



Australian
Human Rights
Commission

Immigration detainees with adverse security assessments v Commonwealth

[2013] AusHRC 64

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**Immigration detainees with
adverse security assessments v
Commonwealth of Australia
(Department of Immigration and
Citizenship)**

Report into arbitrary detention and the
best interests of the child

[2013] AusHRC 64

Australian Human Rights Commission 2013



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**Australian
Human Rights
Commission**

May 2013

The Hon. Mark Dreyfus QC MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I have completed my report pursuant to s 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaints made by 9 people in immigration detention with adverse security assessments.

I have found that the following two acts of the Commonwealth resulted in arbitrary detention contrary to article 9(1) of the *International Covenant on Civil and Political Rights*:

- (a) the failure by the Department of Immigration and Citizenship (the department) to ask the Australian Security Intelligence Organisation (ASIO) to assess their individual suitability for community based detention while awaiting their security clearance (either at all, or for a period of at least a year without reasonable explanation); and
- (b) the failure to assess on an individual basis whether the circumstances of each individual complainant indicated that they could be placed in less restrictive forms of detention.

In relation to one of the complaints who is a child, I have also found the failure of the department to consider fully alternatives to closed detention in a way that included an assessment of the specific security risk of alternatives and how that risk could be mitigated, was inconsistent with or contrary to articles 3 and 37(b) of the *Convention on the Rights of the Child*.

By letters dated 26 April 2013 the Hon Brendon O'Connor MP, Minister for Immigration and Citizenship, and the Department of Immigration and Citizenship provided responses to my findings and recommendations. I have set out the responses of the Minister and the department in their entirety in part 12 of my report.

Please find enclosed a copy of my report.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Gillian Triggs', with a long horizontal flourish underneath.

Gillian Triggs
President
Australian Human Rights Commission

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1 Introduction to this report

1. This is a report into the Australian Human Rights Commission's inquiry into complaints by nine people in immigration detention with adverse security assessments against the Commonwealth of Australia alleging a breach of their human rights. Eight of these people (including one child) have been assessed as being refugees. One complainant has not been found to be a refugee but has been assessed as engaging Australia's non-refoulement obligations under the *International Covenant on Civil and Political Rights* (ICCPR)¹ and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).²
2. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
3. I have directed that the identities of each of the complainants not be published in this report in accordance with s 14(2) of the AHRC Act. For the purposes of this report each complainant whose identity has been suppressed has been given a pseudonym beginning with E. A list of each of the complainants' full names has been provided to the Department of Immigration and Citizenship (the department) and the Minister for Immigration and Citizenship (the Minister).
4. All members of this group have made complaints in writing in which they allege that their ongoing immigration detention is arbitrary and therefore inconsistent with the human rights recognised in article 9(1) of the ICCPR.
5. Additionally, a complaint made on behalf of Master EH (aged 4 at the time of the complaint) by his mother Ms EG alleges that his detention is inconsistent with the rights articulated under articles 3 and 37(b) of the *Convention on the Rights of the Child* (CRC).³
6. Ms EG and Master EH have also made a complaint under article 10 of the ICCPR in relation to the conditions of their detention. The Commission is conducting a separate inquiry into this complaint.
7. The situation of the present complainants is substantially similar to the situation of the complainants who were the subject of the Commission's report *Sri Lankan refugees v Commonwealth of Australia (Department of Immigration & Citizenship)* [2012] AusHRC 56. In my letter to the department dated 10 August 2012, I indicated that I intended to rely on material produced by the Commission in the course of that previous inquiry and on material provided to the Commission including the submissions by the Minister and the department. In this report, I refer to findings made in the course of report [2012] AusHRC 56.
8. As a result of the inquiry, I find that the following two acts of the Commonwealth were inconsistent with or contrary to the rights of the complainants recognised under article 9(1) of the ICCPR:
 - (a) the failure by the department to ask the Australian Security Intelligence Organisation (ASIO) to assess their individual suitability for community based detention while awaiting their security clearance (either at all, or for a period of at least a year without reasonable explanation);
 - (b) the failure to assess on an individual basis whether the circumstances of each individual complainant indicated that they could be placed in less restrictive forms of detention.
9. I also find that the failure by the Commonwealth to consider fully alternatives to closed detention for Ms EG and Master EH in a way that included an assessment of the specific security risk of alternatives and how that risk could be mitigated, was inconsistent with or contrary to articles 3 and 37(b) of the CRC.

2 Background

10. The individuals identified in the table below have made complaints in writing to the Commission. The table sets out the date on which each of them was detained, the date that they were found to be a refugee (or in the case of Mr EC the date that he was found to be owed protection obligations following an International Treaties Obligation Assessment (ITOA)), and the date that the department received an adverse security assessment in respect of them from ASIO.

Complainant	Arrived in Australia	Refugee/ITOA finding	ASA finding
Mr EA	13 August 2009	15 October 2009	16 February 2011
Mr EB	23 September 2009	19 March 2010	31 January 2011
Mr EC	23 September 2009	22 July 2010 (ITOA)	5 January 2011
Mr ED	22 October 2009	17 December 2009	24 May 2011
Mr EE	1 March 2010	7 July 2010 (although not notified until 12 January 2011)	26 August 2011
Mr EF	20 March 2010	19 August 2010	17 August 2011
Ms EG	20 March 2010	23 June 2010 (although not notified until 4 March 2011)	24 October 2011
Master EH	20 March 2010	23 June 2010 (although not notified until 4 March 2011)	N/A
Mr EI	20 September 2010	6 January 2011	20 February 2012

11. All of the complainants arrived in Australia at Christmas Island by boat and were detained on behalf of the Commonwealth under s 189(3) of the *Migration Act 1958* (Cth) (Migration Act) immediately upon their arrival.

12. The Commonwealth has determined that all of the complainants other than Mr EC are refugees within the meaning of the *1951 Convention Relating to the Status of Refugees*⁴ and the *1967 Protocol relating to the Status of Refugees*.⁵ Mr EC has been assessed as engaging Australia's *non-refoulement* obligations under the ICCPR and the CAT.
13. Each of the adult complainants (that is, all of the complainants other than Master EH who was aged 4 at the time of the complaint) has received an adverse security assessment from ASIO.

3 Legislative framework

3.1 Functions of the Commission

14. Section 11(1) of the AHRC Act identifies the functions of the Commission. Relevantly s 11(1)(f) gives the Commission the following functions:
 - to inquire into any act or practice that may be inconsistent with or contrary to any human right, and:
 - (i) where the Commission considers it appropriate to do so – to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
 - (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement – to report to the Minister in relation to the inquiry.
15. Section 20(1)(b) of the AHRC Act requires the Commission to perform the functions referred to in s 11(1)(f) when a complaint in writing is made to the Commission alleging that an act is inconsistent with or contrary to any human right.
16. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.

