



THE UNIVERSITY OF NEW  
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FACULTY OF LAW

Committee Secretary  
Joint Select Committee on Australia's Immigration Detention Network  
PO Box 6100  
Parliament House  
Canberra ACT 2600

**BY ELECTRONIC SUBMISSION**

3 November 2011

Dear Committee Secretary,

**Inquiry into Australia's Immigration Detention Network: Questions on Notice**

When we appeared before the Committee on 5 October 2011, we were asked the following Questions on Notice:

*Review of ASIO security assessments*

1. Could ASIO concerns about protecting national security be alleviated by adopting a review process whereby the ASIO decision is reviewed by a security-cleared judge in the Federal Court (and where the individual is represented by a security-cleared lawyer)?

To enable merits review, could a Federal Court judge sit other than as a judge (*persona designata*) in order to be able to assess errors of both fact and law?

*Monitoring of asylum seekers in the community*

2. What conditions may be placed on asylum seekers living in the community so as to alleviate fears that the community may hold about absconding (e.g. electronic bracelets)?

*Outsourcing of detention management*

3. Do other countries outsource the operation of immigration detention facilities to private contractors?

*Reviewability of decisions by non-DIAC officers*

4. The Comcare Report makes the assumption that anyone working within immigration detention facilities is under the care of DIAC (whether they are DIAC, Serco or contractors to Serco), and therefore the Commonwealth. What implications does this have for the reviewability of decisions made by non-DIAC officers?

Our responses are contained in the numbered annexures to this letter.

Yours sincerely,

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## REVIEW OF ASIO SECURITY ASSESSMENTS

3 November 2011

This section addresses the Committee's request for additional submissions in response to an issue raised by Professor Ben Saul regarding the current lack of oversight over ASIO decisions that particular refugees pose adverse security threats to Australia.

### **Security-cleared Judicial Officers and Lawyers**

In the course of the Committee's hearing, the Chair and Professor Saul participated in an exchange (Transcript of the Committee's hearings for Wednesday 5 October 2011, p17), in which the Chair (Mr Melham) raised the possibility of the Federal Court having "a panel of security cleared judges ... [and] a security cleared lawyer who could represent" an asylum-seeker who was subject to an adverse security assessment by ASIO. This was suggested as a means of satisfying concerns held by ASIO that merits review of its decision in the normal manner would inevitably reveal sensitive information. In response to Professor Saul's statement that "you need to give a merits review tribunal a shot" at reviewing such ASIO determinations, the Chair went on to suggest that one could "expand what the Federal Court can test for so that in effect the powers of the Federal Court judges are expanded to ... replace a tribunal". The Chair asked us (Transcript p23) to consider this point and to make a supplementary submission.

Obviously, both the Chair and Professor Saul are aware of the constitutional issues with reposing such powers in the Federal Court, particularly that such powers would offend the principle articulated by the High Court in *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. I do not take either the Chair or Professor Saul to have intended this result; rather, I assume that they were referring to the preferable situation of having ASIO determinations reviewed on their merits by a court (or at least by judicial officers) rather than in a tribunal, to the extent that that outcome may be constitutionally possible.

In our opinion, the constitutional impediments to reposing in a Chapter III court the powers to review both for errors of fact and of law would prevent the Federal Court from exercising a true merits review function over security assessments made by ASIO. This is an executive function which cannot be exercised by a court constituted under Chapter III of the Constitution. As far as we can see, the only ways of having a judicial officer exercise a merits review function over decisions of ASIO is either to have a statutory review function granted to a Federal Court judge acting as *persona designata* or to have that function granted to a tribunal which has Federal Court judges as members. We have not been able to come up with an alternative which is within the Commonwealth's legislative competence.

The other point raised by the Committee's discussion with Professor Saul was the possibility that an asylum seeker could be represented by a security cleared lawyer in judicial or tribunal hearings to challenge an adverse security assessment, presumably with a role as contradictor to the case being put by ASIO but without the usual obligations to the asylum seeker which would normally attach to a lawyer appearing for a client. This "special advocate" process is beyond our expertise but we would direct the Committee to two documents in particular which shed light on this process:

- Andrew Lynch, Tamara Tulich and Rebecca Welsh, 'Secrecy and Control Orders: The Role and Vulnerability of Constitutional Values' (Paper presented at the IACL Research Group on Constitutional Responses to Terrorism, Milan, Italy) at 8-15; and
- Ben Saul, 'The Kafka-esque Case of Sheikh Mansour Leghaei: 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, 647-52.

