IS ASIO A GOOD JUDGE OF CHARACTER?

SUSAN HARRIS RIMMER

ASIO can force the cancellation of a person's visa if they are found to be a security threat under the terms of the *Australian Security Intelligence Organisation Act 1979* (Cth) (the ASIO Act). This article considers the impact of character in assessments of non-citizens made by ASIO under the Migration Act. The following questions are considered:

- How are ASIO assessments relevant to character decisions under the Migration Act? For example, under what provisions might ASIO trigger or compel a visa refusal/cancellation?
- How often are visas refused or cancelled based on ASIO assessments?
- What are the grounds on which ASIO may issue an adverse assessment, and do these grounds represent a character test?
- What appeal or review rights are available to those who receive an adverse assessment and any decision based thereon?

The case studies of the adverse ASIO assessments of two Iraqis in Nauru and of US activist Scott Parkin are considered. Barrister Julian Burnside QC and solicitor Anne Gooley combined the situation of these three litigants to launch a public interest test case in the Federal Court. The article goes on to describe the ongoing court battle between these three people and ASIO which seeks to determine whether a person has the right to see adverse ASIO files relating to them. The case highlights the procedural difficulties of the current process. The case will set a legal precedent if the applicants succeed in gaining access to their files, although this will not necessarily lead to increased transparency in the decision-making process.

It should be emphasised that in contrast to character refusals under the operation of section 501 of the *Migration Act 1958* (Cth),[1] adverse ASIO assessments are rare occurrences. In 2006—07, ASIO completed 53 387 security assessments in relation to individuals seeking entry to Australia and issued only seven adverse findings.[2] In 2007-2008, the number increased to 89 290 assessments and no adverse findings.[3]

The internal process ASIO follows in making an assessment is not public, but it is assumed that it follows the principles set out in the *Australian Government Protective Security Manual*. It should also be noted that ASIO received a clean bill of health for competence and professionalism in the *Report of the Clarke Inquiry into the case of Dr Haneef* released in December 2008.[4]

This article is not arguing that ASIO should not undertake national security assessments of applicants who wish to enter Australia. Rather, it focuses on how these assessments are made and what accountability mechanisms are in place. This is especially relevant now as the new citizenship laws and new employment requirements in critical industries incorporate ASIO assessments. ASIO reports that the volume of clearance work has been increasing steadily and the agency is facing an additional caseload from the recent changes to the citizenship laws and checks for Aviation Security Identity Cards (ASICs) and Maritime Security Identity Cards (MSICs).[5]

This subject is ripe for critical assessment because of the temptation seen around the globe for the executive to use immigration law as a tool to combat suspected terrorism instead of the ordinary criminal justice framework, especially administrative detention and deportation.[6] This was clearly seen in the Dr Haneef case in Australia and this 'blurring' is the subject of a new UN report by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin.[7]

ASIO assessments under the Migration Act — character testing?

The Migration Act provisions require ASIO to determine whether a person seeking to enter Australia is a risk to national security. For example, an ASIO clearance can be refused on national security grounds because a person is judged capable of committing an act of 'politically motivated violence' in the future. There are also overtly political grounds; for example, the Foreign Minister might consider that a person will prejudice Australia's foreign relations, or has some tenuous relationship with weapons of mass destruction (a post-Iraq War amendment). In these circumstances, the Foreign Minister does have the power to cancel visas (rather than veto decisions) under section 116 of the Migration Act as prescribed by regulation 2.43 and the Immigration Minister has no power to overturn this decision.

ASIO would argue strongly that their security assessments are not character tests. Although in the different context of unauthorised arrivals, a rare insight into the role of ASIO in migration-related assessments was gained through a parliamentary process in August 2002. In the course of this inquiry, then Director-General of ASIO, Mr Dennis Richardson, explained that

REFERENCES

1. S 501 provides that a person's visa may be cancelled if the minister considers they have failed to pass the character test (subsection 501(2)). The requirements of the test are set out in ss 501(6). If the person has been sentenced to a term of imprisonment of 12 months or more, this constitutes a 'substantial criminal record', which can trigger ministerial refusal (ss 501(7)). Factors for the more general category of 'future risk to Australian citizens', which can be taken into account when exercising this discretion, are past and likely future conduct of the individual concerned, whether strictly criminal or merely reflecting on that person's 'good character'; and past or likely future response of the Australian community, or some sector of the community, to that person's presence in Australia.

2. Australian Security Intelligence Organisation, *Report to Parliament 2006–2007*, 30.

3. Australian Security Intelligence Organisation, *Report to Parliament 2007–2008*, 24.

4. *Report of the Clarke Inquiry into the case of Dr Haneef* <haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Volume+1+FINAL.pdf/$file/Volume+1+FINAL.pdf> at 20 March 2009..