3.2 What is a 'human right'?

17. The rights and freedoms recognised by the ICCPR and the CRC are 'human rights' within the meaning of the AHRC Act.⁶ The following articles of the ICCPR and the CRC are relevant to the acts and practices the subject of the present inquiry.
18. Article 9(1) of the ICCPR provides:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
19. Article 3(1) of the CRC provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

20. Article 37(b) of the CRC provides:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

3.3 What is an ‘act’ or ‘practice’

21. The terms ‘act’ and ‘practice’ are defined in s 3(1) of the AHRC Act to include an act done or a practice engaged in by or on behalf of the Commonwealth or an authority of the Commonwealth or under an enactment.

22. Section 3(3) provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.

23. The functions of the Commission identified in s 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken;⁷ that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.

4 The complaints

24. The acts of the Commonwealth to which I have given consideration in relation to each of the complainants are as follows:

Act 1: The failure by the department to ask ASIO to assess their individual suitability for community based detention while awaiting their security clearance.

Act 2: The failure to assess on an individual basis whether the circumstances of each individual complainant indicated that they could be placed in less restrictive forms of detention.

25. Each of these acts is considered in the context of article 9 of the ICCPR and, in the case of Master EH, the acts are considered in the context of articles 3 and 37(b) of the CRC.

26. For the reasons set out below, I find that each of Acts 1 and 2 was inconsistent with or contrary to the rights of the complainants under article 9 of the ICCPR and, in the case of Master EH, articles 3 and 37(b) of the CRC.

5 Arbitrary detention

27. The following principles relating to arbitrary detention within the meaning of article 9 of the ICCPR arise from international human rights jurisprudence:

(a) ‘detention’ includes immigration detention;⁸

(b) lawful detention may become arbitrary when a person’s deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth’s legitimate aim of ensuring the effective operation of Australia’s migration system;⁹

- (c) arbitrariness is not to be equated with 'against the law'; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability;¹⁰ and
- (d) detention should not continue beyond the period for which a State party can provide appropriate justification.¹¹

28. In *Van Alphen v The Netherlands*¹² the UN Human Rights Committee found detention for a period of two months to be arbitrary because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime. Similarly, the HRC considered that detention during the processing of asylum claims for periods of three months in Switzerland was 'considerably in excess of what is necessary'.¹³
29. The UN Human Rights Committee has held in several cases that there is an obligation on the State Party to demonstrate that there was not a less invasive way than detention to achieve the ends of the State Party's immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was arbitrary.¹⁴
30. The United Nations Working Group on Arbitrary Detention has expressed the view that the use of administrative detention for national security purposes is not compatible with international human rights law where detention continues for long periods or for an unlimited period without effective judicial oversight.¹⁵ A similar view has been expressed by the Human Rights Committee, which has said:

if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law ... information of the reasons must be given ... and court control of the detention must be available ... as well as compensation in the case of a breach¹⁶
31. The Working Group emphasised that people who are administratively detained must have access to judicial review of the substantive justification of detention as well as sufficiently frequent review of the ongoing circumstances in which they are detained, in accordance with the rights recognised under article 9(4) of the ICCPR.¹⁷
32. A short period of administrative detention for the purposes of developing a more durable solution to a person's immigration status may be a reasonable and appropriate response by the Commonwealth. However, detention for immigration purposes without reasonable prospect of removal may contravene article 9(1) of the ICCPR.¹⁸

6 Act 1: Failure by the department to ask ASIO to assess the individual suitability of the complainants for community based detention while awaiting their security clearance

6.1 Security clearance process

33. At the time of the lodging of the complaints in this matter (and at the time that each of the complainants received their adverse security assessment) most classes of visas, including protection visas, contained a requirement that the applicant meet public interest criteria 4002 (the security requirement).
34. The High Court has since held in *Plaintiff M47/2012 v Director General of Security* [2012] HCA 46 that the prescription of public interest criterion 4002 as a criterion for the grant of a protection visa is beyond the power conferred by s 31(3) of the Migration Act and is invalid.
35. The former security requirement was described in the department's Procedures Advice Manual at the relevant time as intended to 'protect the resident Australian community from the actions and influence of persons who might threaten the security of the nation'.¹⁹ Security assessments against public interest criteria 4002 were carried out by ASIO at the request of the department. The ASIO security assessment is based on the definition of 'security' in s 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act) which is in the following terms:

security means:

- (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
- (i) espionage;
 - (ii) sabotage;
 - (iii) politically motivated violence;
 - (iv) promotion of communal violence;
 - (v) attacks on Australia's defence system; or
 - (vi) acts of foreign interference;
- whether directed from, or committed within, Australia or not; and
- (aa) the protection of Australia's territorial and border integrity from serious threats; and
- (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

36. ASIO has the function under s 37 of the ASIO Act of furnishing security assessments to Commonwealth agencies that are relevant to the functions and responsibilities of those agencies. A security assessment is relevantly defined in s 35 of the ASIO Act as a statement in writing furnished by ASIO to a Commonwealth agency expressing any recommendation, opinion or advice on whether it would be consistent with the requirements of security for a prescribed administrative action to be taken in respect of a person. In the case of an assessment against public interest criteria 4002, the prescribed administrative action is the granting of a visa, such as a protection visa. That is, ASIO provides advice to the department about whether it would be consistent with the requirements of security for a particular person to be granted a visa of a particular type. A security assessment may include 'any qualification or comment expressed in connection with any such recommendation, opinion or advice'.
37. The department may also ask ASIO to carry out other types of security assessments for different purposes. For example, the department also asks ASIO to carry out security assessments in relation to the exercise by the Minister of powers under s 197AB of the Migration Act to make a residence determination in favour of a person which would allow them to live in community detention.
38. ASIO notes that the type of assessment that it carries out varies according to the purpose for which it has been asked to make an assessment. In particular, the assessment will relate to the particular administrative action that is proposed (for example, the act of granting a visa or the act of placing someone in community detention).²⁰
39. As noted in the Commission's report [2012] AusHRC 56, ASIO describes the two types of security assessments that it provides to the department in relation to 'irregular maritime arrivals' as follows:
- The first one is to determine suitability of community based detention and the second one is to determine the suitability for an individual to reside permanently in Australia.²¹
40. ASIO confirmed in its Report to Parliament for 2010-11 that different considerations apply to each type of assessment.²² ASIO also noted in response to questions asked by the Commission in relation to report [2012] AusHRC 56 that:
- A community detention assessment is a form of advice to DIAC on the security implications of placing an individual in community detention. Community detention assessments are not assessments of the security implications of the individual being granted a visa to remain in Australia.
- Not all individuals are referred to ASIO for community detention assessment. For example, minors under 16 are not referred for this purpose.²³
41. ASIO says that it usually responds to requests for community detention assessment within 24 hours.²⁴ ASIO stated that the quicker community detention assessment could be carried out in advance of a security assessment in relation to the grant of a visa if a request for such a community detention assessment were made by the department.²⁵
42. The department has confirmed that it now agrees with the above statements by ASIO and that it does not consider that the assessment provided by ASIO for the purpose of determining whether a visa should be granted is the same as the assessment provided by ASIO for the purpose of determining whether a person should be placed in community detention.²⁶

43. By contrast, in his response to report [2012] AusHRC 56 at paragraph 173 on pages 31-33, the Minister said that ‘the question being asked is the same in each case’. The Minister said that ASIO is being asked a general question about ‘whether the individual assessed presents a risk to security’. However, as set out above, in each case ASIO is in fact being asked a more specific question of whether it would be consistent with the requirements of security for the department to do a particular act. This question will be different if the act is different. As a result, the answer may well also be different. This issue is considered in more detail in relation to Act 2 below where the key concern is the policy position taken by the Government that a person who received an adverse security assessment in relation to the grant of a visa should not be considered for community detention (and that ASIO should not be asked whether community detention would or could be consistent with the requirements of security).