### **Judges Reviewing ASIO Decisions as *Personae Designatae***

In response to the Chair's suggestion that a system of judicial oversight, such as we have considered above, "would require some changes in terms of the ability to expand the review provisions that a judge would be able to get involved in" (Transcript p23), we noted that the judge involved may need to sit other than in his or capacity as a Federal Court judge. This section considers the issues which would arise from such a process.

There is no problem in general with a security-cleared individual who holds the office, for example, of a Federal Court judge exercising the administrative function of reviewing the merits of an ASIO determination that a certain asylum-seeker constitutes a security risk (*Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 413 per Bowen CJ & Deane J; and see generally *Wainohu v NSW* (2011) 85 ALJR 746, 755-6 [21] per French CJ & Kiefel J).

Our concern with this possibility is more of a practical nature than a constitutional impediment. There is a practical limit to what judges (with existing case loads and other responsibilities) can do by way of investigating the merits of an ASIO decision without the benefit of hearing argument, both for and against the decision under review. If the investigative burden of assessing the merits of ASIO determinations falls solely on individual judges acting outside the scope of their usual duties, it is likely that the scope for challenging these determinations will be reduced as a matter of fact. It would be preferable to take advantage of the institutional advantages of an existing tribunal to perform this task.

### **Administrative Appeals Tribunal (Security Appeals Division)**

Professor Saul's comment in the Committee hearing that there is no merits review from ASIO security assessments "because the Administrative Appeals Tribunal, AAT, review is simply precluded by the ASIO Act" is not entirely accurate. The *Australian Security Intelligence Organisation Act 1979* (Cth) provides at section 65(1) that a Minister who has received a security assessment from ASIO:

*may, if satisfied that it is desirable to do so by reason of special circumstances, require the [AAT] to inquire and report to the Minister upon any question concerning that action or alleged action of [ASIO], and may require the [AAT] to review any such assessment or communication and any information or matter on which any such assessment or communication was based, and the [AAT] shall comply with the requirement and report its findings to the Minister.*

The AAT therefore has a Security Appeals Division, constituted subject to section 21AA of the *Administrative Appeals Tribunal Act 1975* (Cth), which allows a Tribunal constituting a Presidential Member and two other members who have been assigned to the Security Appeals Division (including at least one "with knowledge of,

or experience in relation to, the needs and concerns of people who are or have been immigrants” – s 21AA(5)(c)) to review adverse security assessments which have been made by ASIO. There are 14 Presidential Members of the AAT who also currently hold office as judges of the Federal Court (and a further three who hold office as judges of the Family Court of Australia) according to Appendix 1 to the Administrative Appeals Tribunal Annual Report 2010-11 (available at <http://www.aat.gov.au/docs/Reports/2011/AR2011-Appendix1.pdf>).

The Security Appeals Division conducts its proceedings in private and may determine who is able to be present during the course of a hearing, although there is scope for the applicant and / or the applicant’s representative to be present (see <http://www.aat.gov.au/ApplyingForAReview/SecurityAppeals.htm>). The Security Appeals Division’s findings are able to be appealed to the Federal Court under section 44 of the AAT Act and are also subject to judicial review for jurisdictional error.

The Security Appeals Division is an under-utilised jurisdiction within the AAT, with only a handful of reviews being conducted by it each year. It is our view that the efficacy of the Security Appeals Division as a method of reviewing ASIO security assessments has not yet been adequately tested. We do not recommend any legislative changes to allow judges of the Federal Court (either sitting as judges or as *personae designatae*) to have additional powers of review over ASIO security assessments if it is possible that the Security Appeals Division of the AAT may deal adequately with that function.

This annexure was drafted by Greg Weeks, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of NSW.

## CONDITIONS ON ASYLUM SEEKERS LIVING IN THE COMMUNITY

2 November 2011

### Introductory Notes

- The countries examined below form the basis of the comparative studies in the International Detention Coalition’s (IDC) report *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention* (2011). Further details have been obtained from the following reports which are listed in full at the end of this document: Edwards (2011); Banki and Katz (2009) and Field and Edwards (2006). These reports examine a number of countries in detail to provide an illustration of the types of conditions which may be imposed on asylum seekers in the community. A comprehensive list of countries that impose each of the types of conditions examined in this research is provided in the IDC Report at page 63.
- This document focuses on enforcement models, which rely on the imposition of restrictions/conditions on asylum seekers in the community. It does not examine (in any detail) community-based models which may be just as, if not more, effective in engaging asylum seekers and discouraging absconding.
- Unless indicated otherwise, the restrictions examined below are a list of restrictions that *may* be applied to an individual who falls within the description of the ‘to whom restriction is applied’ column. The actual conditions applied are determined on a case-by-case basis and contingent on factors such as security risk and flight risk.
- It is important to be cognisant of the definition of ‘irregular migrant’ in the table below: ‘A migrant who does not fulfil, or no longer fulfils, the conditions of entry, stay or residence within a State.’ This encompasses a much broader category of people than ‘asylum seekers’, and is not tailored to address the particular vulnerabilities which asylum seekers may have.