5. ASIO, above n 3.

6. Eminent Jurists Panel, *Assessing Damage, Urging Action*, 92. http://ejp.icj.org/IMG/EJP-Report.pdf at 20 March 2009.

7. Martin Scheinin, *Report by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, A/HRC/10/3 (2009).

There is a difference in the way ASIO applies assessments to people outside Australian territory trying to get in and to those who are already here.

boat people were not seen by the agency as a terrorist threat after a review of 6 000 boat arrivals:

> ASIO's role in the processing of illegal arrivals is to provide security assessments. We do not do character checks, nor do we make assessments on character grounds. That is the responsibility of the Department of Immigration. ASIO's security assessments are designed to ascertain whether someone poses a direct or indirect threat to Australia's security, being defined in the ASIO Act as:
>
> (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.[8]

The argument is, however, that when an ASIO official is making a determination as to whether a person is likely to engage in a future act or threat of politically-motivated violence in particular, questions of character are raised. Reflecting the High Court discussion of 'fit and proper person' in the *Bond* case, ASIO is presumably undertaking its assessment based on a combination of a person's history of criminal conduct and general conduct, including patterns of behaviour and isolated incidents, and thus making a prediction about how a person is likely to behave in the future.[9] The scope and rigour of the inquiry will depend on what information is available to ASIO through intelligence sources and will be influenced by the general security risks Australia is facing at the time.

ASIO assessments and offshore applications

There is a difference in the way ASIO applies assessments to people outside Australian territory trying to get in and to those who are already here. A person offshore might apply for a visa, fulfil the health requirements and be selected for a place in the program, but then receive an adverse ASIO assessment. Where an applicant fails an ASIO clearance in this situation, they have no recourse to appeal the decision either under international or Australian law and there is no obligation on Australia's part to receive them as immigrants, not even under offshore refugee and humanitarian considerations. A non-citizen cannot apply to the Administrative Appeals Tribunal for merits review.[10]

The only recourse left to an offshore person is to lodge a complaint to the Inspector-General of Intelligence and Security (IGIS), currently Mr Ian Carnell. The IGIS is a reviewer of the security agencies with strong coercive powers, similar to a Royal Commission (except for a contempt power). The IGIS generally conducts inspections of agency activities and can also investigate complaints. While this level of formal scrutiny offers reassurance, it is notable that the only accountability mechanism in this situation can offer no substantial justification or criticism of ASIO's actions beyond ascertaining that they are procedurally sound. The current IGIS also examines the propriety of decisions, such as procedural fairness, proportionality and integrity of assessments.[11] In many ways, the IGIS fulfils the same type of function as judicial review. An example of the complaint lodged by Mr Rhuhel Ahmed is given below.

The character of Mr Rhuhel Ahmed

The IGIS made an inquiry into ASIO's assessment of Mr Rhuhel Ahmed on 12 March 2007. Mr Ahmed, a UK national, planned to visit Australia to promote the release of a new film, *The Road to Guantanamo*. The film recounts the story of Mr Ahmed and two fellow UK nationals who were captured in Afghanistan in 2001 and subsequently detained in the US complex located at Guantanamo Bay, Cuba, until their eventual release in March 2004. Mr Ahmed's visa was refused on the basis of an adverse security assessment by ASIO. The IGIS found that the assessment was properly made, but did not elaborate on the information or rationale behind the decision, presumably for reasons of national security.[12]

The previous IGIS, Mr William Blick, recommended that at least refugee applicants be allowed access to the AAT for merits review.[13] Refugee and humanitarian cases pose a particular dilemma. When people are on Australian territory or under Australia's effective control, the potential risk they might pose to the national security of Australia is obviously more pronounced. However, Australia faces additional obligations under international law that require it to comply with treaties covering the right of all persons not to be detained without trial and not to be deported back to torture or persecution.[14] How these two factors work together in practice is not always clear-cut. Two Iraqi asylum seekers, Mr Mohammed Sagar and Mr Muhammad Faisal, became caught in the middle of a politically-generated legal black hole when they were not on Australian territory but rather were detained by Australia in Nauru and could not return to their countries of origin (see below).

8. Evidence to the Joint Standing Committee on Foreign Affairs, Defence and Trade Human Rights Subcommittee, Parliament of Australia, Canberra, 22 August 2002 (Dennis Richardson).

9. *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

10. *Leghaei v Director-General of Security* [2005] FCA 1576.

