CHAPTER 6

The assessment process

Introduction

6.1 Determining the outcome of claims for refugee status entails two separate but related assessment processes. The first, conducted by the Department of Immigration and Citizenship (DIAC), determines whether claimants are genuine refugees in need of protection. The second process is a security assessment conducted by the Australian Security Intelligence Organisation (ASIO).

6.2 This second process begins only if and once a person is assessed as being a refugee in need of protection. Those found not to be refugees are subject to deportation, and are not assessed further unless they appeal the initial negative assessment. These people are referred to as being on 'negative pathways'. On 29 June 2011, there were over 2500 people on negative pathways in detention.[489]

6.3 Once refugees are security assessed, they are either released into the community, or, if they receive adverse ASIO assessments, they are kept in detention, indefinitely.

6.4 At present, the majority of asylum seekers remain in detention for the duration of these processes. The average time spent in detention is 297 days.[490] Most people who seek asylum in Australia are ultimately found to be refugees and issued protection visas.[491]

6.5 The first part of this chapter will outline the two assessment processes asylum seekers undergo. In the second part the Committee will focus on the length and consequences of this process.

Legal framework

6.6 The *United Nations 1951 Convention relating to the Status of Refugees* (the Refugee Convention) defines who is a refugee, their rights and the obligations—both legal and moral—of states. Until the *1967 Protocol*, the Refugee Convention applied only to post-World War II European refugee situations. These limitations were removed by the *1967 Protocol* to allow the Refugee Convention to apply to refugees

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489 Department of Immigration and Citizenship, *Submission 32, Key Strategic Themes*, p. 50.

490 DIAC, *Question on Notice 84* (received 8 December 2011), p. 1.

491 For number of arrivals and protection visa grants see DIAC, *Asylum Statistics–Australia Quarterly Tables, December Quarter 2011,* http://www.immi.gov.au/media/publications/statistics/asylum/ (accessed 27 March 2012), and DIAC, *Annual Report 2012-11*, pp 119–121, http://www.immi.gov.au/about/reports/annual/2010-11/pdf/report-on-performance.pdf (accessed 27 March 2012).

in any country. Together, the *1967 Protocol* and Refugee Convention form the cornerstones of refugee protection worldwide.[492]

6.7 People from anywhere in the world, whether Irregular Maritime Arrivals (IMAs) or not, have a legal right to make claims for asylum in countries which have signed up to the abovementioned treaties, irrespective of their method of arrival. As a signatory to the abovementioned treaties, Australia has a legal obligation to assess all claims for asylum against criteria defined at Article 1A of the Refugee Convention.[493]

6.8 The visa process for determining who comes into Australia is regulated under the *Migration Act 1958* (the Act). The Act was amended by the *Migration Amendment (Excision from Migration Zone) Act 2001,* which barred non-citizens who first entered Australia at an excised offshore place without a valid visa from applying for such a visa during their stay in the country.

Assessing protection claims

6.9 Depending on people's mode of arrival, there are currently two different avenues of assessment of protection claims, dependent on asylum seekers' place of arrival. Those who enter Australia's migration zone who are *not* offshore entry persons (OEPs) can immediately apply for a protection visa (Class XA)(Subclass 866).[494]

6.10 However, OEPs arriving at an excised offshore place cannot lodge applications for a protection visa. Under the Protection Obligation Determination (POD) process, which applies to OEPs, the Migration Act prevents a person who arrives at an excised offshore place and is not in possession of a valid visa making an application for a visa. Any protection claims made since the introduction of the POD process are subject to the process.[495]

6.11 OEPs are sent to Christmas Island, where they begin their separate assessment process.[496]

Protection visa assessments for non-OEPs

6.12 Since 2005, DIAC has been required to reach protection visa decisions within 90 days of receipt of an application. Approximately 60 per cent of such decisions were made within the required timeframe in 2010-11. Where this 90-day requirement is not satisfied DIAC reports this to the Minister and these reports are tabled in Parliament.[497]

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492 DIAC, *Submission 32, A Historical Perspective of Refugees and Asylum Seekers in Australia 1976-2011,* p. 2.
493 *1951 Convention Relating to the Status of Refugees,* article 1A.
494 DIAC, *Submission 32, Key Strategic Themes,* p. 46.
495 DIAC, *Submission 32, Key Strategic Themes,* p. 46.
496 See DIAC, *Submission 32, Policy Evolution,* p. 24.
497 DIAC, *Submission 32, Key Strategic Themes,* p. 46.

6.13 The application process begins when a person applies for a protection visa. As soon as they provide personal identifiers, their application is accepted and their eligibility for a bridging visa assessed:

> Asylum seekers who have arrived in Australia's migration zone and who subsequently lodged a Protection visa application may receive a bridging visa. In most cases, the bridging visa allows applicants to remain lawfully in Australia while their Protection visa application is being finalised. Consequently, most Protection visa applicants are not detained for long periods, and they often live in the community while their application for protection is being assessed or reviewed.[498]

6.14 At this point applicants undergo health, identity and character checks. A DIAC officer assesses the case and determines whether further information is required from the applicant. The applicant is then invited to an interview with their allocated decision-maker. If more information is required from the applicant, it may be requested during the interview or at any other point of the assessment process.

6.15 On the basis of the information provided, the relevant DIAC officer makes a decision to grant or refuse a protection visa. The applicant is then informed of this decision and their right to review in the case of a refusal.

6.16 Asylum seekers who are found to be refugees are offered permanent protection in Australia, subject to appropriate health screening, meeting the character requirement and passing security checks.[499]

6.17 Applicants not granted a protection visa may seek a review with the Refugee Review Tribunal (RRT) with the power to review protection visa applications. This power is subject to the Minister's decision that a review or change in decision would be contrary to the national interest.

6.18 This review process is explained later in this chapter.

Protection determination process for OEPs

6.19 OEPs are prevented by the Migration Act from making a valid application for a protection visa. If they raise a protection claim, it is subject to the POD process.

6.20 The POD process represents a recent change in the department's assessment processes. It was introduced on 1 March 2011, replacing the previous Refugee Status Determination (RSD) process after a High Court decision on 11 November 2010 which found that Irregular Maritime Arrivals (IMAs) should be afforded natural justice and provided access to judicial review.

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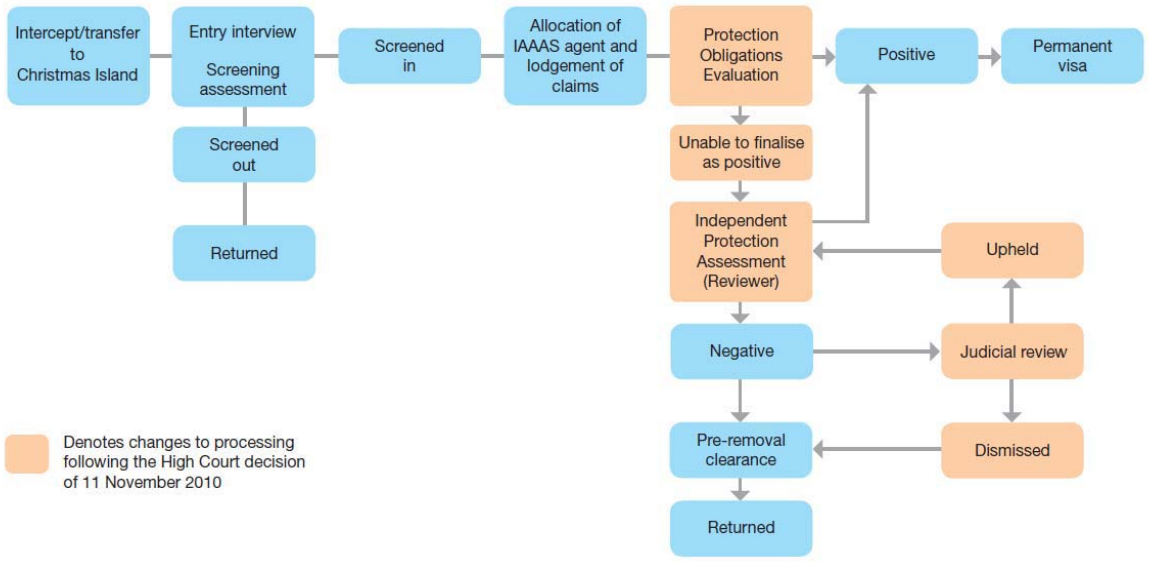
498 DIAC, *Submission 32, Key Strategic Themes,* p. 49.

499 DIAC, *Submission 32, Key Strategic Themes,* p. 46. Subsection 501(6) of the *Migration Act 1958* defines the circumstances in which a person would fail the character test. See DIAC, *Question on Notice 296* (received 22 March 2012), p. 1.

6.21 Irrespective of their date of arrival, IMAs who received a primary assessment interview after 1 March 2011 are now processed under the POD process.[500] Claims for protection subject to the POD process are assessed on an individual basis against the criteria at Article 1A of the Refugee Convention, and in accordance with Australian legislation, case law and up-to-date information on conditions in the applicant's country of origin.