6.2 Failure to conduct security assessments for community detention while awaiting PIC 4002 security clearance

44. In respect of six of the single adult male complainants, the department only asked ASIO to perform a security assessment against public interest criteria 4002 in relation to the potential grant of a visa. The department did not ask ASIO to conduct an assessment to determine the suitability of community based detention.
45. The department confirmed that, prior to the Government’s announcement on 18 October 2010 that it proposed to expand the use of community based detention for identified vulnerable irregular maritime arrivals, there were no protocols in place for the referral of clients to ASIO for the provision of security advice regarding community detention placement.²⁷ From 18 October 2010, women, children and family groups were considered for community detention.
46. From January 2011, single adult males were identified as eligible for referral to ASIO. Only one of the adult males in this group of complainants was so referred.
47. Six complainants were detained for between 15 and 19 months before a security assessment was provided by ASIO to the department. In four of these cases (Mr EA, Mr ED, Mr EE and Mr EI) the complainant was detained in an immigration detention facility for more than a year between being found to be a refugee and receiving an adverse security assessment.
48. In circumstances where a community detention assessment could have been conducted within 24 hours, the failure to request such an assessment prior to conducting a full security assessment may have had the effect of requiring the complainant to remain in an immigration detention facility much longer than was necessary, pending the outcome of their security assessment.
49. In the case of Mr EI, a referral to ASIO for advice about community detention was made on 25 October 2011, more than 13 months after he arrived in Australia and more than nine months after he was found to be a refugee. On 7 November 2011, ASIO advised as follows:
- ASIO recommends that the Minister for Immigration and Citizenship should not exercise his powers under the Immigration Act 1958 [sic] as it would not be in the public interest. This assessment is limited to the question of the Minister exercising his power under section 197AB of the Act and a further security assessment will be provided in due course about the security consequences of the Minister granting a visa to the individual.²⁸
50. Three and a half months later, on 20 February 2012, Mr EI received an adverse security assessment in relation to the grant of a visa.

51. I note that community detention was considered to be an appropriate option for Ms EG and her young son Master EH pending their security assessment. They arrived in Australia on 20 March 2010. On 23 June 2010 they were found to be refugees although they were not informed of this determination until 4 March 2011, over 8 months later. On 6 April 2011 a residence determination was made in their favour and they were released from closed detention and placed in community detention. At the time of this residence determination, the submission to the Minister noted:²⁹
- They are currently awaiting the outcome of their security assessment. ...
- The Department has advised the external agency of this community detention consideration and they have raised no objections on security grounds, noting that this is not an assessment in relation to the security implications of them being granted visas to remain in Australia.
- There is no information that the Department holds that would suggest that the ... family would pose a threat to the Australian community that would exclude them from being considered for a community detention placement.
52. Ms EG received an adverse security assessment on 24 October 2011. On 25 November 2011 the residence determination made in her favour was revoked. I deal in some more detail at paragraphs 63 to 64 and 70 below with the alternatives to revocation put to the Minister by the department at the time.
53. I find that the failure by the department to ask ASIO to conduct an assessment for the following complainants to determine the suitability of community based detention while a security assessment in relation to the grant of a visa was carried out was inconsistent with or contrary to article 9(1) of the ICCPR because a community detention assessment could have been conducted quickly and may have led to the complainants being held in a less restrictive form of detention.
54. This act is relevant to the situations of each of the following complainants. The time in brackets indicates the period of time that they were held in detention prior to the security assessment by ASIO being completed:
- Mr EA (18 months);
 - Mr EB (16 months);
 - Mr EC (15 months);
 - Mr ED (19 months);
 - Mr EE (18 months);
 - Mr EF (17 months).
55. I find that the significant delay by the department in asking ASIO to conduct an assessment for the following complainants to determine the suitability of community based detention while a security assessment in relation to the grant of a visa was carried out was also inconsistent with or contrary to article 9(1) of the ICCPR. No reasonable explanation has been provided for this delay and in the circumstances I find that the delay was arbitrary.
56. This act is relevant to the situations of each of the following complainants. The time in brackets indicates the period of time that they were held in closed detention prior to a referral to ASIO for consideration of the security implications of them being placed in community detention:
- Ms EG and Master EH (12 months);
 - Mr EI (13 months).

7 Act 2: Failure to assess on an individual basis whether the circumstances of each complainant indicated that they could be placed in less restrictive forms of detention

7.1 Security clearance as proxy for community detention assessment

57. In the Commission's report [2012] AusHRC 56 at paragraphs 71-83, the then President dealt with the Government's policy position that individuals who received an adverse security assessment in relation to the possible grant of a visa would not be eligible for consideration for community detention. The position was reiterated by the Minister in his response to that report, saying:

As a matter of policy, the Australian Government has determined that, individuals who have been assessed by ASIO to be directly or indirectly a risk to security should remain in held detention, rather than live in the community, until such time as resettlement in a third country or removal is practicable.

58. This policy position has been considered in a number of other reviews of community detention assessments. For example, in its June 2012 report on security assessments of individuals by ASIO, the Australian National Audit Office noted that:

In certain [irregular maritime arrival] cases, the individual has been assessed by DIAC as meeting the definition of a 'refugee', but has also been given an adverse security assessment by ASIO. Such people are not eligible for the grant of a permanent Protection visa and, under current policy parameters, are presently ineligible for release into community detention.³⁰

59. The policy has been applied to the circumstances of each of the present complainants. In a number of cases, the relevant case officers for complainants made a request to the Complex Case Resolution Section (CCRS) within the department for consideration of community detention rather than closed detention. In each case, CCRS determined that the cases would not be referred to the Minister for consideration of community detention because of the Government's policy that detainees with adverse security assessments in relation to the grant of a visa should not be placed in the community.

60. For example:

- In the case of Mr EB, on 13 July 2011 his case manager referred his case to the CCRS for consideration of a community detention placement. Notes on his case review by the department indicate that on 19 October 2011 CCRS advised that Mr EB 'did not meet the guidelines for CD due to adverse security assessment'.

- In the case of Mr ED, the department said that: 'Although a referral for consideration against the Minister's s197AB guidelines was initiated in departmental systems on two occasions, [Mr ED] has not been formally considered for community detention in line with the government's position on managing clients with adverse security assessments within held immigration detention'.³¹
- In the case of Mr EF, notes on his case review by the department indicate that he was referred for consideration of a community detention placement on 31 August 2011. The notes indicate that on 13 December 2011, CCRS advised that Mr EF 'did not meet the guidelines for CD due to adverse security assessment'.