11. Inspector-General of Intelligence and Security ,'Inquiry into ASIO's assessment of Mr Rhuhel Ahmed 12 March 2007'.

12. Ibid.

13. Inspector-General of Intelligence and Security ,*IGIS Annual Report 2005–06*. Canberra.

14. Note Articles 9(1) and 10(1) of the International Covenant on Civil and Political Rights (ICCPR), Article 3 of the Convention against Torture (CAT).

The refugee process itself already allows for people to be rejected on the grounds that they present a serious danger to the host state.[15] The 1951 Refugee Convention does not consider the possibility that a signatory state will exclude a refugee who has not committed a serious crime, especially when that refusal will result in the indefinite detention of a refugee, an act also in breach of the Convention. The predicament of Mr Sagar and Mr Faisal was unique to Australia.

The characters of Mr Mohammed Faisal al Delimi and Mr Muhammud Sagar

Mr Faisal and Mr Sagar were among more than 1 500 asylum seekers held on Nauru or Papua New Guinea's Manus Island as part of an immigration strategy by Australia aimed at deterring others from trying to reach the country's mainland. The strategy was introduced in 2001 after a Norwegian freighter, the MV Tampa, rescued 433 asylum seekers from a leaking Indonesian fishing boat off the north-western coast of Australia, but was then denied permission to land those people in Australia.[16]

By 2006, the claims of nearly all of the asylum seekers who had been on Nauru since 2001 had been processed and they had been accepted either into Australia or another country or they had returned voluntarily to their countries of origin. However, Mr Faisal and Mr Sagar, who had arrived in 2001, were recognised as refugees by the Immigration Department in September 2005 but were refused residence in Australia following their ASIO assessments. The decision effectively gave the two men a choice between detention on Nauru or returning to Iraq, where Australia acknowledged they faced a real danger of persecution.

Michael Gordon of The Age newspaper charted the mental state of the men over the six years of their detention. In one article, he quotes Mr Sagar as stating in 2006:

> People tell me they wish me a happy life and that this would end. I say, 'I don't want to be happy. I just want my life back ... whether it would be happy or sad doesn't matter. I just want it back'.[17]

Gordon goes on to ask a question:

> How can a country that prides itself on upholding principles of natural justice and the rule of law tolerate a situation where two men are detained for five years without being told what they are accused of?[18]

The detention of the two men ended in 2007. After Australian immigration authorities initially refused to grant a visa to Mr Faisal, citing an assessment by intelligence officials that he posed a security risk, he became suicidal. He was transferred to a psychiatric hospital in Brisbane in August 2006. After arriving in Australia, Mr Faisal was able to lodge a fresh visa application and a re-assessment by intelligence officials cleared him of posing any security threat. He was granted a permanent visa in February 2007.[19]

Mr Sagar however, was 'left on Nauru' — the title of his website, which recorded his time on the island as the 'forgotten man'.[20] In February 2007, he finally left Nauru after the UNHCR arranged a resettlement place for him in a 'Scandinavian country'.[21] The grounds of his adverse security assessment were never revealed and the matter was never resolved. The ongoing court case over the rights of these men to see the grounds of their adverse ASIO assessments is examined below.

ASIO assessments and onshore applications

This section considers the process of ASIO assessments relevant to a person on Australian territory (an 'onshore' application). As noted above, there are advantages to being an onshore applicant because the person can instigate review rights additional to a complaint to the IGIS. But there are also disadvantages because, like section 501, an adverse ASIO assessment can trigger the automatic cancellation of a visa and therefore lead to detention and deportation. The case of US activist Scott Parkin in 2005 provides a recent example of an onshore case (see box below).

In Parkin's case, the applicable law states that an applicant for a tourist visa must meet certain public interest criteria and the Minister must be satisfied that the granting of the visa is in the national interest. The public interest criteria are set out in Schedule 4 of the Migration Regulations 1994, Public interest criteria and related provisions 4002. They require that the applicant 'is not assessed by the competent Australian authorities (usually ASIO) to be directly or indirectly a risk to Australian national security'. Eventually, it was revealed that Scott Parkin's visa was cancelled under subsection 116(3) of the Migration Act as prescribed by Migration Regulation 2.43 after ASIO made an adverse security assessment against him.

As a result, the Immigration Minister effectively had no choice but to cancel the visa. This was confirmed in *Tian v MIMIA* [2004] FCAFC 238, where their Honours found:

> Section 116(3) does not permit the Minister to exercise any discretion at all. If the prescribed circumstances exist, and they are the circumstances provided for in regulation 2.43(2), the Minister must cancel the visa. In our opinion, the words of the section are clear. The subsection is mandatory. No discretion arises if the prescribed circumstances referred to in s 116(3) and provided for in regulation 2.43(2) exist. The Minister must cancel the visa.