6.22 Applicants must put their claims in writing. All applicants are invited to an interview to discuss their claims and provide more information if required. Procedural fairness applies to all applicants in responding to information that may affect the outcome of their assessment.[501]

6.23 The following diagram provided by DIAC outlines the POD process:



Source: DIAC

6.24 The POD process is non-statutory and has two parts: a Protection Obligations Evaluation (POE) stage and, in the event of a negative decision at this stage, an Independent Protection Assessment.

Protection Obligations Evaluation (POE)

6.25 The POE determines whether an IMA is owed protection under the Refugee Convention. To determine this, claims are assessed against criteria set out by the Refugee Convention and considered in accordance with case law. Assessors draw on currently available country information. For reasons of procedural fairness, IMAs have the opportunity to comment on the information being considered if they believe

500 DIAC, *Submission 32, Key Strategic Themes*, p. 48.
501 DIAC, *Submission 32, Key Strategic Themes*, p. 46.

it could be adverse to their case, and can update country information if there is a change in conditions in their country of origin.[502]

6.26 To make a POE decision, the Department draws on a range of sources, including:

- the Department's Country Research Service, which collects information from a variety of sources, such as international human rights groups, Australian posts overseas, foreign governments, academics, international media and other organisations;

- departmental guidelines and advice on refugee law, protection policy and procedures; and

- client statements, which may include supporting material and additional comments. These are provided in writing or during an interview, with the help of an interpreter if necessary.[503]

6.27 If the POE finds that an IMA is owed protection, the appropriate recommendation is made to the Minister, who then exercises their power to lift the bar, allowing the IMA to apply for a protection visa.

6.28 It is important to note that people who arrived as IMAs and received their primary assessment before the POD process came into being on 1 March 2011 continue to be processed under the old Refugee Status Assessment (RSA) and the Independent Merits Review (IMR) processes.

6.29 Those processed under the new POD process do not themselves have to lodge applications for decisions to be reviewed. Instead, if DIAC is not satisfied that a person is a refugee, their case is automatically referred for an independent protection assessment.[504]

Opportunity for review

6.30 Australia's immigration detention population currently consists mostly of those who have received a negative protection visa decision and are involved in process of review.[505] Several avenues exist to enable these asylum seekers and/or DIAC to review negative decisions.

Refugee Review Tribunal

6.31 Non-OEPs whose applications for protection visas are refused are able to apply to the RRT for an IMR in relation to their case. Alternatively, they may apply to

502 DIAC, *Submission 32, Key Strategic Themes*, p. 48.
503 DIAC, *Submission 32, Key Strategic Themes*, p. 48.
504 DIAC, *Submission 32, Key Strategic Themes*, p. 48.
505 DIAC, *Submission 32, Key Strategic Themes*, p. 54.

the Administrative Appeals Tribunal if their application was rejected for character reasons.[506]

6.32 The RRT is an independent statutory body which '...provides a non-adversarial setting in which to hear evidence'. It has the power to review protection visa application decisions – unless the Minister is of the view that such a review would be against the national interest. Applicants' claims are examined by the tribunal against the provisions of the Refugee Convention.[507] The RRT may:

- uphold the primary decision—agreeing that the applicant is not entitled to a Protection visa
- vary the primary decision
- refer the matter to the department for reconsideration—the department then makes a fresh assessment of the application, considering the RRT's directions and recommendations
- set aside the department's decision and substitute a new decision—if the RRT finds the applicant is entitled to a Protection visa.[508]

6.33 When undertaking its reviews, the RRT considers the merits of each protection visa application anew, taking into account any relevant new information, such as information supplied by the applicant or changes in country information.[509]

Independent Protection Assessment

6.34 When a person who arrived offshore receives a negative decision at the POE stage, their case moves into the second part of the POD process, the Independent Protection Assessment phase. At this stage an independent assessor considers the case and its supporting information. The assessor may also interview the refugee claimant before making a recommendation about whether or not they should be found to be a refugee. The number of assessors was increased to 124 in June/July 2011, and a Principal Reviewer and 3 Senior Reviewers appointed to strengthen professional supervision.[510]

6.35 In November 2010 the High Court found that people processed under arrangements applying to OEPs were being denied procedural fairness in the review of their claim. Following this decision, IMAs who are the subject of a negative Independent Protection Assessment are able to seek judicial review of their assessment. The review considers whether *legal errors* were made over the course of the decision-making process, but does not reconsider IMA claims. When judicial

506 DIAC, *Submission 32, Key Strategic Themes*, p. 46.
507 DIAC, *Submission 32, Key Strategic Themes*, p. 46.
508 DIAC, *Submission 32, Key Strategic Themes*, pp 46–47.
509 DIAC, *Submission 32, Key Strategic Themes*, p. 47.
510 DIAC, *Submission 32, Key Strategic Themes*, p. 48.

reviews find that legal errors have been made, the original Independent Protection Assessment decision is set aside and a new assessment made.[511]

6.36 Liberty Victoria acknowledged this important outcome for asylum seekers arriving by sea, but drew the Committee's attention to the potential for this to increase time spent in detention:

> It is inevitable that applications for judicial review, and the time taken to finalise these, will add to the time spent in detention by unsuccessful applicants for asylum (DIAC estimates it will add 'many months' to time spent in detention).[512]

6.37 Non-OEPs whose applications for a protection visa have been refused already had the right to appeal to a court for review.

6.38 Seeking judicial review concurrently triggers an International Treaties Obligations Assessment.

International Treaties Obligations Assessment

6.39 A person who is not found to engage protection obligations may under the provisions of the *Migration Act* be subject to removal from Australia. The removal process:

> ...takes into account Australia's *non-refoulement* (non-return) obligations under other international human rights instruments, other than the Refugee Convention, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. The removal process also takes into account other unique or exceptional circumstances that may warrant referral of a person's case to the minister under section 195A of the Migration Act.[513]

6.40 For this reason, judicial reviews of negative protection decisions also trigger an International Treaties Obligations Assessment, which takes into consideration Australia's *non-refoulement* obligations in cases where a person is facing removal from the country. If appropriate, the assessment results in protection being extended to people who are not found to be refugees but who may not be returned to their country of origin due to a risk of torture, cruel, inhuman or degrading treatment, punishment or violation of their right to life, as well as in other exceptional circumstances.[514]

511 DIAC, *Submission 32, Key Strategic Themes,* p. 49.
512 Liberty Victoria, *Submission 39*, p. 10.
513 DIAC, *Submission 32, Supplementary,* p. 49.
514 DIAC, *Submission 32, Key Strategic Themes,* p. 49.

Criticisms of the assessment process and its length

Processing times

6.41 At the outset of this inquiry the Committee sought to establish why so many people were spending significant periods of time in detention, prolonged detention being the underlying cause of so much distress, mental illness and community concern. Despite fluctuations, the Committee is concerned that overall processing times remain too long, and because the longstanding government policy has been to detain people for the duration of their processing, longer processing times translate directly to longer periods in detention.[515] On this point, Liberty Victoria submitted that:

> The primary reason for such lengthy periods of detention is the time taken to process the protection claims (and subsequent appeals and reviews) of people arriving by sea. Such people are dealt with according to the 'non-statutory' refugee assessment process. Under the refugee status assessment and independent merits review process, applicants can expect to wait 12 months from arrival to finalisation of merits review. Most people are detained throughout the processing of their application for asylum and subsequent appeals and reviews.[516]

6.42 The Committee understands that DIAC, together with ASIO, has implemented a number of strategies aimed at improving the process, which should result in shorter processing times and better mental health outcomes for detainees. In its submission the department points to this refined process and cites improved processing times in 2011:

> The department has significantly reviewed its determination process as a result of the November 2010 High Court decision. This included introducing the POD process in March 2011, which resulted in a faster initial assessment of claims and a more efficient referral process for negatively assessed clients.
>
> Early provision of the latest country information to migration agents, along with client entry interviews, has assisted agents to prepare more comprehensive statements of claims at the primary stage.
>
> A significant number of IMA cases were resolved in the 2010-11 program year. In total, 2816 people were released from immigration detention. Of these, 2738 people were granted Protection visas and 78 were voluntarily removed from Australia.
>
> The department also has a process known as a Pre-Review Examination, which was implemented from 22 August 2011 and involves checking if original decisions on refugee status of IMAs waiting for independent merits review are still valid and current.[517]

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515 The Forum of Australian Services for Survivors of Torture and Trauma, *Submission 45*, p. 4.
516 Liberty Victoria, *Submission 39*, p. 9.
517 DIAC, *Submission 32, Key Strategic Themes*, p. 53.

6.43 The department also noted that streamlined security checking was helping to speed up processing times:

> In January 2011 the Australian Security Intelligence Organisation (ASIO) developed an intelligence-led and risk-managed security assessment framework for IMAs who meet Article 1A of the Refugee Convention. Since December 2010 only IMAs found to meet Article 1A of the Refugee Convention are referred to ASIO for security assessment.[518]

6.44 This new framework was implemented in March 2011 and enabled ASIO to prioritise long-standing cases. Around 3000 IMAs found to be refugees were security assessed under the new framework between mid-March 2011 and 8 August 2011.[519] This ASIO security assessment process is discussed later in this chapter.