Country	To whom restriction is applied	Nature of restriction	Reference/Other Comments
Canada	Irregular migrants  (see note on definition above)	At detention reviews, people may be released with or without conditions imposed. The Immigration and Refugee Board determines which conditions are necessary and appropriate. Such conditions may include: <ul style="list-style-type: none"> <li>• <b>Payment of bail by a ‘bondsperson’</b> – a financial deposit is placed with the authorities, held in trust, and returned if the individual complies with conditions of release (which includes reporting requirements)</li> <li>• <b>Provide a nominated address</b> – where the individual can live and be contacted by authorities</li> <li>• <b>Hand over travel documents</b></li> <li>• <b>Reporting requirements</b> – the individual is required to present</li> </ul>	IDC Report: 44 (Box 14) Banki and Katz, 2009: 20–22 Field and Edwards, 2006: 26, 83

		<p>himself/herself to the authorities as required</p> <p><u>Toronto Bail Program</u>  An NGO that posts bail for asylum seekers who lack family or community contacts to assist them with bail. By posting bail for asylum seekers, TBP accepts responsibility for their compliance with conditions of release. TBP's supervision includes <b>bi-weekly reporting, social counselling and frequent and unannounced house visits</b>. TBP has a high compliance rate (91.6% compliance rate for 2003 fiscal year) and involves low cost relative to detention. (NB: the high compliance rate must be interpreted in recognition of the fact that the TBP only accepts those who meet its selection criteria, which relate to the individual's credibility, amenability of the individual to supervision, and flight risk).</p>	
Hong Kong	<p>Irregular migrants</p> <p>(Government detention policy requires each decision to detain to be based on the merits of the individual case. Under this policy, most asylum seekers and torture claimants are released from detention.)</p>	<p>Those who are released from detention are provided with a 'recognizance' document, which may be subject to a number of conditions, including:</p> <ul style="list-style-type: none"> <li>• <b>Reporting requirements</b></li> <li>• <b>Payment of bond</b></li> </ul> <p>The 'recognizance' document is issued for a period of usually 6–8 weeks, which incentivises the need to report regularly to obtain an extension. (However, this document does not provide legal status: the individuals are considered 'detained pending removal', but live within the community).</p> <p>This system of release is supplemented by government-funded support services operated by International Social Service (an NGO). Services include: accommodation searches, food, transportation, and counselling. The individual signs a contract with ISS, which is renewed every month and <b>subject to conditions</b>: eg failure to appear for two food collections will result in the agreement being terminated. The government reports that absconding rate is very low, at approximately 3%.</p>	<p>IDC Report: 28 (Box 5)  Edwards, 2011: 65</p>
Indonesia	<p>Asylum seekers/refugees awaiting resettlement</p>	<p>Indonesia has established that irregular migrants holding attestation letters or letters verifying their status as refugees or asylum seekers by UNHCR should be allowed to remain in Indonesia. It does not provide legal status, but prevents detention. Such individuals must be <b>registered with immigration authorities</b> and sign a Declaration of Compliance while their application or resettlement is</p>	<p>IDC Report: 38 (Box 10)</p>