Mr Scott Parkin

According to the Friends of Scott Parkin website, Scott Parkin is a 'stand-up' guy from Houston, Texas. He is described as a 'grass-roots environmental and peace activist with the organisation Houston Global Awareness Collective (HGAC) with a Masters thesis in history'. The reported aim of his visit to Australia was to continue the HGAC's campaign to expose Halliburton's support for the occupation of Iraq.[22]

15. Article 1F(2)(b), 1951 United Nations Convention Relating to the Status of Refugees, 189 UNTS 150, *entered into force* April 22 1954.

16. See further David Marr and Marian Wilkinson, *Dark Victory* (2003).

17. Michael Gordon, 'Last man standing', *The Age* (Melbourne), 30 September 2006, 6.

18. Ibid

19. UN News Centre, 'UN refugee agency welcomes Australian visa for long-term Iraqi refugee', 2 February 2007.

20. Gordon, above n 17

21. UN News Centre, above n 19.

22. Jewel Topsfield, 'Peace activist's deportation probed', *The Age* (Melbourne), 21 September 2005.

A more serious issue is the denial of natural justice when a person challenges an adverse assessment.

On a tourist visa, Parkin participated in a protest in Sydney during the Forbes Global CEO Conference in September 2005, organising a piece of street theatre outside the Australian headquarters of Kellogg Brown & Root (KBR), a subsidiary of Halliburton. Halliburton is an oil services company, which received a substantial share of the contracts to rebuild Iraq.[23]

On 10 September 2005, after breakfast at a Melbourne café, Mr Parkin was arrested by six officials from the AFP and the Immigration Department. He was held in solitary confinement for five days in the Melbourne Assessment Prison for 'questioning detention' and deported back to the US on 15 September 2005.[24] US authorities did not take any action against Mr Parkin.[25]

Mr Parkin was never questioned by ASIO or charged by the AFP in relation to a particular offence.

Appealing an ASIO adverse assessment

The grounds on which an adverse assessment can be made by ASIO have been considered. This section considers appeal rights. Appealing an adverse ASIO assessment is very difficult for a non-citizen; only Australian citizens are entitled to the reasons behind an adverse assessment of their character.[26] The attempts by Mr Scott Parkin, deported US activist, and the two Iraqi asylum seekers on Nauru to seek access to the grounds of their adverse ASIO assessments in a joint legal action is examined in some detail below.

As evidenced by the Street review into the operation of ASIO,[27] it is difficult, for a variety of reasons, to be confident that ASIO always gets assessments right. Australia is often forced to rely on the security agencies of other countries,[28] although this is a debate outside the scope of this article. Nevertheless, regardless of whether or not ASIO makes meritorious decisions, those decisions resulting in adverse assessments are problematic because neither the applicant nor the AAT is entitled to obtain the material on which the assessments are made. ASIO would argue that review by the IGIS and the Security Appeals Division of the AAT is sufficient.[29] Australian courts have also held that the intelligence agencies, including ASIO, are subject to judicial review and must abide by natural justice.[30]

However, in reality, it is difficult to obtain the information necessary to prove that an intelligence agency is acting improperly, and courts often find themselves incapable of assessing security risks.[31]

ASIO and the IGIS are exempt from the operation of the *Freedom of Information Act 1982 (Cth)* (FoI Act) and other Commonwealth agencies are exempt 'in relation to a document that has originated with, or has been received from' ASIO or the IGIS.[32] This lack of access to adverse information denies an applicant any meaningful opportunity to present a case against a visa refusal, a circumstance that is examined further in the landmark ongoing case of *Parkin v O'Sullivan* below.

The Parkin case: testing the parameters

The Federal Court decision in *Parkin v O'Sullivan* [2007] FCA 1647, allowing the release of adverse ASIO security assessments in the discovery process, is an historic precedent. The case involved the deportation of Parkin on 15 September 2005, and the non-acceptance into Australia from Nauru of the two asylum seekers, Mr Sagar and Mr Faisal. As described above, Mr Faisal and Mr Sagar were recognised as refugees by the Department of Immigration in September 2005 but refused residence in Australia after their ASIO assessments. Barrister Julian Burnside QC and solicitor Anne Gooley took on a public-interest test case in the Federal Court on the basis of the combined situations of these three men.