6.45 Liberty Victoria was not of the view that DIAC's new POD process represented a significant improvement:

> The Department of Immigration and Citizenship...was required to overhaul its non-statutory process following the High Court's decision in M61 v Commonwealth. It has now announced the new 'protection obligation evaluation' process, which commenced in March 2011. It is beyond the scope of this submission to comment at length on the nature of this process, its fairness and its similarities with the 'refugee status assessment'. However, Liberty notes that the only substantial difference between the new and old procedures appears to be that, now, unfavourable assessments will be automatically referred to independent review. It seems likely this will result in only a modest improvement to the speed of the process.[520]

Processing suspension

6.46 On 9 April 2010 the Minister for Immigration, Minister for Foreign Affairs and Minister for Home Affairs announced that the government would not be processing new asylum claims by Sri Lankan nationals for three months or those from Afghan nationals for six months.[521] The policy intention was to ensure that decision-making was based on up-to-date, accurate realistic information about the country circumstances in those two places.[522]

6.47 The suspensions were not extended. The government lifted the suspension for Sri Lankan asylum seekers on 6 July 2010 and for Afghan asylum seekers on 30 September 2010.[523]

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518 DIAC, *Submission 32, Key Strategic Themes*, p. 53.
519 DIAC, *Submission 32, Key Strategic Themes*, p. 53.
520 Liberty Victoria, *Submission 39*, p. 9.
521 DIAC, *Submission 32, Key Strategic Themes*, p. 52.
522 See discussion with Mr Andrew Metcalfe, Secretary, DIAC, *Proof Committee Hansard*, 16 August 2011, p. 9.
523 DIAC, *Submission 32, Key Strategic Themes*, p. 52.

6.48 However, over the course of the suspension the number of asylum seekers, specifically those from Afghanistan, increased significantly. The processing freeze also resulted in longer periods of detention for existing detainees.[524]

Identifying asylum seekers

6.49 In cases where IMAs are found to be owed protection, those who arrive with inadequate identification documents may experience added delays due to concerns about the integrity of their claims. Lack of documentation can also impede the issuing of travel documents for those subject to deportation, which in turn increases the time they spend in detention.[525]

6.50 When the Committee pursued the issue of inadequate documentation, it was reassured that the majority of asylum seekers are in a position to provide adequate identification within two to four weeks of arrival.[526]

Quality of information used in assessment

6.51 Country Guidance Notes (CGNs) were introduced by DIAC in 2010 as part of a range of measures designed to help case officers assess asylum seeker claims:

> The CGNs are designed to support robust, transparent and defensible decision making, regardless of the outcome. The CGNs draw on many sources including reports by government and non-government organisations, media outlets and academics. Before they are released, the CGNs are circulated for comment to key stakeholders including other government agencies such as the Department of Foreign Affairs and Trade and the Attorney-General's Department, as well as nongovernment organisations specialising in asylum and protection issues.[527]

6.52 CGNs assist refugee case officers to:

- locate and synthesise country of origin information relevant to assessing claims presented by asylum seekers to Australia
- identify relevant issues for consideration
- conduct robust and transparent analysis of claims.[528]

6.53 Guidance notes currently exist for Afghanistan, Iran, Iraq and Sri Lanka. All CGNs are updated as required and are available on the DIAC website.[529]

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524 See discussion with Mr Andrew Metcalfe, Secretary, DIAC, *Proof Committee Hansard,* 16 August 2011, p. 10.

525 DIAC, *Submission 32, Key Strategic Themes,* p. 52.

526 Ms Janet Mackin, Assistant Secretary, DIAC, and Mr Steven Karras, Acting Regional Manager Christmas Island, DIAC, *Proof Committee Hansard,* 6 September 2011, pp 38–39.

527 DIAC, *Submission 32, Key Strategic Themes,* p. 52.

528 For more on CGNs see http://www.immi.gov.au/media/publications/country-guidance-notes.htm (accessed 14 December 2011).

6.54 As well as CGNs, refugee case officers routinely use DIAC's country information database (CISNET) when making their assessments. The database includes but is not limited to information that is already in the public domain. Specific documents available on CISNET can be assessed by external stakeholders under Freedom of Information legislation.[530]

6.55 The quality of RSA and IMR decision-making processes has attracted considerable criticism from a number of quarters. For example:

> RSA and IMR decisions are often sloppy and riddled with errors, such as text from one decision being copied and pasted into another decision without changing relevant details such as names, dates and places.
>
> It is imperative that a system of quality control be implemented to oversee the RSA and IMR decision-making processes. At present, the process is inconsistent and arbitrary, and unduly subject to the personal whims and fancies of the individual reviewer. This should not be so.[531]

6.56 Furthermore, the Committee is aware that detainees have questioned the accuracy of country information used to inform decision-making, asserting that the information could be prolonging and even skewing the process as a result.[532]

6.57 In a recent ruling, the Federal Magistrates Court of Australia found that a particular DIAC reviewer appeared to be biased, taking an 'inflexible and mechanical' approach when reviewing refugee claims by Afghan ethnic Hazara minorities. The court found that the reviewer did not afford procedural fairness, in particular:

- The reviewer used a repeated formula or template for his recommendation;
- The formula or template was applied inflexibly by the reviewer in relation to this review of the applicant's claims and the claims of several other IMR applicants;
- The IMR reviewer had used the same formula or template as a precedent for recommendations in relation to other IMR applications prior to the applicant's IMR's advisor's submissions.[533]

Committee view

6.58 The Committee notes the differences in assessment processes for onshore and offshore arrivals seeking asylum, and draws attention to the view of the UNHCR:

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529 See http://www.immi.gov.au/media/publications/country-guidance-notes.htm (accessed 12 December 2011).
530 DIAC, *Submission 32, Key Strategic Themes*, p. 52.
531 Liberty Victoria, *Submission 39*, p. 11.
532 This represented the general views of a number of submissions made *in camera*.
533 Federal Magistrates Court of Australia, SZQHI v Minister for Immigration & Anor [2012] FMCA72 (9 February 2012).

> UNHCR is of the view that the offshore procedures for assessing refugee status should be as closely aligned as possible with onshore procedures and subject to appropriate legal frameworks and accountability, and due process. The current policy creates a bifurcated system whereby those arriving by air receive greater procedural safeguards than those arriving by sea. It is arguable that this is a discriminatory policy that is also at variance with Australia's obligations under Article 31(1) of the 1951 Convention relating to the Status of Refugees, which provides that:
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> > The Contracting States shall not impose penalties, on account of their illegal entry or presence on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article I, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

6.59 The Committee believes that Australia's assessment processes should be consistent with our obligations under the convention. To this end, the Committee notes recent changes allowing DIAC to use existing powers more flexibly in assessing IMA asylum seekers, notably by approving them for bridging visas.[534]

6.60 Furthermore, the Committee notes concerns raised by organisations such as Liberty Victoria about the pre-POD assessment process, the RSA, and the associated IMR. The Committee is concerned that a significant number of people in detention are still subject to old processes, simply because they arrived prior to the new, improved POD process being implemented. The Committee is troubled by allegations of inconsistency in assessment, and is of the view that an enhanced quality control system would have the dual benefit of ensuring probity and easing stakeholder concerns.

Recommendation 25

6.61 The Committee recommends that the Department of Immigration and Citizenship consider revising and enhancing its system of quality control to oversee those Refugee Status Assessment and Internal Merits Review processes still underway.

Security assessments

6.62 Responsibility for determining entry of non-citizens to Australia rests with DIAC,[535] and DIAC decides whether and when to refer a person applying for a visa to ASIO for security assessment. The timing of ASIO security assessments of IMAs and

534 See Mr Andrew Metcalfe, Secretary, DIAC, *Proof Committee Hansard*, 29 February 2012, p. 22.

535 Australian Security Intelligence Organisation, *Submission 153*, p. 1.

of onshore arrivals seeking protection visas is not mandated by legislation; it is a matter of government policy.[536]

6.63 ASIO informed the Committee that its function in this regard is to 'support the department of immigration [DIAC] in its management of irregular maritime arrivals.'[537] ASIO's role and responsibilities are mandated by the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act):

> The ASIO Act specifies ASIO's remit as 'security', which it defines as the protection: of Australia and Australians from espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia's defence systems, and foreign interference; and of Australia's territorial and border integrity from serious threats.[538]

6.64 Individuals are assessed against security threats set out in Section 4 of the ASIO Act:

> That includes espionage, sabotage, threats to our defence systems, promotion of communal violence, and protection of border integrity is the last one. Here, the particularly relevant one is an issue of politically motivated violence, which, of course, contains within it the whole question of terrorism.[539]

6.65 Following a security assessment, ASIO may provide one of three findings:

(a) non-prejudicial finding, which means there are no security concerns that ASIO wishes to advise;

(b) a qualified assessment, which means that ASIO has identified information relevant to security, but is not making a recommendation in relation to the prescribed administrative action; or

(c) an adverse assessment in which ASIO recommends that a prescribed administrative action be taken (cancellation of a passport, for example), or not taken (not issuing access to a security controlled area, for example).[540]

6.66 Security assessments are made without regard to social or family circumstances of the individual being assessed so as to retain objectivity and ensure that people are assessed exclusively in terms of the potential security threat they pose. Similarly, character tests are not applied at the time of assessment:

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536 See discussion with Committee at public hearing: *Proof Committee Hansard,* 22 November 2011, pp 35–36.

537 Mr David Irvine, Director-General, Australian Security Intelligence Organisation, *Proof Committee Hansard*, 22 November 2011, p. 24.