		<p>being processed by UNHCR. The Declaration stipulates certain conditions, including:</p> <ul style="list-style-type: none"> <li>• <b>Must stay within a designated area</b></li> <li>• <b>Not allowed to be in an airport or seaport without an immigration officer present</b></li> <li>• <b>Not allowed to have guests stay</b> in the accommodation provided</li> <li>• Must fully comply with Indonesian laws</li> <li>• Must <b>report to immigration every two weeks</b> to register their presence</li> <li>• Violations will likely result in detention</li> </ul>	
Japan	Irregular migrants	<p>‘Provisional release’ from detention may be granted (on a discretionary basis) if the detainee can present evidence of:</p> <ul style="list-style-type: none"> <li>• Financial self-sufficiency (personal income or a sponsor’s income)</li> <li>• Alternative accommodation</li> <li>• Ability to post a <b>bond</b></li> <li>• Other circumstances (evidence provided in support of application)</li> </ul> <p>‘Provisional release’ is <b>restricted to one designated area</b> (the Prefecture that the released detainee selects for his/her residence). Prior approval must be sought from the Immigration Bureau to travel outside the designated area. Most released detainees are required to <b>report on a monthly basis</b>, and to <b>notify authorities of any change in address</b> within the Prefecture.</p>	<p>Field and Edwards, 2006: 27, 137</p> <p>The system favours wealthier asylum seekers: maximum amount requested as bond is 3m yen (US\$25,000–30,000).</p>
New Zealand	Irregular migrants	<p>The terms of a conditional release from detention must be flexibly set in proportion to the needs of the individual case, and may include:</p> <ul style="list-style-type: none"> <li>• <b>Reside at a specified place</b></li> <li>• <b>Report</b> to a specified place at specific periods or times in a specified manner (frequency or manner of reporting requirements depend on the individual case)</li> <li>• If the person is a claimant, <b>attend any required interview</b> with refugee and protection officer or hearing with the Tribunal</li> <li>• <b>Provide a guarantor</b> who is responsible for: ensuring the person complies with any of the conditions in this list, and reporting any failure by the person to comply with these conditions</li> <li>• Undertake any other action for the purpose of facilitating the person’s deportation or departure from NZ</li> </ul>	<p>IDC Report: 21 (Box 2)</p> <p>Field and Edwards, 2006: 163</p>



		Person may be <b>subject to arrest and detention</b> if they fail to comply with the conditions of their release, or in order to execute a deportation order.	
Philippines	Asylum seekers	Section 13 of the Department of Justice Department Order No 94 of the series of 1998: ‘if the [refugee] applicant is under detention, the Commission may order the provisional release of the applicant under recognizance to a responsible member of the community’. The only condition is that the asylum seeker agrees to <b>follow requirements of refugee status determination process</b> .	IDC Report: 25 (Box 4)
Sweden	Asylum seekers	<ul style="list-style-type: none"> <li>• <b>Must visit refugee reception office at least monthly</b> to receive allowance, news on refugee application and risk assessment</li> <li>• For those asylum seekers who do not voluntarily leave the country following a negative final outcome, conditions may be introduced whilst they are still in the community, including <b>reporting requirements or reduced benefits</b> (detention may be applied as a last resort).</li> </ul>	IDC Report: 35 (Box 9) Mitchell, 2001
United Kingdom	Irregular migrants	<p>An individual released from immigration detention may be placed under the following conditions:</p> <ul style="list-style-type: none"> <li>• ‘Temporary Admission’: release without bail but dependent on having a <b>place of residence</b>, with a prohibition on employment and <b>requirement to re-appear on a specified date</b>.</li> <li>• <b>Bail</b> – two types available to immigration detainees: may apply through (i) UK Immigration Service; or (ii) an adjudicator/Immigration Appeals Tribunal. Bail is generally granted subject to conditions, usually <b>residence and reporting requirements</b>. NB: Bail is difficult to access for asylum seekers. Two NGOs – Bail for Immigration Detainees (BID) and Bail Circle – work to bring some equity into the system by offering bail.</li> <li>• <b>Support payments are linked to regular reporting requirements</b> (if applicants fail to present to a Reporting Centre, their Asylum Registration Card is cancelled and they are unable to access their support payments).</li> <li>• <b>Electronic monitoring and home curfew</b> of persons to be deported, including failed asylum seekers. This is a system whereby an electromagnetic device is attached to person’s wrist/ankle, which emits a signal received by a device attached to home telephone, so authorities can ring the number and check whether a person is at home between certain, specified hours. [For more information on electronic monitoring, see table below on the United</li> </ul>	<p>Field and Edwards, 2006: 26, 29, 37, 208, 215</p> <p>Banki and Katz, 2009: 52</p> <p>Few reports have studied the effects of bail. One from 2002 documented high levels of compliance by both those awaiting deportation (80%) and those awaiting decisions about their status (90%).</p>

		States.]	
United States		See table below.	
Venezuela	<p>Foreigners subject to deportation or expulsion procedures</p> <p>(Venezuela has no law allowing for detention of migrants)</p>	<p>The following conditions may be imposed (but conditions must not exceed 30 days):</p> <ul style="list-style-type: none"> <li>• <b>Regular reporting</b> to the relevant authority in foreign affairs and migration</li> <li>• <b>Ban on leaving the town</b> in which he resides without authorisation</li> <li>• Provision of adequate <b>monetary bail</b>, to which economic conditions of the foreigner must be taken into account</li> <li>• <b>To reside in a particular locality</b> during the administrative procedure</li> <li>• Any other measure deemed appropriate to ensure compliance with decisions of the relevant authority, provided that such measures do not involve deprivation or restricting the right to personal liberty</li> </ul>	IDC Report: 20 (Box 1)