61. In relation to Mr EA, Mr EC and Mr EE no referral for consideration of community detention was made prior to them receiving an adverse security assessment. The department has said that the current position for each of them is that: 'In line with the Government's position regarding clients with an adverse security assessment, these clients will remain in held immigration detention while third country resettlement is explored'.³²
62. As noted above, Ms EG and her young son Master EH were initially placed in community detention pending the outcome of the security assessment of Ms EG in relation to her application for a visa. Ms EG received an adverse security assessment on 24 October 2011. On 23 November 2011, the department provided a submission to the Minister containing three options: maintain the current residence determination, maintain the current residence determination with amended conditions or revoke the residence determination. The submission to the Minister noted:³³
- [Ms EG] has been resident at the above address since 6 April 2011 and has adhered to the conditions associated with her community detention placement There have been no reported minor or major incidents while she has been in community detention. ...
- Given her compliance, it would be open to you to maintain [Ms EG's] current detention arrangements. We note the adverse security assessment has been made in relation to an application for a permanent visa, and not for the residence determination made in relation to the ... family.
63. As the department's submission makes clear, the adverse security assessment in relation to the grant of a permanent visa to Ms EG was not an adverse security assessment in relation to community detention. It was a matter for the Minister to determine whether to consider allowing Ms EG and her son to remain in community detention subject to additional conditions. The decision that was made was to revoke her residence determination and to require Ms EG and her son to be detained in closed detention.
64. The Commission is concerned that the individual circumstances of each of the complainants were not taken into account in assessing whether community based detention (or some other less restrictive form of detention than detention in an immigration detention facility) was appropriate and consistent with any risk the complainants posed to security. Instead, Government policy makes assumptions about the security risk of community detention based on a security assessment carried out for another purpose. Further, no consideration has been given to how any risk associated with community detention could be mitigated.

7.2 Mitigation of potential risk

65. It may well be that there are alternative options to prolonged detention in secure facilities which can be appropriately provided to the complainants despite their having received adverse security assessments. These alternative options may include less restrictive places of detention than immigration detention centres as well as community detention, if necessary with conditions to mitigate any identified risks. Conditions could include a requirement to reside at a specified location, curfews, travel restrictions, regular reporting and possibly even electronic monitoring.
66. The Guidelines promulgated by the Minister in relation to the exercise of public interest powers under s 197AB and s 197AD of the Migration Act provide that the department may refer cases to the Minister along with a submission that indicates 'how any potential risk can be mitigated through the use of conditions I may place on the residence determination'. These guidelines were considered in more detail in the Commission's report [2012] AusHRC 56 at paragraphs 64 to 68.
67. In the course of this inquiry, I asked the department what consideration had been given to conditions to mitigate any potential risk and to provide copies of any documents relating to this consideration. The department's response was as follows:³⁴

In line with the government's position on managing clients with adverse security assessments, clients are being managed within held immigration detention. By virtue of the adverse security assessment these clients are not individually considered for a community detention placement or for a temporary visa. Consequently, the Department has not conducted individualised mitigation assessments and as such there are no documents to be referred.

68. That is, the policy decision not to allow any clients with an adverse security assessment to apply for community detention means that the department has not considered whether or how any risks to security could be mitigated.
69. The only exception to this in relation to this group of complainants appears to be the submission in relation to Ms EG and her son Master EH. The submission to the Minister following Ms EG's adverse security assessment included the following statement:³⁵

It would be open to you to maintain [Ms EG's] current detention placements with amendments to the conditions associated with her community detention placement (under section 197AD), for example, by increasing her interactions with the Department of Immigration and Citizenship and or to require her to engage with the International Organization for Migration in respect of options for departing Australia (refer to amended conditions under section 197AD attached to residence determination at [Attachment E](#)).

70. The amended conditions were not agreed to by the Minister and Ms EG's residence determination was revoked.

7.3 Residence determinations

71. As noted above, lawful immigration detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system. Accordingly, where alternative places of detention that impose a lesser restriction on a person's liberty are reasonably available, and where detention in an immigration detention centre is not demonstrably necessary, prolonged detention in an immigration detention centre may be disproportionate to the goals said to justify the detention.

72. The complainants claim that it is open to the Minister to permit them to live in the community subject to a 'residence determination'. Section 197AB permits the Minister, where he thinks that it is in the public interest to do so, to make a residence determination to allow, subject to conditions, one or more specified persons to reside in a specified place instead of being detained. A 'specified place' may be a place in the community.
73. The department has developed a client placement model pursuant to which persons with a range of individual circumstances may meet the guidelines for referral to the Minister for consideration of a community detention placement.³⁶ These circumstances include families with minor children and persons whose prospect of removal is unlikely within a reasonable time frame and who are not eligible for a 'removal pending' bridging visa. The present complainants fall within these identified circumstances.
74. However, there has been a decision by the Minister to instruct the department not to refer to him for consideration under s 197AB any cases where a refugee has been given an adverse security assessment in relation to the grant of a visa.
75. The act of the department not to refer each complainant's case to the Minister for consideration under s 197AB (or alternatively the instruction by the Minister based on the Government's policy identified above) was not required by law. It is an 'act' for the purposes of s 3 of the AHRC Act.
76. It appears that this act was done without considering the individual circumstances of each of the complainants to determine whether community detention (or some other less restrictive form of detention than detention in an immigration detention facility) was appropriate. In particular, it appears that no comprehensive and individualised assessment has been undertaken in respect of each complainant to assess whether any risk they may pose to the Australian community could be addressed (for example by the imposition of particular conditions) without their being required to remain in an immigration detention facility.
77. For completeness, I note that it would also be open to the Minister to grant a visa to any of the complainants under s 195A of the Migration Act, again subject to any conditions necessary to take into account their specific circumstances.
78. I find that the act identified above is inconsistent with or contrary to article 9(1) of the ICCPR in that it results in ongoing detention in immigration detention facilities of people to whom Australia has protection obligations, and who may be eligible for placement in community detention (or a visa at the discretion of the Minister), without adequate consideration of their individual circumstances and the extent to which they pose any particular risk to the Australian community.
79. The breach identified above arises from a failure adequately to consider less restrictive forms of detention or alternatives to detention taking into account the circumstances of each complainant. The Commission does not express any view as to what the outcome of any such consideration in each particular case would be.

8 Third country resettlement

80. Half of the complainants in this matter have been detained in closed detention facilities for more than two years (excluding time spent by Ms EG and Master EH in community detention) and the other half for more than three years.
81. The Commission has asked the department to provide details of the steps taken by it to pursue third country resettlement options.