538 ASIO, *Submission 153,* p. 1.

539 Mr David Irvine, Director-General, ASIO, *Proof Committee Hansard,* 22 November 2011, p. 24. Also see ASIO Act 1979, s. 4.

540 ASIO, *Submission 153,* p. 2.

> Security assessments are not character checks and character factors such as criminal history, dishonesty or deceit are only relevant if they have a bearing on security considerations. Character is not itself sufficient grounds for ASIO to make an adverse security finding. Assessments of character not relevant to security are required to be made by DIAC.[541]

6.67 ASIO only conducts security assessments of asylum seekers able to apply for protection visas. In the three years 2008-09, 2009-10, 2010-11, ASIO did not issue a single adverse assessment for *onshore* arrivals seeking protection visas. From January 2010 to November 2011, 54 adverse assessments were issued for offshore arrivals.[542]

Streamlining the assessment process

6.68 Prior to December 2010, it was government policy that every IMA would be subject to a full security assessment upon arrival. This meant that IMAs were subject to 'parallel processing', that is, both protection determination and security assessments conducted upon arrival:

> Under this policy, ASIO's resources were expended providing assessments for a large number of individuals who did not require security assessment because they were not ultimately assessed to be genuine refugees.[543]

6.69 That is no longer the case. Following an internal review by ASIO of its assessment processes in 2010, ASIO implemented changes to '...ensure an intelligence-led and risk-managed approach to security assessments and security assessment referral.' To this end, in December 2010 the government decided to abandon parallel processing:

> As part of these changes, the Government agreed in December 2010 that only those IMAs who were assessed to be genuine refuges (known as '1A met' [having met the definition of a refugee under Section 1A of the Refugee Convention]) would be referred to ASIO for security assessment.[544]

6.70 More about the genesis of the new framework was explained by ASIO Director-General David Irvine in this way:

> This referral process has been developed in consultation with DIAC. What it has done, particularly recently, is enable us to streamline security checking for what I will call non-complex cases and that it is commensurate with the level of risk that they present. What it does is allow us to focus our most intensive security investigation effort into the groups or individuals of most security concern. The result is, I believe, particularly in recent times, that our security checking has become more thorough and more effective.

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541 ASIO, *Submission 153,* p. 2.

542 See discussion with Mr David Irvine, Director-General, ASIO, *Proof Committee Hansard,* 22 November 2011, p. 30.

543 ASIO, *Submission 153,* p. 3.

544 Mr David Irvine, Director-General, ASIO, *Proof Committee Hansard,* 22 November 2011, p. 35.

> In fact, this is evidenced in the number of adverse security assessments, which have increased as a result of our ability to focus on these complex cases.[545]

6.71 Separately, ASIO reported improvements as a result of the new framework:

> The impact of these measures has been a significant reduction in the number of IMAs in detention solely awaiting security assessment.[546]

How the triaging process works

6.72 When asylum seekers arrive, they are processed by DIAC. Once DIAC determines that a person qualifies for refugee status, they are measured against the triaging process. The triaging process is designed to establish, implement and apply security criteria in order to identify which refugees DIAC should refer to ASIO for security assessment.

6.73 The Committee was told by Mr Irvine that the 80 to 85 per cent of refugees who are measured against the triaging process then go through required immigration processes and to a recommendation to the Minister. The 15 to 20 per cent of refugees that DIAC refers to ASIO go through a more rigorous security assessment, and, '...if they are found to be non-prejudicial they go back through the ordinary way.'[547]

6.74 Mr Irvine gave an example of this process in operation:

> Let us suppose that 116 people arrive. Immigration collects information about those people relative to their claims, their names, their personal details and so forth. That is then measured against what we would regard as indicators for concern, and about 80 per cent to 90 per cent of people would not trigger those indicators of concern. Then they would then go on and be processed in the normal way to a decision by the minister that they be given protected visas. Those people who do trigger concerns—and they might be, say, 15 per cent or whatever of that 116—are then subject to a more thoroughgoing ASIO investigation in which we have access to all of the information that they have provided during the immigration process relative to their claims, and details about them, and that then forms the basis for our investigation. Out of that comes one of three results. The first is a non-prejudicial finding whereby we simply advise the department of immigration that we have no concerns about that person. The second is that we could issue what I will call qualified security assessments—and we have issued a number of these—where we identify that there are some security issues but we do not think they represents such a risk to security that a visa should not be issued. The third is where we have identified security issues

545 Mr David Irvine, Director-General, ASIO, Legal and Constitutional Affairs Legislation Committee, *Estimates Hansard,* 25 May 2011, p. 107.

546 ASIO, *Submission 153,* p. 4.

547 Mr David Irvine, Director-General, ASIO, *Proof Committee Hansard,* 22 November 2011, p. 26.

> and assess that person for whatever security reason to represent a threat to security such that a visa should not be issued.[548]

Process for in-depth security assessments

6.75 ASIO only conducts in-depth security assessments when refugees are referred for such assessments by DIAC, 'unless something comes to light where we discover that, for whatever reason, we need to look at something.'[549]

6.76 However, although DIAC refers individuals to ASIO for such assessments, the criteria for referral are set by ASIO. Asked whether DIAC determines what goes to ASIO for assessment, DIAC Secretary Andrew Metcalfe told the Committee, 'ASIO determines what goes to ASIO.'[550]

6.77 In August 2011 Mr Metcalfe gave evidence regarding the application of ASIO guidelines for referral:

> ...ASIO has advised us on what it requires to be done and that is what is being done...We [DIAC officers] are trained and briefed, and we apply their guidelines as we do around the world on this issue.[551]

6.78 The Committee understood from this evidence that DIAC officers are involved in measuring people against criteria, determined by ASIO, to assess which cases need to move to a more in-depth security check.

6.79 ASIO was also asked about this process, and informed the Committee that ASIO and DIAC had agreed in May 2011 that all security triaging would be performed solely by ASIO:

> Prior to and following the commencement of the Framework in April 2011, ASIO provided Department of Immigration and Citizenship (DIAC) officers with training on the implementation of the security indicators. ASIO also established appropriate administrative procedures to enable DIAC to undertake this function as directed by Government in December 2010.
>
> Since June 2011, all triaging pursuant to the framework is undertaken by ASIO; this includes establishing the security criteria as well as implementing and applying the criteria for security assessment referral. However, DIAC may provide feedback on the security indicators within the Framework as required.[552]

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548 Mr David Irvine, Director-General, ASIO, *Proof Committee Hansard,* 22 November 2011, p. 25.

549 Mr David Irvine, Director-General, ASIO, *Proof Committee Hansard,* 22 November 2011, p. 35.

550 Mr Andrew Metcalfe, Secretary, DIAC, *Proof Committee Hansard,* 16 August 2011, p. 12.

551 Mr Andrew Metcalfe, Secretary, DIAC, *Proof Committee Hansard,* 16 August 2011, p. 13.

552 ASIO, *Question on Notice 315* (received 16 December 2011), p. 2.

6.80 The Committee noted from the evidence above that DIAC provides feedback on security assessments, but it was not entirely clear when and if DIAC officers make referral assessments without involvement from ASIO. The Committee was informed by DIAC that the two organisations work closely together in this regard, and that 'there is a symbiotic interdependency' between them.[553]

6.81 The criteria for referral were not disclosed by ASIO for security reasons.

Committee view

6.82 The Committee notes evidence that the new intelligence-led assessment framework established by ASIO in March 2011 has, according to evidence from DIAC Secretary Andrew Metcalfe, 'vastly reduced the number of people in long-term detention.'[554] The Committee considers this a very positive initiative and commends both ASIO and DIAC for their work in implementing the new framework.

Process for asylum seekers going into community detention

6.83 The Committee heard that ASIO conducts a particular security assessment for anyone DIAC decides to release into the community. This assessment, however, is a much shorter, simpler process than that undertaken in order to issue a permanent visa. This shorter process is able to be completed in around 24 hours, and gives ASIO the opportunity to inform DIAC of any concerns regarding a particular individual before that individual is placed in community detention.[555]

6.84 Furthermore, this shorter assessment is already routinely performed for *every* refugee referred to ASIO by DIAC, whether in community detention or a detention facility, *prior* to the more in-depth assessment taking place.[556]

6.85 The Committee notes that ASIO is not prevented or inhibited in any way whatsoever from performing in-depth security assessments once people are in community detention:

> At the moment Immigration is referring to us anyone it wishes to release into community detention. That does not prejudice in any way our ability subsequently, once they have been declared 1A met, to conduct a much different assessment process.[557]

553 Mr Andrew Metcalfe, Secretary, DIAC, *Proof Committee Hansard,* 16 August 2011, p. 33.
554 Mr Andrew Metcalfe, Secretary, DIAC, *Proof Committee Hansard,* 16 August 2011, p. 33.
555 See Mr David Irvine, Director-General, ASIO, *Proof Committee Hansard,* 22 November 2011, pp 30–31.
556 See the Committee's discussion with Mr David Irvine, Director-General, ASIO, *Proof Committee Hansard,* 22 November 2011, p. 31.
557 Mr David Irvine, Director-General, ASIO, *Proof Committee Hansard,* 22 November 2011, p. 31.