### United States

Program	To whom restriction is applied	Description of Program	Reference/Other Comments
Appearance Assistance Program (AAP)	Irregular migrants	<p>3-year study of community supervision for people in immigration removal proceedings (February 1997–March 2000), conducted by Vera Institute of Justice (invited by US government).</p> <p>Two levels of supervision were offered to participants, who were released without bond:</p> <ul style="list-style-type: none"> <li>• <u>Regular supervision</u>: required <b>attendance at a group orientation</b> and <b>provision of an address</b>. No penalty for stopping participation in the program.</li> <li>• <u>Intensive supervision</u>: <b>mandatory personal and telephonic reporting requirements, visits to participant’s home address</b> (both prearranged and unannounced) and <b>disclosure of employment</b> (even if unauthorised). Violation could result in recommendation to the INS to re-detain the participant. Also required to have a <b>guarantor</b> who agreed to take moral responsibility for the person to fulfil their obligations (no financial consequences for guarantor upon non-compliance)</li> </ul> <p>The appearance rates of participants were compared with control groups who were released on bail or on their own recognisance. (See composition of the asylum-seeking groups assigned to regular and intensive</p>	<p>IDP Report: 39 (Box 11)</p> <p>Sullivan and others, 2000</p> <p>Banki and Katz, 2009: 73</p>

		<p>supervision at AAP Final Report p 26).</p> <p>For asylum seekers, there was not a monumental difference between appearance rates for regular supervision (84%) and intensive supervision (93%) (The appearance rate of the asylum seeker control groups was 62% and 78% respectively). Given the extra costs and burden of intensive requirements, this suggests that for asylum seekers, intensive supervision may be necessary in only infrequent circumstances.</p>	
Intensive Supervision Appearance Program (ISAP)	Irregular migrants	<p>Current program (commenced in 2004).</p> <p>ISAP supervises participants through: <b>unannounced home visits, reporting requirements</b> (in person and by telephone), <b>employment verification, curfews, travel documentation information collection</b> and <b>electronic monitoring</b> via radio frequency (RF) and global positioning satellite (GPS) equipment (further information below).</p> <p>ISAP monitors more than 5,700 participants and reports a 99% total appearance rate at immigration hearings, a 95% appearance rate at final removal hearings and a 91% compliance level with removal orders.</p>	Banki and Katz, 2009: 76
Enhanced Supervision/ Reporting Program (ESR)	Irregular migrants	<p>Current program (commenced in 2007).</p> <p>Similar to ISAP (above), but requires fewer home visits and in-person reporting visits and does not incorporate community referral requirements.</p> <p>ESR reports a 98% total appearance rate at immigration hearings, 93% appearance rate at final removal hearings and 63% compliance level with removal orders.</p>	Banki and Katz, 2009: 76–77
Electronic Monitoring (EM) – a component of both ISAP and ESR	Irregular migrants	<p>EM monitors irregular migrants using telephonic reporting, RF and GPS technologies. Participants are required to be at home during certain hours of the day, with higher restrictions at the start of their monitoring, which gradually become less intense over time.</p> <ul style="list-style-type: none"> <li>• <b>RF:</b> An electromagnetic tag is attached to a person’s wrist or ankle: this emits a radio frequency which is received by a device usually attached to home telephone, so that authorities can ring that number to verify whether the individual is within a certain radius of their home phone (RF)</li> <li>• <b>GPS:</b> An electromagnetic tag is attached to a person’s wrist or ankle: uses satellite technology to track the person’s location anywhere.</li> <li>• <b>Telephonic reporting</b> (using voice recognition technology): the least restrictive and most cost effective EM measure. Requires the individual to call in at certain times, usually once a month.</li> </ul>	<p>Banki and Katz, 2009: 77–78</p> <p>Field and Edwards, 2006: 36</p> <p>Joint Standing Committee on Migration, 2009: 51</p>

	<p><u>Issues with EM:</u></p> <ul style="list-style-type: none"> <li>• Questionable whether the electromagnetic tags may meet the tests of necessity and proportionality required by international law for the majority of asylum seekers who have every incentive to comply with asylum procedure</li> <li>• Stigmatising and negative psychological effects of the electromagnetic tags</li> <li>• Tags/bracelets may require an individual to be plugged into a wall for up to 3 hours a day in order to recharge the batteries (a restriction on liberty)</li> <li>• RF can only apply to persons who can stay in private homes (i.e. asylum seekers with family and community ties): it is unsuitable for asylum seekers in large collective centres</li> </ul> <p>Conflicting data make it difficult to measure compliance. No statistics currently support the argument that all (or even most) asylum seekers require EM for high compliance.</p>	Edwards, 2011: 78
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#### **Additional Comments on Conditions in Other Countries**