82. Mr EB provided details of family members in two countries. The department has been advised that neither country will resettle Mr EB, although it appears that one may be willing to consider an application for family reunion. Mr EC provided details of a family member in one country. The department has been advised that that country will not resettle Mr EC. Mr EF provided details of a family member in one country. The department has been advised that that country will not resettle Mr EF.
83. In relation to all of the complainants other than Mr EB, it appears that the only prospect of third country resettlement is as a result of approaches by Australia to countries where the complainants do not have direct family links. The department has described these as 'cohort approaches'. The department has provided copies of memoranda to the Minister containing updates as to these cohort approaches. These memoranda reveal that several countries have declined the request. In relation to the countries approached that have not declined the request and in relation to other countries suggested for a possible approach, there is no indication that there is any realistic prospect that they will agree to resettle the complainants.
84. The department noted that 'it is recognised that we should not have high expectations that countries would be willing to accept refugees who have been determined by Australian authorities to have adverse security assessments'.
85. In report [2012] AusHRC 56 dated July 2012, the former President indicated her concern about the time it has taken to find a durable alternative to detention for each of the complainants the subject of that report. She encouraged the Commonwealth to continue actively to pursue alternatives to detention for each of the complainants, including the prospect of third country resettlement. If third country resettlement was not possible, she indicated that the Commonwealth should actively consider all other appropriate alternatives to detention.
86. I am also concerned about the time it has taken to find a durable alternative to detention for people with adverse security assessments. I note the lack of both progress and prospects of the third country resettlement approaches. This situation places even greater emphasis on the need to find domestic solutions.

9 Master EH's complaint: articles 3 and 37(b) of the CRC

87. The complaint on behalf of Master EH alleges that his ongoing detention is arbitrary under article 9 of the ICCPR and is also contrary to article 37(b) of the CRC which provides that detention of children should not be arbitrary, should be a measure of last resort, and should be for the shortest appropriate period of time.
88. The claim in relation to article 37(b) also engages article 3 of the CRC which requires that in any decision about the detention of a child their best interests must be a primary consideration.
89. Alternatives to detention include:
- (a) the grant of a bridging or substantive visa such as a protection visa;
 - (b) making a residence determination in favour of him and his mother;
 - (c) offering him resettlement in a third country.

90. Master EH was recognised as a refugee on 23 June 2010 (although the notification to Ms EG was not given until 4 March 2011). He is not the subject of an adverse security assessment.
91. In my letter to the department of 10 August 2012 I noted that it was open to the Minister to grant Master EH a protection visa pursuant to s 195A regardless of whether an application for such a visa had been made. The department has informed me that on 21 August 2012 the Minister 'lifted the s 46A bar' for Master EH which would allow him to make an application for a protection visa and that both Ms EG and her immigration agent were advised of this.
92. Section 4AA of the Migration Act confirms that children should only be detained as a measure of last resort. The reference to detention does not include a reference to a child residing at a place in accordance with a residence determination. Therefore, if it is open to make a residence determination in relation to a child in detention, such a determination should be made.
93. Issues relating to resettlement are dealt with above.
94. I consider that it is in the best interests of Master EH to be released with his mother into the community pursuant to a visa or a residence determination, potentially with conditions attached. It may be that these interests are outweighed by other considerations. However, it does not appear that the Commonwealth has given any separate or specific consideration to the particular security risks of alternatives to closed detention for the family and how any risk could be mitigated. Rather, it appears that the Commonwealth made a decision about the detention of Ms EG based on advice from ASIO that she not be granted a permanent visa which resulted in the consequential detention of Master EH.
95. I find that there has been a failure by the Commonwealth fully to consider available alternatives to closed detention for the family in a way that would be consistent with the best interests of Master EH. As a result, I find that the detention of Master EH was also inconsistent with or contrary to articles 3 and 37(b) of the CRC.

10 Previous recommendations

96. There are a number of recommendations about the processing of people in immigration detention with adverse security assessments that have been made by the Commission, the Inspector-General of Intelligence and Security and the Commonwealth Ombudsman. These recommendations are summarised below.
97. Following these recommendations are the recommendations that I make in relation to the present complaints.

10.1 Previous Commission recommendations

98. The former President of the Commission made a series of recommendations in the Commission's report [2012] AushRC 56 (at paragraphs 162 to 171) which dealt with a number of complainants in similar circumstances to the present complainants. Ms Branson recommended that the Minister indicate to his department that he will not refuse to consider a person in immigration detention for release from detention or placement in a less restrictive form of detention merely because the department has received advice from ASIO that the person not be granted a visa on security grounds.

99. Ms Branson also made a series of recommendations to the department. In summary, she recommended:
- that the department refer each of the complainants to ASIO for advice about whether less restrictive detention could be imposed, if necessary subject to special conditions to ameliorate any identified risk to security;
 - that similar advice be sought in relation to other people in immigration detention with adverse security assessments; and
 - that the department refer cases back to the Minister for consideration of alternatives such as community detention along with details of how any potential risk identified by ASIO could be mitigated.
100. Ms Branson also recommended that Australia continue actively to pursue alternatives to detention, including the prospect of third country resettlement, for all people in immigration detention who are facing the prospect of indefinite detention and to inform each of these individuals on a regular basis of the steps taken.

10.2 Inspector-General of Intelligence and Security recommendations

101. In late 2011, the Inspector-General of Intelligence and Security commenced an inquiry into the process by which ASIO conducts security assessments which are used by the Minister when deciding whether an individual is eligible to be transferred to a community detention arrangement.
102. The Inspector-General reported to the Attorney-General in June 2012 and published an unclassified abridgment of the final report in her Annual Report 2011-12 tabled in Parliament on 10 October 2012.
103. The Inspector-General noted that different considerations applied to security assessments for visas and for community detention. She noted that:
- Whereas a visa to live permanently in Australia cannot be issued if a person is assessed to be directly or indirectly a risk to security, the Minister may allow a person to be transferred to community detention if they are satisfied it is in the public interest.³⁷
104. Further, the Inspector-General noted that ASIO had a statutory function under s 17(1)(c) of the ASIO Act 'to advise Ministers and authorities of the Commonwealth in respect of matters relating to security, in so far as those matters are relevant to their functions and responsibilities'. She considered that this function would allow ASIO to advise the department on conditions that might be applied to individuals with adverse security assessments and how such conditions might serve to mitigate the risk to security.
105. Recommendation 1 by the Inspector-General was in the following terms:
- In cases where ASIO issues an adverse security assessment for community detention but where DIAC has identified significant health, welfare or other exceptional issues, ASIO should engage in a dialogue with DIAC so the Minister for Immigration and Citizenship can be advised on possible risk mitigation strategies and conditions with which a person allowed community detention might be required to comply.

106. ASIO did not formally accept this recommendation but the Acting Director-General indicated that ASIO was 'open to dialogue with DIAC should the department wish to pursue this proposal with us'. The Inspector-General indicated that the Acting Secretary of the department agreed that the approach suggested might help improve the management of some sensitive cases.
107. This recommendation by the Inspector-General seems to be consistent with the recommendations made by President Branson referred to above.