Concerns around security assessments

6.86 The Committee took a great deal of evidence on the issue of security assessments. These can broadly divided into three themes:

1. The length of time taken to complete security assessments.

2. The need to detain people for the duration of the assessments.

3. Adverse assessments and the lack of opportunity for review.

6.87 Given the undeniable impact of prolonged detention on mental health and the serious consequences of an adverse security assessment, the Committee spent considerable time examining the security assessment process and evaluating the criticisms levelled at it.

Length of the process

6.88 As previously stated, the indeterminate duration of the security assessment process has been identified as a major contributing factor to distress among detainees.

6.89 The Committee heard that round 80 per cent of ASIO assessments are completed in less than a week. It can take many months to complete security assessments for the other 20 per cent of cases which are more complex and time-consuming.[558]

6.90 ASIO contended that its security assessments were not the primary factor in lengthy processing times:

> At 12 August 2011, there were around 5,232 irregular maritime arrivals in immigration detention, of which 448 had been found to be refugees and were awaiting security assessment – this represented eight per cent of those in detention at that time.[559]

6.91 ASIO also stated:

> Processing priorities for security assessments and the order in which they were progressed were also directed by DIAC. For example, prior to May 2010 DIAC directed complex, long-term IMA detention cases be afforded lower priority for security assessment, in order to clear less-complex cases to address serious accommodation limitations on Christmas Island.
>
> In early 2010, ASIO undertook a review of its internal assessment process, with a view to streamlining and improving through-put. As a result, processing times were sped up and additional resources assigned to the

558 Mr David Irvine, Director-General, ASIO, *Proof Committee Hansard,* 22 November 2011, p. 24.

559 ASIO, *Submission 153,* p. 6.

> security assessments function. These measures were, however, overtaken by the rapid increase in IMA arrivals throughout the year.[560]

6.92 Evidence provided by the Director-General of ASIO indicated that a small proportion of cases take significant time to resolve. Mr Irvine spoke of the number of people in detention awaiting security clearances:

> At the moment, we reckon that about 80 per cent of our assessments are completed in less than a week. The 20 per cent or less of remaining cases are what we call complex cases, which do require a much longer time if you are going to do a thorough assessment, basically with cause. At the moment, out of however many people are currently in detention, in community detention or are awaiting the conclusion of the process, there are 463 people awaiting a security assessment from ASIO.[561]

6.93 Mr Irvine also confirmed for the Committee that ASIO would be able to conduct its in-depth security assessments while asylum seekers were in community detention or on bridging visas while their applications for protection were being processed.[562]

Committee view

6.94 From the evidence provided by ASIO, the Committee understands that placing people in community detention following an initial, routine security check does not prejudice any subsequent, in-depth security assessment ASIO may provide prior to a permanent visa being issued and a refugee being released into the community. From this it follows that refugees whose initial security checks do not produce red flags could be placed in community detention while their in-depth assessment is underway. The Committee is of the view that asylum seekers found to be refugees should therefore be taken out of detention facilities and placed in community detention, unless initial ASIO checks produce cause for concern.

6.95 The Committee recognises that refugees in detention awaiting ASIO security assessments comprise a relatively small portion of the detention population. The Committee also recognises that people in this category have not yet passed the in-depth security assessment required for a permanent visa, but notes that they have cleared initial security checks, and that placement in community detention does not prejudice ASIO's ability to conduct in-depth assessments. The Committee is therefore of the view that refugees who pass initial security assessments are of sufficiently low risk to national security to be transferred from detention facilities to community detention while in-depth security assessments are completed. This would significantly

560 ASIO, *Submission 153,* p. 3.

561 These figures are current as of 22 November 2011. See Mr David Irvine, Director-General, ASIO, *Proof Committee Hansard,* 22 November 2011, p. 24.

562 Mr David Irvine, Director-General, ASIO, *Proof Committee Hansard,* 22 November 2011, pp 35–36.

reduce the amount of time refugees who are not deemed to be a risk to national security spend confined in detention facilities.

Recommendation 26

6.96 The Committee recommends that the Australian Government move to place all asylum seekers who are found to be refugees, and who do not trigger any concerns with the Australian Security Intelligence Organisation following initial security checks, and subject to an assessment of non-compliance and risk factors, into community detention while any necessary in-depth security assessments are conducted.

Adverse assessments and the lack of opportunity for review

6.97 Ultimately, security assessments can determine the outcome of a person's bid for asylum in Australia. When a person is found to be a refugee but receives an adverse security assessment, the nature of that assessment (which is not known to them) in most cases results in the refugee not being able to gain entry into the Australian community, irrespective of any genuine need for protection. There are a considerable number of people currently detained in Australia's immigration detention facilities that have been assessed as genuine refugees but have nonetheless received adverse security assessments.

6.98 Being a signatory to the *1951 Convention Relating to the Status of Refugees* (the Refugee Convention) and its 1967 Protocol Relating to the Status of Refugees (the Protocol), Australia does not *refoule* (return) 'people to countries where they have a well-founded fear of persecution for reasons of race, nationality, political opinion or membership of a particular social group.'[563] A consequence of this policy is that refugees who receive adverse security assessments can be left, effectively, in indefinite detention. Many have been kept in detention for significant periods of time, with no resolution to their individual cases in sight. Some have children who were born, or are growing up, in detention facilities. Adverse security assessments mean people cannot be released into the community or sent to third countries, but their refugee status means they cannot be repatriated.

6.99 As previously noted, ASIO does not decide what action to take once it makes an adverse security assessment. ASIO simply provides advice to DIAC, which acts on an assessment:

> The consequences of an ASIO security assessment depend on the purpose for which it is made, and the relevant legislation, regulation or policy. In most visa categories, a visa may not be issued (or be cancelled) where ASIO determines the applicant to be directly or indirectly a risk to security. The enabling legislation in this instance is the *Migration Act 1958*, especially the *Migration Regulations 1994* and public interest criterion

563 DIAC, *Submission 32*, p. 45.

> 4002. ASIO itself is not permitted by the ASIO Act to take any administrative action.[564]

6.100 The Committee notes ASIO's assurance that adverse assessments are not made easily, or often:

> I think it is important to put on the record that ASIO is, in fact, highly discriminating in the use of such assessments. We issue them only when we have strong grounds to believe that a person represents a security threat. That is reflected in the relatively small number of adverse security assessments issued. Of the nearly 7,000 security assessments that we have undertaken since January 2010, in relation to IMAs, we have issued only 54 adverse assessments and 19 qualified security assessments. That represents about one per cent of IMA security assessment cases. We therefore do not take a decision to issue an adverse security assessment lightly and nor are we contemptuous of or *blase* about the human rights of the individuals involved. We take very seriously our responsibility to behave ethically and professionally and, obviously, with the utmost probity.[565]

6.101 However, refugees with adverse security assessments do not have legal recourse to a review of this assessment. The impossible situation these people are in is perhaps one of the greatest challenges currently facing the immigration detention system. The next section addresses this point.

What to do with the hard cases

6.102 Even though the overall detention population decreased during 2011, the number of asylum seekers held in detention for longer than 12 months saw a significant increase since September 2010.[566] The Department informed the Committee that this was in large part due to an increase in the number of detainees on negative pathways; that is, those who received negative initial decisions which were subsequently under review. Negative pathway cases present significant detainee management challenges, and their growth has contributed significantly to the burden of the detention and asylum processing systems.[567]

6.103 The Department also cited the following exacerbating factors:

- the significant and rapid increase in the number of arrivals in 2010
- increasing complexity of claims
- new cohorts of IMAs with different claims
- changes to country of origin information resulting in greater complexity of assessments for clients seeking asylum

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564 ASIO, *Submission 153*, pp 2–3.

565 Mr David Irvine, Director-General, ASIO, *Proof Committee Hansard*, 22 November 2011, p. 24.

566 DIAC, *Submission 32, Key Strategic Themes*, p. 57.

567 DIAC, *Submission 32, Key Strategic Themes*, p. 58.

- changing country information also resulted in the temporary suspension of processing of new asylum claims from people from Sri Lanka and Afghanistan for periods of three and six months respectively

- difficulties in determining clients' identity and, in some instances, their country of residence
- infrastructure pressures and detention incidents limiting access to some IDFs
- completing third country checks
- processing times for completion of security assessments
- the need to reconsider a number of client decisions at the Independent Merits Review stage resulting from the November 2010 High Court decision.[568]

6.104 There are currently, broadly speaking, two groups of people in prolonged detention: confirmed refugees who failed the security test and therefore cannot be released or returned to their country of origin, and people who have failed to gain refugee status but still cannot be deported or repatriated. Although their bids for protection failed before any security assessment even occurred, these people also effectively find themselves in indefinite detention.