- **Reporting requirements:**
  - France, Luxembourg and South Africa require asylum seekers to present themselves in person to renew their identity documentation (which may serve as a de facto reporting requirement, depending on the frequency with which papers need to be renewed).
  - Austria, Denmark, Greece, Ireland, Japan and Norway have legal frameworks that can require individuals to report to the police/immigration authorities at regular intervals.

#### **Additional General Comments**

- The IDC Report did not come across any examples of reporting mechanisms that made use of new communication technologies (eg email, SMS, Skype, web-based login). Exploring avenues for reporting using new communication technology has the potential to increase the frequency of contact with authorities for some groups, with limited impositions on daily life (see footnote 140).

#### **References**

- Alice Edwards, Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Asylum-Seekers, Stateless People and Other Migrants (UNHCR Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1, April 2011): [http://reliefweb.int/sites/reliefweb.int/files/resources/Full\\_Doc\\_1.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Doc_1.pdf)
- US Immigration and Customs Enforcement, ‘Alternatives to Detention for US Immigration and Customs Enforcement Detainees’ (23 October 2009): <http://www.aila.org/content/default.aspx?bc=1016%7C6715%7C12053%7C26286%7C31038%7C30487>

- Eileen Sullivan and others, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program* (Report to the US Immigration and Naturalization Service, 1 August 2000): [www.vera.org/content/testing-community-supervision-ins-evaluation-appearance-assistance-program](http://www.vera.org/content/testing-community-supervision-ins-evaluation-appearance-assistance-program)
- Susan Banki and Ilan Katz, *Resolving Immigration Status: Part 2 Comparative Case Studies* (Report for the Australian Department of Immigration and Citizenship, November 2009): <http://www.immi.gov.au/media/publications/pdf/unsu-report-2.pdf>
- Joint Standing Committee on Migration, *Immigration Detention in Australia: Community-Based Alternatives to Detention* (May 2009): <http://www.aph.gov.au/house/committee/mig/detention/report2/fullreport.pdf>
- Ophelia Field and Alice Edwards, 'Alternatives to Detention of Asylum Seekers and Refugees' (UNHCR Legal and Protection Policy Research Series, POLAS/2006/03, April 2006): <http://www.unhcr.org/refworld/pdfid/4472e8b84.pdf>
- International Detention Coalition, *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention* (2011): <http://www.scribd.com/doc/54661929/IDC-Handbook-There-are-alternatives>
- Grant Mitchell, 'Asylum Seekers in Sweden: An Integrated Approach to Reception, Detention, Determination, Integration and Return' (2001): <http://idcoalition.org/asylum-seekers-in-sweden/>

This information was compiled by Fiona Chong and Jane McAdam, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of NSW.

## OUTSOURCING IN IMMIGRATION DETENTION CENTRES

2 November 2011

The countries listed below outsource (wholly or partly) the operation of their immigration detention centres to private companies.

For further details of the practices in Austria, Czech Republic, Estonia, Finland, Hungary, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovak Republic, Sweden, and the United Kingdom, see responses to question 4 in **European Migration Network (EMN) Ad-Hoc Query** (2011):

[http://www.emn.fi/files/424/EE\\_EMN\\_Ad\\_Hoc\\_Query\\_on\\_facilities\\_for\\_detention\\_COMPILATION\\_open\\_2.pdf](http://www.emn.fi/files/424/EE_EMN_Ad_Hoc_Query_on_facilities_for_detention_COMPILATION_open_2.pdf). Where such countries utilize private contractors, this is noted below.