10.3 Ombudsman recommendations

108. Under s 486O of the Migration Act, the Commonwealth Ombudsman is to give an assessment to the Minister of the appropriateness of the arrangements for the detention of persons who have been in immigration detention for more than two years.
109. The Ombudsman has made a number of recommendations in such assessments in relation to persons who are in immigration detention who have been given an adverse security assessment and who face the prospect of indefinite detention.
110. For example, in assessments 643/11 and 652/11 dated 5 September 2011, the Ombudsman recommended that:

DIAC should give consideration to developing, in consultation with the appropriate external agency, a more targeted and flexible assessment process that identifies the specific nature of the risk to the Australian community. Consideration should be given to alternative, less restrictive detention arrangements, including community detention, for those who do not pose a direct threat to the Australian community. In such cases appropriate safeguards and oversight could be put in place to address any security concerns that have been identified in the assessment process.

111. In six assessments dated 30 July 2012 (assessments 662/11, 675/12, 690/12, 805/12, 821/12 and 834/12) and in three assessments dated 16 and 20 August 2012 (assessments 804/12, 847/12 and 982/12), the Ombudsman made the following comments:

The Ombudsman notes with growing concern the increasing number of people held in immigration detention for two years or more who have been found to be owed protection but have received an adverse security assessment from ASIO. Without changes to current policy and practice these people appear likely to remain in a restrictive form of immigration detention for an indefinite period.

The Ombudsman notes ASIO's assessment that these detainees pose a direct or indirect threat to Australia. We also note the Government's duty of care to detainees and the serious risk to mental and physical health the prolonged and indefinite restrictive immigration detention may pose.

The Ombudsman recommends that the Government give the utmost priority to finding a solution that reconciles the management of any security threat with its duty of care to immigration detainees, including considering alternative avenues for managing any security threat.

112. In his statements to Parliament, the Minister noted these concerns.

11 Conclusions and recommendations

11.1 Conclusions

113. I find that the following acts amount to a breach of article 9(1) of the ICCPR:
- (a) the failure by the department to ask ASIO to assess the complainants' individual suitability for community based detention while awaiting their security clearance (either at all, or for a period of at least a year without reasonable explanation);
 - (b) the failure to assess on an individual basis whether the circumstances of each individual complainant indicated that they could be placed in less restrictive forms of detention.
114. The failure to take these steps raises the real possibility that each of the complainants was either detained unnecessarily or detained in a more restrictive way than their circumstances required. The detention of the complainants in these circumstances was arbitrary.
115. I also find that the failure by the Commonwealth to consider fully alternatives to closed detention for Ms EG and Master EH in a way that included an assessment of the specific security risk of alternatives and how that risk could be mitigated, was inconsistent with or contrary to articles 3 and 37(b) of the CRC.
116. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with or contrary to any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.³⁸ The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.³⁹

11.2 Independent review process

117. Before making my recommendations in relation to the present inquiry, I note the steps that have been taken by the Government since the Commission's last report to address the situation of people in immigration detention with adverse security assessments.
118. On 16 October 2012, the Government announced that it would provide an independent review process in relation to adverse security assessments furnished by ASIO to the department in relation to persons in immigration detention who have been found by the department to be owed protection obligations under international law. The Hon Margaret Stone was appointed as the Independent Reviewer.
119. Under the Government's terms of reference, the primary review function of the Independent Reviewer is to:
- conduct an independent review of each relevant adverse security assessment;
 - examine all of the ASIO material that was relied upon by ASIO in making the adverse security assessment;
 - form and record in writing an opinion as to whether the assessment is an appropriate outcome based on the material ASIO relied upon (including any new material) and provide such opinion to the Director-General of ASIO, including recommendations as appropriate;

- provide a copy of that written opinion to the Attorney-General, the Minister and the Inspector-General of Intelligence and Security; and
 - advise the subject of the security assessment in writing of the outcome of the review.
120. On 18 October 2012, the Commission indicated that it welcomed the announcement of the independent review process. In particular, the announcement was an important acknowledgment that there needs to be greater transparency and accountability in the application of ASIO security assessments to asylum seekers and refugees.
121. The Commission noted that it continued to hold concerns that the review process announced is not equivalent to that offered to other people in Australia who have received adverse security assessments, such as permanent residents and special purpose visa holders, who have access to the Security Appeals Division of the Administrative Appeals Tribunal. Moreover, the Independent Reviewer could only provide an opinion about whether the assessment is appropriate and make recommendations to the Director-General of ASIO.
122. The Commission said that it continued to be concerned at the ongoing detention of people who have received adverse security assessments, both during the period of the review, which may take some time, and possibly after a review if an adverse security assessment is confirmed. As at October 2012, there were seven children of people who have received adverse assessments who had spent prolonged periods of time in detention.
123. The Commission again encouraged the Government to conduct an individual assessment of the ongoing need to detain all people who have received adverse security assessments as soon as possible. If a person with an adverse security assessment is not granted a protection visa, alternative visa options should be considered; or alternatives to indefinite detention in closed facilities including community detention with the imposition of conditions if necessary to mitigate any identified risks.
124. On 3 December 2012, the Attorney-General announced that the Independent Reviewer had commenced work.
125. The department has informed the Commission that each of the people covered by the independent review process has been contacted about the process and has formally requested a review of their circumstances. The department has said that, 'consistent with previous Government policy, while this review process is undertaken the Minister is not minded to exercise his non-compellable powers under section 46, section 195A or section 197AB'.

11.3 Recommendation to the Minister

126. As noted above, it is possible that the Independent Reviewer will form the view that the adverse security assessment furnished by ASIO to the department in relation to the grant of permanent visa to a particular person was an appropriate outcome.
127. The Independent Reviewer has not been asked to separately consider whether it would be consistent with the requirements of security for a person to be placed into community detention, along with any conditions necessary to mitigate any security risk.
128. A possible outcome of the independent review process is that one or more people with adverse security assessments in relation to the grant of a permanent visa will continue to be kept in held detention without an assessment of whether their circumstances indicated that they could be placed in less restrictive forms of detention. This is a result of the Government policy referred to in paragraph 58 above and in the Commission's report [2012] AusHRC 56 at paragraphs 71-83.

129. In response to report [2012] AusHRC 56, the Minister suggested that there would be no utility in asking ASIO to conduct an assessment of whether it would be consistent with the requirements of security for a person to be placed into community detention (along with any conditions necessary to mitigate any security risk) if the person had already received an adverse security assessment in relation to the grant of a permanent visa. The reason given for this was that 'in each case ASIO is actually answering the same question'.
130. For the reasons set out in paragraphs 34 to 44 and 58 to 65 above, this is not the case.
131. The result of the Government's policy is that a person refused a visa on security grounds is precluded from consideration for community detention or other forms of community placement. However, it may be ASIO would not assess that person as a risk to security if placed in community detention or would consider that any risk could be mitigated through imposing other conditions.

Recommendation 1

The Minister for Immigration and Citizenship indicate to his department that he will not refuse to consider a person in immigration detention for release from detention or placement in a less restrictive form of detention merely because the department has received advice from ASIO that the person not be granted a visa on security grounds.