Non-refugees who cannot be repatriated

6.105 A growing number of cases have become subject to protracted delays due to delays in obtaining the documentation necessary for repatriation. The Department advised the Committee that difficulties in securing travel documents for these people is likely to become an increasing problem for some cohorts, 'particularly where governments of other countries are reluctant to facilitate involuntary return of their nationals.'[569] Similarly protracted delays have been identified in securing return options for stateless asylum seekers who are not found to be refugees.[570]

Refugees in indefinite detention

6.106 In other instances, some refugees are being held in what amounts to indefinite detention. They have no prospect of release or deportation, and no legal right to a merit review of their adverse security assessment.[571] Significant concerns about the ethical and moral implications of issuing a security assessment which indefinitely

568 DIAC, *Submission 32, Key Strategic Themes*, p. 51.
569 DIAC, *Submission 32, Key Strategic Themes*, p. 52.
570 DIAC, *Submission 32, Key Strategic Themes*, p. 52. Note: Individuals who lack identity as nationals of a state for legal purposes and are not entitled to rights, benefits and protections ordinarily available to a country's nationals are considered to be 'stateless'.
571 For a discussion on how many refugees issued with adverse security assessments see Mr David Irvine, Director-General, ASIO, *Proof Committee Hansard*, 22 November 2011, p. 30.

removes liberty without disclosing evidence of the justification for such an assessment were expressed.[572]

6.107 The Committee also received comprehensive evidence from legal experts on the matter. The evidence before the Committee outlines why these legal experts specialising in security, human rights and refugee law have concluded that Australia is in breach of its obligations under international law.[573] Professor Jane McAdam from the Gilbert and Tobin Centre of Public Law, University of New South Wales (UNSW), unequivocally stated:

> Australia's policy of mandatory detention undeniably violates this country's obligations under international law. Countless international and domestic reports have explained why this is so, including those by the UN Human Rights Committee, the UN Working Group on Arbitrary Detention, the UN Committee on the Rights of the Child, the UN Committee Against Torture, the UN Committee on Economic, Social and Cultural Rights, the UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health; the Australian Human Rights Commission, and many reputable international and national human rights NGOs.[574]

6.108 The Committee was informed that under Australian law only some individuals have recourse to a review of adverse security assessments:

> Qualified or adverse ASIO security assessments may be appealed to the Administrative Appeals Tribunal (AAT) if the applicant is an Australian citizen or permanent resident, or holds a special visa or special purpose visa. Non-Australian citizens who are applying for a visa are entitled to file an application in the Federal Court or High Court and seek judicial review in respect of an adverse security assessment. Such a review involves a court's determining the legality of administrative decisions and does not extend to the merits.[575]

6.109 Professor Ben Saul from the Sydney Centre for International Law explained:

> [Refugees] are unable to effectively challenge the adverse security assessments issued by ASIO, upon which the decisions to refuse them refugee protection visas and to detain them are based. In particular:
>
> > (i) The reasons and evidence for their adverse security assessments have not been disclosed to them, because ASIO has decided to refuse any disclosure to them (including even a redacted summary);

572 See for example Ms Pamela Curr, Campaign Coordinator, Asylum Seeker Resource Centre, *Proof Committee Hansard,* 18 November 2011, p. 17; Mr Richard Towle, Regional Representative, UNHCR, *Proof Committee Hansard,* 18 November 2011, p, 10.

573 For details see Professor Ben Saul, *Submission 130, Attachment,* pp 1–72.

574 Professor Jane McAdam, Gilbert and Tobin Centre of Public Law, UNSW, *Proof Committee Hansard,* 5 October 2011, p. 22.

575 ASIO, *Submission 153,* p. 3.

> (ii) They enjoy no statutory rights to judicially challenge their assessments under the Australian Security Intelligence Organisation Act 1979 (Cth) ('ASIO Act'), or to review the merits of the assessments before any administrative tribunal;
>
> (iii) Australian courts are not empowered to review the substantive 'merits' of adverse security assessments, but are confined to limited judicial review of them for errors of law ('jurisdictional error');
>
> (iv) Such judicial review at common law is *practically* unavailable, because Australia has not disclosed to them any reasons for, or evidence substantiating, their adverse security assessments, and they are therefore unable to identify any prima facie errors of law which would permit them to legitimately commence proceedings, without risking abuse of the courts' process and incurring costs orders;
>
> (v) They are unable to compel disclosure of the reasons for, or evidence substantiating, their adverse security assessments, both because the courts have accepted that procedural fairness at common law is reduced to 'nothingness' in their circumstances (as long as the ASIO Director-General has given genuine consideration to whether disclosure would not prejudice national security), and/or public interest immunity would preclude disclosure to them anyway; and
>
> (vi) There is no other special judicial procedure enabling their adverse security assessments, and thus their detention, to be tested to the standard demanded by article 9(4).[576]

6.110 Examples were cited, including:

> The ASIO adverse security assessments are a real problem. As you know, there is no appeal process available. I met a man in Scherger who has evidence that he showed me. ASIO had issued him with an adverse security assessment because of his activities in Sri Lanka during a given period of time. He showed me his documents saying he was not there; he was in a refugee camp in India. What opportunity he has he got to appeal? We have written to ASIO and we have written to the IGIS. What opportunity does he have to make a case? None. Currently there is a 17-year-old boy. He left his country as a teenager. He is stateless. He is illiterate; he is not even literate. He has never been to school. He has been assessed as a security risk. We have grave concerns about the indefinite nature of the detention of people.[577]

6.111 Notwithstanding the impact indefinite detention is having on mental health, there is a genuine national security concern that must be addressed within the framework of any solution to this seemingly intractable problem. The Committee

576 Professor Ben Saul, Sydney Centre for International Law, University of Sydney, *Submission 130*, pp 2–3.

577 Ms Pamela Curr, Campaign Coordinator, Asylum Seeker Resource Centre, *Proof Committee Hansard,* 18 November 2011, p. 17.

noted that those seeking a right of appeal for refugees in indefinite detention accepted that some people may pose a risk to national security which must be addressed:

> There obviously is always justification for detaining certain people who may be a national security risk, but in every circumstance like that the Law Council has always argued that the reaction needs to be proportionate to the particular threat that that person poses. So that question needs to be examined in each individual case and there needs to be provision for review of that if different circumstances come to light, or different information comes to light. At the moment, there is no opportunity for review of that assessment.[578]

6.112 Mr Richard Towle, the Australian representative of the United Nations Commissioner for Human Rights, spoke of the need, and ways, to balance national security with fairness:

> We have proposed in our submission a practice that is used in several countries around the world—Canada; New Zealand, my home country; and the United Kingdom—where a bridge can be built between the security assessment and the confidentiality surrounding that and the right for someone to know at least the basic elements of the case against him or her. That is an appropriate way of finding a balance between often two competing sets of interests.[579]

6.113 The Committee pursued the matter with Mr David Irvine, Director-General of ASIO, who explained that even the criteria—let alone specific reasons in individual cases—for issuing adverse assessments were not able to be released:

> Once the criteria for making assessments are known, then you will find very quickly that all the applicants will have methods of evading or avoiding demonstrating those characteristics.[580]

6.114 A submission from Professor Saul, from the University of Sydney, contended that not providing evidence upon which the assessment is based is a violation of article 9(4) of the *International Covenant on Civil and Political Rights* (ICCPR):

> Where detention is purportedly justified by a State on security grounds, the requirement of substantive judicial review of the grounds of detention under article 9(4) necessarily requires a judicial inquiry into the information or evidence upon which a security assessment is based. Without access to such evidence, a court is not in a position to effectively review the substantive grounds of detention.[581]

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578 Ms Rosemary Budavari, Co-Director, Criminal Law and Human Rights, Law Council of Australia, *Proof Committee Hansard,* 22 November 2011, p. 8.

579 Mr Richard Towle, United Nations High Commissioner for Human Rights, *Proof Committee Hansard,* 22 November 2012, p. 9.

580 Mr David Irvine, Director-General, ASIO, *Proof Committee Hansard,* 22 November 2011, p. 28.

581 Professor Ben Saul, *Submission 130, Attachment,* p. 40.

6.115 Currently, however, Professor Saul explained that refugees merely receive letters 'cast in near-identical terms', which state:

> 'ASIO assesses [author name] to be directly (or indirectly) a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*.'[582]

6.116 The Director-General of ASIO reiterated to the Committee that it was not ASIO's decision to deny opportunity for review, but that the law as it stands would only permit Australian citizens and a few select categories of people to appeal against ASIO assessments. He drew the Committee's attention to the words of Justice Robert Hope in 1977:

> At that time he considered the whole question of appeals against the ASIO assessment process. He recommended that Australian citizens, and a few other categories of people, should be allowed to appeal but he recommended against appeal rights for noncitizens. What he wrote was this:
>
> > The claim of noncitizens who are not permanent residents but who are in Australia to be entitled to such an appeal is difficult to justify, particularly as they have no general appeal, and I shall recommend that they shall have no such right.
>
> That was actually taken up in section 36 of the [ASIO] act. That is the legal basis on which we are operating.[583]

Refugees with adverse assessments already living in the community

6.117 The Committee sought evidence from ASIO concerning precedents for people with adverse security assessments being released into the community. The Committee noted one case in which a family had received an adverse assessment in 2002, but had since been released. The Committee pointed out that in this particular instance, the asylum seekers in question applied for protection visas onshore having arrived by plane—that is, they were not IMAs—and sought clarification on whether refugees deemed to be a potential threat to national security were being treated differently depending on their means of arrival.

6.118 The Committee was informed by the Director-General of ASIO that such people were subject to a high degree of resource-intensive monitoring:

> I am comfortable—that is probably not the word I would use—with a very small number, but I simply would not have the resources to provide the level of monitoring and so on that would be required over a long period of time for anyone with an adverse assessment to be in the community...