Country	Reference
Canada	Services are provided by a combination of government and private contractors: <a href="http://www.globaldetentionproject.org/countries/americas/canada/list-of-detention-sites.html">http://www.globaldetentionproject.org/countries/americas/canada/list-of-detention-sites.html</a> .
Czech Republic*	The immigration detention centres are managed by government agencies, but private security companies have been used to maintain security within the centres: <a href="http://www.globaldetentionproject.org/de/countries/europe/czech-republic/introduction.html">http://www.globaldetentionproject.org/de/countries/europe/czech-republic/introduction.html</a> . A June 2011 report suggests that this private arrangement is no longer in operation: <a href="http://www.emn.fi/files/424/EE_EMN_Ad_Hoc_Query_on_facilities_for_detention_COMPILATION_open_2.pdf">http://www.emn.fi/files/424/EE_EMN_Ad_Hoc_Query_on_facilities_for_detention_COMPILATION_open_2.pdf</a> .
Finland	A semi-private body provides security, cleaning, maintenance and food services ('semi' because the body is a company owned by Helsinki municipality): <a href="http://www.emn.fi/files/424/EE_EMN_Ad_Hoc_Query_on_facilities_for_detention_COMPILATION_open_2.pdf">http://www.emn.fi/files/424/EE_EMN_Ad_Hoc_Query_on_facilities_for_detention_COMPILATION_open_2.pdf</a> .
France	Private not-for-profit organisations are contracted by government agencies to provide a range of services to detainees, including social, legal, and psychological counselling: <a href="http://www.globaldetentionproject.org/fileadmin/docs/GDP_PrivatizationPaper_Final5.pdf">http://www.globaldetentionproject.org/fileadmin/docs/GDP_PrivatizationPaper_Final5.pdf</a> , p. 4.
Germany	Two private contractors are involved in managing IDCs in Germany, but their services are limited and government officials are also present: <a href="http://www.globaldetentionproject.org/fileadmin/docs/GDP_PrivatizationPaper_Final5.pdf">http://www.globaldetentionproject.org/fileadmin/docs/GDP_PrivatizationPaper_Final5.pdf</a> , pp. 6–8
Italy	There are limited service contracts with private providers, as well as contracts with the Italian Red Cross and other charitable organizations: <a href="http://www.globaldetentionproject.org/de/countries/europe/italy/list-of-detention-sites.html">http://www.globaldetentionproject.org/de/countries/europe/italy/list-of-detention-sites.html</a> ; <a href="http://www.globaldetentionproject.org/fileadmin/docs/GDP_PrivatizationPaper_Final5.pdf">http://www.globaldetentionproject.org/fileadmin/docs/GDP_PrivatizationPaper_Final5.pdf</a> , pp. 8–10.
Ireland	'Accommodation centres' for asylum seekers are managed by private companies. There are no immigration detention centres: <a href="http://www.globaldetentionproject.org/countries/europe/ireland/introduction.html">http://www.globaldetentionproject.org/countries/europe/ireland/introduction.html</a>
Japan	All centres are run by the government, except the Landing Prevention Facility at Narita Airport which is run by a contractor: <a href="http://www.globaldetentionproject.org/countries/asia-pacific/japan/list-of-detention-sites.html">http://www.globaldetentionproject.org/countries/asia-pacific/japan/list-of-detention-sites.html</a>

Portugal	Private not-for-profit organisations are contracted by government agencies to provide a range of services to detainees, including social, legal, and psychological counselling: <a href="http://www.globaldetentionproject.org/fileadmin/docs/GDP_PrivatizationPaper_Final5.pdf">http://www.globaldetentionproject.org/fileadmin/docs/GDP_PrivatizationPaper_Final5.pdf</a> , p. 4. Security and internal order is provided by a private company: <a href="http://www.emn.fi/files/424/EE_EMN_Ad_Hoc_Query_on_facilities_for_detention_Compilation_open_2.pdf">http://www.emn.fi/files/424/EE_EMN_Ad_Hoc_Query_on_facilities_for_detention_Compilation_open_2.pdf</a> .
New Zealand	The Mangere Accommodation Centre is jointly run by the government and non-governmental organizations: <a href="http://www.globaldetentionproject.org/countries/asia-pacific/new-zealand/list-of-detention-sites.html">http://www.globaldetentionproject.org/countries/asia-pacific/new-zealand/list-of-detention-sites.html</a>
The Netherlands	Security and cleaning services are contracted out: <a href="http://www.emn.fi/files/424/EE_EMN_Ad_Hoc_Query_on_facilities_for_detention_Compilation_open_2.pdf">http://www.emn.fi/files/424/EE_EMN_Ad_Hoc_Query_on_facilities_for_detention_Compilation_open_2.pdf</a> .
Norway	Some private security contractors are used (which may violate the Immigration Act 2008): <a href="http://www.globaldetentionproject.org/countries/europe/norway/introduction.html">http://www.globaldetentionproject.org/countries/europe/norway/introduction.html</a>
United Kingdom	The UK contracts out the management of many of its immigration detention facilities, although some are operated by HM Prison Service: <a href="http://www.globaldetentionproject.org/de/countries/europe/united-kingdom/list-of-detention-sites.html">http://www.globaldetentionproject.org/de/countries/europe/united-kingdom/list-of-detention-sites.html</a>
United States	There is some contracting out of services: <a href="http://www.globaldetentionproject.org/countries/americas/united-states/list-of-detention-sites.html">http://www.globaldetentionproject.org/countries/americas/united-states/list-of-detention-sites.html</a>
South Africa	Services are contracted out: <a href="http://www.emn.fi/files/424/EE_EMN_Ad_Hoc_Query_on_facilities_for_detention_Compilation_open_2.pdf">http://www.emn.fi/files/424/EE_EMN_Ad_Hoc_Query_on_facilities_for_detention_Compilation_open_2.pdf</a> , pp. 10–12.