11.4 Recommendations to DIAC

132. Only two of the complainants have been assessed by ASIO in relation to whether it would be consistent with the requirements of security for them to be placed in community detention. In the case of Ms EG, ASIO considered that it would be consistent with the requirements of security for her to be placed in community detention (see paragraph 52 above). A residence determination was made in her favour but was later revoked after ASIO furnished the department with an adverse security assessment in relation to the grant of a permanent visa. In the case of Mr EI, ASIO furnished the department with an adverse security assessment in relation to the making of a residence determination (see paragraph 50 above).
133. ASIO was not asked to provide advice in Mr EI's case about whether or how any risk to security could be mitigated through the imposition of conditions to allow him to reside in community detention.
134. It is important that an individualised assessment be undertaken in relation to each of the complainants about the level of risk that they would pose to the community if they were in a less restrictive form of detention or if they were in the community subject to conditions. If there is any risk, it is also important that an assessment is undertaken of whether there are conditions that could be imposed on a residence determination that would ameliorate or mitigate such risk. It is only once the department has such information that it will be in a position to assess properly placement options for each of the complainants.

Recommendation 2

The department refer each of the complainants to ASIO and request that ASIO provide a security assessment pursuant to s 37(1) of the ASIO Act relevant to the following prescribed administrative actions:

- (a) granting the complainant a temporary visa and imposing additional conditions necessary to deal with any identified risk to security, for example, a requirement to reside at a specified location, curfews, travel restrictions, reporting requirements or sureties;*
- (b) making a residence determination under s 197AB of the Migration Act in favour of the complainant;*

(c) *making a residence determination in favour of the complainant, if necessary subject to special conditions to ameliorate any identified risk to security, for example, curfews, travel restrictions, reporting requirements or sureties.*

135. The identification of any risk associated with community detention and how such risk could be addressed was a key part of the recommendations made by the Inspector-General of Intelligence and Security (see paragraph 118 above) and the Ombudsman (see paragraphs 123 and 124 above).
136. In particular, the Inspector-General drew attention to the function of ASIO under s 17(1)(c) of the ASIO Act 'to advise Ministers and authorities of the Commonwealth in respect of matters relating to security, in so far as those matters are relevant to their functions and responsibilities'. She noted that it would be consistent with this provision for ASIO to advise the department on conditions that might serve to mitigate any risk to security involved in a community detention placement.⁴⁰

Recommendation 3

To the extent that the security assessment carried out in Recommendation 2 would result in an adverse security assessment, the department ask ASIO to advise it of any measures that could be taken to allow the complainants to be placed in a less restrictive form of detention consistently with the requirements of national security.

137. The Commission understands that there are a number of people whose circumstances are not specifically considered in this report but who are in a similar situation to the complainants in that they continue to be held in immigration detention as a result of an adverse security assessment.⁴¹ It is important that the recommended action in relation to the present complainants is extended to all others in comparable circumstances so that all detention is appropriately matched to the level of risk that the individuals in question pose to Australia's national security.

Recommendation 4

The department seek advice from ASIO of the kind identified in Recommendations 2 and 3 in respect of each person held in immigration detention who has received an adverse security assessment from ASIO.

138. Once the department has received advice from ASIO sought in relation to Recommendations 2, 3 and 4 above, these cases should be referred to the Minister for consideration of the use of appropriate public interest powers.

Recommendation 5

As the department receives advice sought from ASIO in relation to Recommendations 2, 3 and 4, the department refer the cases of each relevant person to the Minister for consideration of the exercise of appropriate public interest powers. The submissions accompanying the referrals should include details of how any potential risk identified by ASIO can be mitigated. In the case of Ms EG and Master EH, the submission should address what the best interests of the child requires.

139. Durable solutions must be found for individuals, such as the complainants, who have been refused a substantive visa and who cannot be returned to their country of origin. The complainants cannot be returned to their country of origin because Australia has determined that they have a well-founded fear of persecution should they return there. Stateless people who have been given an adverse security assessment are in a similar situation.⁴²
140. It appears that over the past three years Australia has sought resettlement of the complainants in other countries, and shared with those countries some or all of the content of the adverse security assessments prepared by ASIO. However, to date, it appears that no other countries have agreed to allow the complainants to resettle there.

Recommendation 6

The Commonwealth continue actively to pursue alternatives to detention, including the prospect of third country resettlement, for each of the complainants and for other people in immigration detention who are facing the prospect of indefinite detention. The Commonwealth inform each of these individuals on a regular basis of the steps taken to secure alternatives to detention and the Commonwealth's assessment of the prospects of success of these steps.

12 The Minister's and department's responses to my conclusions and recommendations

141. On 14 February 2013 I provided a notice to the department under s 29(2)(a) of the AHRC Act setting out my findings and recommendations in relation to the complaints dealt with in this report.
142. By letter dated 26 April 2013 the Minister for Immigration and Citizenship, Mr Brendon O'Connor MP, provided the following response to recommendation 1:

Recommendation 1

The Minister for Immigration and Citizenship indicate to his department that he will not refuse to consider a person in immigration detention for release from detention or placement in a less restrictive form of detention merely because the department has received advice from ASIO that the person not be granted a visa on security grounds.

Not accepted.

The Government is actively exploring solutions for persons who are owed protection obligations and are the subject of an adverse security assessment. But at this stage I can confirm that the Australian Government's policy on managing clients who are subject of an adverse security assessment has not changed.

I would like to respond to the discussion in paragraphs 33 – 43 of the Notice of findings with regard to the processes available under the Australian Security and Intelligence Organisation Act 1979, and the discussion that if my Department sought further advice regarding the security implications of these clients being placed in the community, then perhaps the advice may be different.

To address this issue I think it is important that I clarify the Australian Government's position regarding the security advices received from ASIO as they relate to the management of irregular maritime arrivals (IMAs). I can confirm that the Australian Government recognises that there are two processes through which security advice is sought from ASIO regarding IMAs: the Public Interest Criteria 4002 (PIC 4002) security assessments for the grant of a permanent visa, and the security advice requested for release into the community. I note however, that the latter is only available where a client is yet to be formally assessed by ASIO in regard to the PIC 4002 process.

I am aware that the former Minister advised that he was not inclined to use his nondelegable and non-compellable Ministerial Intervention powers in these circumstances. I have considered this issue and like my predecessor, I am not inclined to exercise these powers in respect of individuals with adverse security assessments.

I would also like to take this opportunity to update you regarding the circumstances of complainant EH. Following intervention under section 46A(2) of the Migration Act 1958 (the act) by my predecessor this complainant was able to lodge a Protection visa application in their own right. I can advise you that this client was granted a Protection visa on 8 February 2013. I understand that this client resides with their parent within the Sydney Immigration Residential Housing complex at the parent's request.

I note that you have made reference to the High Court decision in the case of plaintiff M47. It is important to distinguish the circumstances of these complainants from the circumstances of the plaintiff in that case as their immigration statuses and available pathways are different. The decision in M47 found that the PIC 4002 requirement can no longer be validly prescribed as a requirement for the grant of a Protection visa. As the complainants referenced in this notice are statute barred, by section 46 of the Act, from making a valid visa application, the High Court decision does not directly impact them. Additionally, as the clients are subjects of adverse security assessments in line with my guidelines for ministerial intervention under section 46A(2) they will not be referred by my Department for my consideration.