582 Professor Ben Saul, *Submission 130, Attachment,* p. 25.

583 Mr David Irvine, Director-General, ASIO, *Proof Committee Hansard,* 22 November 2011, p. 28.

> ...I do not want to go into it too deeply, but the question then reflects on the levels of quality of monitoring and the quality assurance that I can give the government in terms of national security considerations. It is a concern.[584]

6.119 The Committee notes that the Council for Immigration Services and Status Resolution (CISSR)[585] had earlier discussed options for undertaking risk analysis of refugees with negative security assessments:

> The Chair raised the idea of using the National Security Monitor to undertake risk analysis of negative security assessments. He saw as appropriate the use of an independent person to look at the application of security assessment of people in detention and the risk they pose.[586]

6.120 Minutes from the CISSR meeting in question, however, do not indicate that a workable way forward was identified:

> ...[T]he National Security Monitor is a relatively new role set up under legislation to deal primarily with counter-terrorism issues. It was not intended to be used in the way suggested by the Council and she would prefer to speak with Duncan Lewis at Prime Minister and Cabinet (PM&C) about pursuing this avenue before preparing a proposal for the Minister.[587]

Committee view

6.121 The Committee reiterates its concern regarding the indefinite detention of refugees with adverse security assessments. While the Committee understands and appreciates that these questions are necessarily viewed through the prism of national security, the Committee remains deeply troubled by the fact that those with adverse assessments cannot obtain evidence-based justifications for their status, and is mindful that assessments effectively determine people's freedom and, in many cases, that of their children.

6.122 The Committee notes ASIO's view that disclosing reasons behind a negative assessment to the individuals in question could impact on ASIO's ability to gather reliable background information. However, the Committee is not convinced that disclosing relevant information to a security-cleared third party, or a security-cleared

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584 Mr David Irvine, Director-General, ASIO, *Proof Committee Hansard*, 22 November 2011, p. 33.

585 The Council for Immigration Services and Status Resolution (the CISSR) is an advisory council to the Minister for Immigration and Citizenship, offering independent advice on policies, processes and services relating to resolution of immigration status. See Department of Immigration and Citizenship, *Question on Notice 72.* As of 9 February 2012, CISSR is known as the Minister's Council on Asylum Seekers and Detention (MCASD). See http://www.minister.immi.gov.au/media/cb/2012/cb182434.htm (accessed 22 March 2012).

586 DIAC, *Question on Notice 72, CISSR 10th General Meeting Minutes 27-28 June 2011* (received 2 December 2011), p. 14.

587 DIAC, *Question on Notice 72, CISSR 10th General Meeting Minutes 27-28 June 2011* (received 2 December 2011), p. 14.

legal representative of the individual, would be so detrimental as to justify detention without charge for the term of the individual's natural life.

6.123 Furthermore, being aware that a number of refugees have received permanent visas and are living in the community despite adverse security assessments, the Committee believes that ASIO is able to discern varying levels of risk posed by individuals with adverse security assessments.

6.124 The Committee is of the view that the government should take immediate steps to resolve how best to afford refugees an opportunity to appeal the grounds for their indefinite detention without compromising national security, and it is this matter to which the chapter now turns.

Establishing a right of review

6.125 The Committee explored various ways in which a right of review of security assessments could be established. In particular, the Committee notes Professor Ben Saul's reference to Article 9 of the International Covenant on Civil and Political Rights (ICCPR), whereby decisions to prolong detention require periodic reviews so that the grounds for detention can be assessed:

> Thus, even if detention may be initially justified on security grounds, article 9 requires periodic review of such grounds and precludes indefinite detention flowing automatically from the fact of original grounds justifying detention.[588]

6.126 The Committee heard from ASIO that it would work within any legal framework that was established:

> Whether IMAs or any other applicants for visas who are rejected on security grounds should be afforded merits review is essentially a matter for the government. Should the government introduce a merits review process for IMAs who are subject to adverse or qualified assessments, we will then work within that legal framework.[589]

6.127 The Committee asked Mr Irvine whether he could foresee negative implications arising from that right being established:

> I think that is advice I would have to give the government. But what I would say is: there are a number of factors that you would need to take into account...What form of merits review would you have? Where would it go? What protections for other national security considerations would you have, including as far as I am concerned elements of national interest but also sources and methods for ASIO? What is the scope of that process? Would merits review apply to someone who we knocked back as a suspected spy for a foreign power, someone we gave an adverse assessment to on the

588 Professor Ben Saul, *Submission 130, Attachment,* p. 29.

589 Mr David Irvine, Director-General, ASIO, *Proof Committee Hansard,* 22 November 2011, p. 29.

> basis that we thought that person might be coming to Australia to pursue the acquisition of parts of weapons of mass destruction or something like that or to conduct sabotage? How would the merits review process in those circumstances protect us from a foreign government probing our sources and methods and so on? You would need to be very careful about how you applied such a process. Subsequently, there would be all sorts of resource and other implications, but that would be something for the government to decide.[590]

6.128 The Committee also spoke to Dr Vivienne Thom, Inspector-General of Intelligence and Security. Dr Thom informed the Committee that of 1111 complaints concerning ASIO's handling of security assessments for visa reasons in 2010-11, only 27 per cent related to refugee visa applications. The others were mostly made by offshore visa applicants. The number of complaints issued by refugees in detention totalled 209, with this figure being comparable to previous years.[591] Dr Thom stressed that her reviews of ASIO processes did not currently extend to merit reviews of its decisions:

> We can look at the process that ASIO has followed, to ensure that it is lawful and proper. For example, we look to see whether the correct legal tests and thresholds were satisfied and whether the relevant ASIO officer was authorised to take action.[592]

6.129 Dr Thom discussed the possibility of review rights being extended to noncitizens:

> I note that one of my predecessors, Mr Bill Blick, in his 1998-99 annual report recommended to the then Attorney-General that the government introduce legislation to provide a determinative review process for refugee applicants where they have valid asylum claims. It is worth noting that at the time he said it would apply to no more than a handful of cases in any one year. It should also be remembered that Mr Blick's comments were made 12 years ago, prior to 9-11 and in a different environment. In the 2006-07 annual report, while not endorsing Mr Blick's recommendation, Mr Ian Carnell said that he thought it would be worthwhile revisiting this proposal. Mr Carnell also noted at the time that the number would be very small and hence cost would not be a barrier. I would comment that I do not disagree with Mr Carnell's suggestion that perhaps it is appropriate to re-examine this issue. It is a matter that is attracting major public attention, but it is a complex matter that will require careful consideration of national

590 Mr David Irvine, Director-General, ASIO, *Proof Committee Hansard,* 22 November 2011, p. 29.

591 Dr Vivienne Thom, Inspector-General of Intelligence and Security, *Proof Committee Hansard,* 22 November 2011, p. 37.

592 Dr Vivienne Thom, Inspector-General of Intelligence and Security, *Proof Committee Hansard,* 22 November 2011, p. 37.

> security issues and the rights of individuals, because these decisions do have serious impacts on individuals.[593]

6.130 The Committee sought many views in looking for a way to balance the situation of refugees in indefinite detention with national security considerations. The Law Council of Australia stated:

> There are a number of options that are on the table. One is that the committee could look at removing the current restriction for people to apply for merits review of their security assessment in the Administrative Appeals Tribunal. That restriction does not apply to Australian citizens but it does apply to noncitizens. One recommendation which has been made both by the Human Rights Commission and the Inspector-General of Intelligence and Security is that that restriction be removed, so that people can actually test the merits of that decision.[594]

6.131 The United Nations High Commissioner for Human Rights pointed to appropriate means of finding a balance between the competing interests of national security and fairness:

> We have made some suggestions around that—the possible use of a special advocate system, the use of redacted evidence that can be looked at, and the possible lifting of the restriction for refugee or asylum-seeker claimants to access an appeal mechanism, such as the Administrative Appeals Tribunal. Those are all areas where we think an appropriate accommodation or balance can be found between these two difficult sets of issues. I can, of course, answer more questions about that, if you wish.[595]

6.132 The Committee acknowledges widespread support for the establishment of a merits review process for adverse security assessments. The following sections outline review mechanisms the Committee has considered. Some of the mechanisms may be complementary and able to be implemented simultaneously.

Internal ASIO reviews

6.133 The Committee considered the potential benefits of requiring ASIO to conduct periodic reviews of all adverse assessments. The Law Council posited that a negative assessment was, at present, seemingly permanent:

> At the moment, our understanding is that, once you have an adverse ASIO assessment, you have that virtually for life. There may be information that

593 Dr Vivienne Thom, Inspector-General of Intelligence and Security, *Proof Committee Hansard,* 22 November 2011, p. 37.

594 Ms Rosemary Budavari, Co-Director, Criminal Law and Human Rights, Law Council of Australia, *Proof Committee Hansard,* 22 November 2011, p. 7.

595 Mr Richard Towle, United Nations High Commissioner for Human Rights, *Proof Committee Hansard,* 22 November 2011, p. 10.