## Notes

- Sweden abandoned private contracting in 1997, following instances of violence, hunger strikes, suicide attempts and unrest in detention centres. The government transferred responsibility to the Migration Board, requiring that qualified health professionals be available and that facilities not resemble prison cells: see <http://www.globaldetentionproject.org/countries/americas/united-states/list-of-detention-sites.html> p. 12.

This information was compiled by Fiona Chong and Jane McAdam, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of NSW.

## REVIEWABILITY OF DECISIONS BY NON-DIAC OFFICERS

3 November 2011

In the course of the Committee's hearing on 5 October 2011, Senator Hanson-Young indicated (Transcript p26) that she would like us to make a supplementary submission on the assumption in Comcare Investigation Report EVE00205473 (the "Comcare Report") that anyone working within immigration detention facilities is under the care of the Department of Immigration and Citizenship (regardless of whether s/he is employed by DIAC, Serco or contractors to Serco) and therefore the Commonwealth. We have been asked what implications this has for the reviewability of decisions made by non-DIAC officers in relation to asylum-seekers.

The first point that we would make is that there is a difference between assuming that the Commonwealth (through DIAC) owes a duty of care to every person working in or detained in a detention facility and concluding that the decisions of all persons working in such a facility are reviewable in either the Federal Court or the High Court. The duty of care which arises in tort relies on the fact that DIAC has control of detention facilities and must therefore bear responsibility for harm suffered by those who are subject to that control. This is analogous to the duty of care which attaches to those who are entrusted with the custody of prisoners (see Danuta Mendelson, *The New Law of Torts* (2nd ed, 2010) at p464).

It is another thing altogether to say that the decisions made on behalf of DIAC by contractors such as Serco must be reviewable for jurisdictional error. The High Court's entrenched jurisdiction to conduct judicial review is limited by section 75(v) of the Constitution to granting certain remedies against "officer[s] of the Commonwealth". This limitation has traditionally been liberally construed (see Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4th ed, 2009) at pp36-7); for example, it extends to judges of federal courts (*R v Commonwealth Court of Conciliation and Arbitration and the President thereof; ex parte Whybrow & Co* (1910) 11 CLR 1; *Edwards v Santos Limited* (2011) 242 CLR 421).

There is a likelihood that the High Court will take an even broader view of this constitutional term if it concludes that the government has sought to immunise itself from judicial review proceedings by outsourcing its functions to contractors, although there is no way of predicting authoritatively what the Court may decide in a future case (the Court chose not to comment on the issue in the recent case of *Plaintiff M61/2010E v Commonwealth of Australia*; *Plaintiff M69 of 2010 v Commonwealth of Australia* (2010) 85 ALJR 133, which involved contractors assessing the refugee status of asylum seekers on Christmas Island).

We refer to pages 12 and 13 of our original submission and to the G+T Centre's previous submission to the Administrative Review Council ([http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/Submission\\_Greg\\_Weeks\\_%201July11\\_0.pdf](http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/Submission_Greg_Weeks_%201July11_0.pdf)) to reiterate the point that it would be preferable to deal with this anomaly through legislation rather than to wait for the High Court to provide an authoritative ruling on the issue. This could be achieved by amendments to either the *Judiciary Act 1903* (Cth) or the *Administrative Decisions (Judicial Review) Act 1977* (Cth), or both, which grant the Federal Court jurisdiction to hear judicial review applications against any party exercising a public function. Alternatively, the



threshold for the Federal Court's jurisdiction could be framed in terms of whether a party is performing a function on behalf of or under contract to the Commonwealth.

The practical issue with any such change is that it would remain subject to legislation which seeks to limit access to judicial review. It is likely, therefore, that this issue will remain unclear at least until the High Court has clarified the scope of section 75(v). The uncertainty of this outcome is far from ideal.

This annexure was drafted by Greg Weeks, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of NSW.