Further, as you are aware, the Hon Margaret Stone commenced in the role as Independent Reviewer on 3 December 2012. While this review is undertaken and in line with the Australian Government's policy for managing clients subject of adverse security assessments, I am not inclined to consider exercising my Ministerial Intervention power under section 46 of the Act.

143. By letter dated 26 April 2013 the department provided the following response to recommendations 2 to 6:

Recommendation 2

The department refer each of the complainants to ASIO and request that ASIO provide a security assessment pursuant to 37(1) of the ASIO Act relevant to the following prescribed administrative actions:

- a) granting the complainant a temporary visa and imposing additional conditions necessary to deal with any identified risk to security, for example, a requirement to reside at a specified location, curfews, travel restrictions, reporting requirements or sureties;*
- b) making a residence determination under s197AB of the Migration Act in favour of the complainant;*
- c) making a residence determination in favour of the complainant, if necessary subject to special conditions to ameliorate any identified risk to security, for example, curfews, travel restrictions, reporting requirements or sureties.*

DIAC Response

Not Accepted.

The Australian Government has determined that, as a matter of policy, people who have been assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security, should remain in the held detention, rather than live in the community, until such time as resettlement in a third country or removal is practicable. Accordingly, the Minister for Immigration and Citizenship has advised that he is not minded to exercise his non-compellable intervention powers to grant such persons a temporary visa or to make a residential determination.

Additionally, the Department is aware that the same threshold is applied to a security assessment whether it is requested for the purpose of Public Interest Criterion 4002 (PIC4002) or for community detention purposes. This means that recipients of an adverse security assessment for permanent visa purposes would receive a further adverse response to any subsequent requests for security advice. As such, the Department does not consider there to be any utility in making a further request for information in circumstances where the outcome is already known.

Recommendation 3

To the extent that the security assessment carried out in Recommendation 2 would result in an adverse security assessment, the department ask ASIO to advise it of any measures that could be taken to allow the complainants to be placed in a less restrictive form of detention consistently with the requirements of national security.

DIAC Response

Not accepted.

Refer to response at Recommendation 2.

Recommendation 4

The department seek advice from ASIO of the kind identified in Recommendations 2 and 3 in respect of each person held in immigration detention who has received an adverse security assessment from ASIO.

DIAC Response

Not accepted.

Refer to response at Recommendation 2.

Recommendation 5

As the department receives advice sought from ASIO in relation to Recommendations 2, 3 and 4, the department refer the cases of each relevant person to the Minister for consideration of the exercise of appropriate public interest powers. The submissions accompanying the referrals should include details of how any potential risk identified by ASIO can be mitigated. In the case of Ms EG and Master EH, the submission should address what the best interests of the child requires.

DIAC Response

Not accepted.

Refer to response at Recommendation 2.

In the case of Master EH, the Department can advise that he has been granted a Protection visa and is no longer detained. Master EH resides with his mother at her request. Due to the limitations on alternative care arrangements for Master EH, the Department considers this arrangement to be in the child's best interests.

Recommendation 6

The Commonwealth continue to actively pursue alternatives to detention, including the prospect of third country resettlement, for each of the complainants and for other people in immigration detention who are facing the prospect of indefinite detention. The Commonwealth inform each of these individuals on a regular basis of the steps taken to secure alternatives to detention and the Commonwealth's assessment of the prospects of success of these steps.

DIAC Response

Noted.

The Department is continuing in its efforts to identify third country resettlement options for people in immigration detention with an adverse security assessment, noting that any options identified will be consistent with Australia's international obligations.

The Department further notes that safe return to their country of origin may also become possible, particularly if there has been a change in their home country's situation.

The Department will continue to inform these individuals about their immigration status and options for resolution, including third country resettlement.

144. I report accordingly to the Attorney-General.

A handwritten signature in black ink, appearing to read 'Gillian Triggs', with a stylized flourish at the end.

Gillian Triggs
President
Australian Human Rights Commission
May 2013

- 1 *International Covenant on Civil and Political Rights*, opened for signature 16/12/1966, 999 UNTS 171 (entered into force 23/03/1976 except Article 41 which came into force 28/03/1979), ratified 13/08/1980, except Article 41 which was ratified 28/1/1993.
- 2 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10/12/1984, 1465 UNTS 85 (entered into force 26/06/1987), ratified 8/08/1989.
- 3 *Convention on the Rights of the Child*, opened for signature 20/11/1989, 1577 UNTS 3 (entered into force 2/09/1990), ratified 17/12/1990.
- 4 *Convention Relating to the Status of Refugees 1951*, opened for signature 28/07/1951, 189 UNTS 150 (entered into force 22/04/1954), acceded 22/01/1954.
- 5 *Protocol Relating to the Status of Refugees 1967*, opened for signature 31/01/1967, 606 UNTS 267 (entered into force 4/10/1967), acceded 13/12/1973.
- 6 The ICCPR is referred to in the definition of 'human rights' in s 3(1) of the AHRC Act. On 22 October 1992, the Attorney-General made a declaration under s 47 that the CRC is an international instrument relating to human rights and freedoms for the purposes of the AHRC Act: *Human Rights and Equal Opportunity Commission Act 1986 – Declaration of the United Nations Convention on the Rights of the Child*.
- 7 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
- 8 UN Human Rights Committee, General Comment 8 (1982) *Right to liberty and security of persons (Article 9)*. See also *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/59/D/560/1993; *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999; *Baban v Australia* [2003] UNHRC 22, UN Doc CCPR/C/78/D/1014/2001.
- 9 UN Human Rights Committee, General Comment 31 (2004) at [6]. See also Joseph, Schultz and Castan *The International Covenant on Civil and Political Rights Cases, Materials and Commentary* (2nd ed, 2004) p 308, at [11.10].
- 10 *Manga v Attorney-General* [2000] 2 NZLR 65 at [40]-[42], (Hammond J). See also the views of the UN Human Rights Committee in *Van Alphen v The Netherlands* [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988; *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/59/D/560/1993; *Spakmo v Norway* [1999] UNHRC 42, UN Doc CCPR/C/67/D/631/1995.
- 11 *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/76/D/900/1993 (the fact that the author may abscond if released into the community was not sufficient reason to justify holding the author in immigration detention for four years); *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999.
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- 16 UN Human Rights Committee, General Comment 8 (1982) at [4]. See also the *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile*, UN Doc E/CN.4/826/Rev.1 at [783]-[787].
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- 25 Legal and Constitutional Affairs Committee, Parliament of Australia, Senate Estimates Transcript, Wednesday 25 May 2011, pp 108-109.
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- 27 Letter from the department to the Commission dated 17 April 2012, Attachment A, p 1.
- 28 Submission from the department to the Commission dated 22 October 2012.
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- 38 AHRC Act s 29(2)(a).
- 39 AHRC Act s 29(2)(b).
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Further Information

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