> can come to light later in the process which would justify a review of that assessment.[596]

6.134 Although ASIO is 'always prepared if a person is referred or additional information comes to light to revise our judgement,' there is currently no requirement for to conduct *periodic* reviews. [597]

6.135 As matters stand reviews are possible but not routine. A case has to be referred to ASIO by DIAC, or the former has to reach the decision to conduct a review on the basis of new information that has come to light.[598] Such reviews have not produced new outcomes in the past. Mr Metcalfe informed the Committee that he could recall only one case where a revised ASIO assessment resulted in a different outcome for someone:

> The only case that I can recall of a reconsideration which resulted in a person being treated differently was one of the last [people] detained on Nauru and who was brought to Australia because of severe mental illness. In that case, ASIO subsequently revised their opinion and indicated that the person was not a security concern. Of the current case load, there is no appeal mechanism against an adverse security assessment of a person who is not a visa holder, and that of course is a policy matter for the Attorney-General.[599]

Expanding the powers of the Federal Court

6.136 Another option considered by the Committee was that of a panel of security-cleared Federal Court judges reviewing evidence, with refugees subject to adverse ASIO assessments being represented by security cleared lawyers, otherwise known as special advocates. Professor Ben Saul explained special advocate procedure in place in Britain, Europe and Canada:

> The function of a special advocate is twofold. Firstly, they have a role in testing the government's argument that the evidence or information cannot be safely disclosed, and then if they win that argument and the evidence can be safely disclosed to the person, the person has a shot at testing its merits before the procedure. If it is not admitted, the special advocate then performs a second function, which is making submissions on behalf of the client, without instructions from the client, about the reliability of the

596 Ms Rosemary Budavari, Co-Director, Criminal Law and Human Rights, Law Council of Australia, *Proof Committee Hansard,* 22 November 2011, p. 7.

597 Mr David Irvine, Director-General, ASIO, *Proof Committee Hansard,* 22 November 2011, p. 34.

598 Mr David Irvine, Director-General, ASIO, *Proof Committee Hansard,* 22 November 2011, p. 34.

599 Mr Andrew Metcalfe, Secretary, DIAC, *Proof Committee Hansard,* 9 December 2011, p. 46.

> evidence on the merits. So at least somebody then is testing the merits of the evidence.[600]

6.137 Were a similar system to be adopted here, one of the key changes be a broadening of what judges could examine or test. At present, judges may on occasion look at evidence or lawyers may receive security clearance on an *ad hoc* basis. However, judges are currently empowered to look only at errors of law, not the merits of a case.[601]

6.138 The Committee sought views on how well such a system would function in place of a tribunal, were the law to be changed so that a judge could have broader powers of testing the merits of a particular security assessment, whilst satisfying ASIO's concerns about revealing sensitive information. Professor Saul was of the view that expanding the powers of the Federal Court in such a way would be possible, and explained different versions of the concept:[602]

> You could do it where the person gets to see the information and test it before that procedure, or you could do it in the more limited compromised fashion, which is through the special advocate process, which is what happens in the Special Immigration Appeals Commission in the UK and in a different manner in Canada. I think the broader point is that it would certainly enhance public confidence in justice if you had a federal judge involved in some kind of process like that and it would go a long way towards meeting Australia's international human rights obligations to provide a fair hearing in these cases.[603]

6.139 The Gilbert and Tobin Centre of Public Law within the University of New South Wales Faculty of Law (Gilbert and Tobin) had reservations about such a proposal:

> 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.[604]

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600 Professor Ben Saul, *Proof Committee Hansard,* 5 October 2011, p. 17. For a detailed analysis of legal approaches to the security assessment of refugees in overseas jurisdictions see Professor Ben Saul, *Submission 130, Supplementary,* pp 1–6.

601 See discussion with Professor Ben Saul, *Proof Committee Hansard,* 5 October 2011, pp 17–18.

602 Professor Ben Saul, *Proof Committee Hansard,* 5 October 2011, pp 17–18.

603 Professor Ben Saul, *Proof Committee Hansard,* 5 October 2011, p. 18.

604 Gilbert & Tobin, *Submission 21, Attachment 1,* p. 1.

6.140 Instead, legal experts from Gilbert and Tobin expressed a preference for making use of an existing tribunal, instead of expanding the roles and responsibilities of judges:

> 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.[605]

6.141 Considering the above evidence, the Committee turned to the possibility of utilising the Administrative Appeals Tribunal for merit reviews of adverse refugee security assessments.

Administrative Appeals Tribunal

6.142 The Committee considered the feasibility of establishing a right of merit review for refugees through the Administrative Appeals Tribunal (AAT). Professor Saul reminded the Committee that:

> Section 36 of the ASIO Act provides that the procedural fairness protections of Part IV of the ASIO Act, including merits review before the Administrative Appeals Tribunal ('AAT'), do not apply to a person who is not an Australian citizen or a permanent resident. The authors accordingly are unable to challenge the merits of their security assessments in the AAT.[606]

6.143 Refugees in this situation, the Committee heard, 'are in an incredible bind', and have no hope except that the ASIO Director-General may change his or her mind and decide to disclose evidence:[607]

> You get no merits tribunal at the outset, because the Administrative Appeals Tribunal, AAT, review is simply precluded by the ASIO Act. If it comes before a merits tribunal in the immigration context, no information is usually before that tribunal. For offshore entry persons you do not even get that kind of tribunal. If you try to go to the Federal Court, which you can do in theory, firstly it is impossible to identify jurisdictional error or errors of law if you have not seen the case against it, so it is very difficult to commence proceedings. Secondly, if you get in the door you are usually knocked out for one of two reasons. Firstly, procedural fairness is diminished in the words of the Full Federal Court in the Leghaei case to nothingness if the ASIO Director-General considers that it is not safe to

605 Gilbert & Tobin, *Submission 21, Attachment 1,* p. 2.
606 Professor Ben Saul, *Submission 130, Attachment,* p. 15.
607 Professor Ben Saul, *Proof Committee Hansard,* 5 October 2011, p. 17.

> provide any evidence because that would prejudice national security. Secondly, ASIO can rely on public interest immunity to preclude the admissibility of evidence in court in any case.[608]

6.144 Gilbert and Tobin considered whether the ASIO Act precludes merits reviews, adding that a mechanism for reviews of ASIO security assessments already exists within the AAT:

> 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.[609]

6.145 Gilbert and Tobin pointed to the Security Appeals Division, already in existence within the AAT and constituted subject to section 21AA of the *Administrative Appeals Tribunal Act 1975* (the AAT Act). The AAT Act purportedly allows a Tribunal constituting a) and Presidential Member, and b) two other members (of which one has to possess knowledge or experience relating to the needs and concerns of immigrants) assigned to the Security Appeals Division to review adverse assessments made by ASIO.

6.146 The Committee took further evidence on the workings of the Security Appeals Division of the AAT:

> 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...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.[610]

6.147 The Committee concludes that mechanisms for merits reviews of adverse assessments exist and could be used to review such assessments of refugees, were it not for the stipulations in section 36 of the ASIO Act.

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608 Professor Ben Saul, *Proof Committee Hansard,* 5 October 2011, p. 17.
609 See Gilbert & Tobin, *Submission 21, Attachment 1*, p. 2.
610 See Gilbert & Tobin, *Submission 21, Attachment 1*, p. 2.

Committee view

6.148 The Committee recognises the need to protect national security, and does not doubt that ASIO is highly discriminating in the use of adverse security assessments. However, the Committee resolutely rejects the indefinite detention of people without any right of appeal. Such detention, effectively condemning refugees who have not been charged with any crime to detention for the term of their natural life, runs counter to the basic principles of justice underpinning Australian society. For this reason, the Committee urges the government to find a solution which will protect national security whilst also protecting the rights of refugees under international law.

6.149 The Committee notes that ASIO already, on occasion, reviews particular cases if additional information comes to light and/or on referral from DIAC. The Committee is of the view that ASIO could partly address community concerns by establishing periodic reviews of its adverse refugee security assessments. The Committee did not take evidence on how often such reviews should take place, and is mindful of the resources necessary for such an undertaking. The Committee suggests that 12-monthly reviews are a positive starting point.

6.150 Fundamentally, however, the Committee believes that extending the right of merit reviews to refugees with adverse security assessments is the most straightforward way of protecting against indefinite detention and ensuring probity. Provisions effectively barring refugees from appealing adverse security assessments were inserted into the ASIO Act in 1979 and were designed for a different time, a time when Australia was not grappling with the challenges presented by large numbers of asylum seekers in detention. Those provisions have regrettably resulted in some dramatic, potentially life-shattering consequences for refugees who receive adverse security assessments. The Committee is firmly of the view that the ASIO Act can be amended to allow for refugees and other non-citizens currently in indefinite detention to have access to relevant details of their case without impinging on national security. Merit reviews are currently available for Australian residents who receive similar adverse security assessments. On the balance of evidence gathered during the course of this inquiry, the Committee sees no compelling reason to continue to deny non-residents the same access to procedural fairness.

Recommendation 27

6.151 The Committee recommends that the Australian Government and the Australian Security Intelligence Organisation establish and implement periodic, internal reviews of adverse Australian Security Intelligence Organisation refugee security assessments commencing as soon as possible.

Recommendation 28

6.152 The Committee recommends that the Australian Security Intelligence Organisation Act be amended to allow the Security Appeals Division of the Administrative Appeals Tribunal to review the Australian Security Intelligence Organisation security assessments of refugees and asylum seekers.