of detention amounted to cruel, inhuman or degrading treatment."* (McAdam and Chong, op.cit. page 96)

One of the detained refugees is a young man who, in his homeland, was bludgeoned in the head with rifle butts by soldiers until he was comatose. He was left mentally disabled. Since indefinite detention causes and exacerbates mental illness, this man – or any detainee – cannot be rehabilitated without also being released. Indeed, a hospital to which he was referred has refused to attempt rehabilitation if he is simply to be returned to detention.

This is a matter of grave concern and it must be given immediate and committed attention. Alternatives to prolonged supervised detention must be found.

Alternatives to supervised detention

Allowing that it may take some time to reform the current assessment and review process, we believe that it is imperative that the question of indefinite mandatory detention be reviewed. In August 2013, the UN found over 150 violations of international human rights law against these people and said Australia should release them, offer them rehabilitation and pay them compensation. But more than a year later, most remain in detention, and none has been compensated or rehabilitated. This we believe is unconscionable and a flagrant dereliction of duty of care. None of these people has been convicted of a crime.

McAdam and Chong (op. cit.) point out (page 79) that:

> *"In Australia, the Immigration Minister in fact has the power to enable people to reside in 'community detention', subject to specific conditions, instead of in closed immigration detention. Conditions might include requirements to live at a specified location, curfews, travel restrictions, regular reporting, or even electronic monitoring. From a legal and humanitarian perspective, such mechanisms would be far preferable to indefinite detention, although it would have to be ensured that they were implemented in accordance with Australia's human rights law obligations."*

Personal relationships

Many of the ASIO negative group are very well known to regular visitors to Villawood Immigration Detention Facility. We have also read many of the asylum seeker decision reports upon which the ASIO negative decisions are based. Taking these realities together we are totally mystified about how the negative decisions could have been reached. The people are invariably gentle, respectful and marked by exceptional integrity. Certainly, by any assessment based on extended and deep friendship, they would be no more dangerous to Australia than most Australian residents. Furthermore, taken at face value, their decision records give no hint

of signs of evil intentions towards Australia and Australians. These people have fled for their lives and have no other agenda than to find a place of safety. Certainly they have no animosity towards Australia and no interest in jeopardising their future. They are consistently totally mystified about what could possibly have triggered any suspicion. We have also seen some of the brief statements ('summary of reasons') justifying the ASIO assessments, prepared for the Independent Reviewer of Adverse Security Assessments. Those of us who have good understanding of both the individuals and the original country contexts are astounded by the naivety displayed. We can draw no other conclusion than that grave errors have been made.

Conclusion

Based on evidence of the very significant human rights violations and resultant human suffering caused by current policies I would urge ongoing lobbying of politicians not to let this matter drop. Certainly they should challenge the Minister to exercise his powers in a constructive and humane way to ensure that these people, who have already been found to warrant Australia's protection, are enabled to live a more normal and productive life.