The ASIO Act does not prohibit a court from ordering discovery of an adverse security assessment. The Director-General of ASIO, Paul O'Sullivan, argued however that the intention of the Act is to preclude a non-citizen, who is the subject of an adverse security assessment, from receiving a copy of the assessment and the material relied on in preparing it or from having that assessment reviewed by the AAT. This, he submitted, should be taken into account when determining whether the court should exercise its discretion to order discovery. During the hearing, the barrister for ASIO confirmed that the men themselves might genuinely have no knowledge of the grounds for their adverse assessments, because these might have been due to their 'associations' in their home countries.[33]

Justice Sundberg found in the original 2006 hearing that:

> The applicants' claim is that they have done nothing to justify their security assessments. Therefore ASIO must be wrong to conclude that they are security threats. In order to demonstrate this to a court they need to understand why and on what basis ASIO has formed the view that it has. It stands to reason that they do not yet have the evidence to demonstrate this; that is why they have sought discovery. The Director-General's argument is circular. It is, in effect, that because the applicants do not have the

23. Ibid

24. Andra Jackson, 'Lawyer appeals to stop US activist's deportation', *The Age* (Melbourne), 13 September 2005, 3.

25. Ibid

26. *Australian Security Intelligence Organisation Act 1979*, sections 37(2) and 38(2)(b).

27. Laurence Street, Martin Brady and Ken Moroney, *The Street review: a review of interoperability between the AFP and its national security partners*, Australian Federal Police, 2008.

28. Philip Flood, *Report of the Inquiry into Australian Intelligence Agencies*, (2004).

29. See further the decision of the Full Federal Court in *Hussain v Minister for Foreign Affairs* [2008] FCAFC 128. This involved a Full Federal Court considering a number of aspects of an AAT hearing involving ASIO security assessments in which the AAT hearing proceeded, in part, in the absence of the student whose passport had been summarily cancelled on security grounds.

30. *The Church of Scientology v Woodward* (1983), 57 ALJR 42.

31. Caroline Bush, 'National security and natural justice', (2008) *Australian Institute of Administrative Law Forum No 57*, 78–96, 80.

32. *Freedom of Information Act 1982* (Cth), section 7(2A), schedule 2, part 1.

33. Communication with Anne Gooley, 16 May 2008.

> evidence they need, they therefore have no case and so do not need that evidence. In the circumstances of these applicants, it is not possible to say whether they do or do not have any chance of making out a good case. It would be premature at this stage to say that there is no live issue between the parties.[34]

Justice Sundberg determined that the ASIO Act does not prohibit the discovery of an adverse security assessment. Discovery would not involve impermissible fishing. He exercised his discretion to allow discovery, thus obliging ASIO to compile a list of the documents in their possession and provide it to the applicants. Justice Sundberg held that the parties were to agree on orders allowing access, by 17 November. If they were note able to reach a solution, each party was required to file a written submission to the court by 1 December.

On 28 November 2006, ASIO was granted leave to appeal this decision after lawyers for the security agency argued that providing a list of documents relevant to the Parkin, Sagar and Faisal case would cause 'irreparable harm' to Australia's national security.[35] On 22 May 2007, the Full Bench of the Federal Court revoked ASIO's leave to appeal and ordered that the matters be heard by the primary judge.[36]

On 2 November 2007, primary judge Justice Sundberg ordered discovery of documents related to the case, including Mr Parkin's adverse security assessment. This was a classified ASIO 'determination' setting out the criteria applied to the security assessment and the records of ASIO's advice to the Minister for Immigration, which led to the cancellation of Mr Parkin's visa.[37] ASIO's appeal of the order was heard by the Full Bench of the Federal Court in Melbourne on 28 February 2008 before Justices Ryan, North and Jessup. The decision, reported as *O'Sullivan v Parkin* [2008] FCAFC 134, dismissed the appeal and again sent it back to the primary judge.

However, the Full Court did note that national security may in some circumstances prevent the discovery of documents:

> we recognise the reality that, in some, and perhaps many, cases, the identification of a document with the kind of specificity that is normally required for discovery may itself be contrary to the public interest.[38]

Justice Sundberg again ordered ASIO to provide the applicants with a list of documents. ASIO did produce such a list of documents in late 2008, which was found not to be particularly helpful in the view of the applicants' solicitor but also as rather innocuous, and not readily obvious as constituting a threat to national security as had been alleged by ASIO.[39] A date has been set for June 2009 in the Federal Court in front of a single judge to request an order for inspection of the listed documents.

Although the case may set a precedent, there are six important limitations to note.

1. The case applies only to the discovery process, which is subject to judicial discretion. Discovery is the pre-trial process where each party has to present to the other a full list of documents and witnesses that might be relevant to the case.
2. Discovery is not the same thing as production. It may be that a litigant is entitled to know what documents exist relevant to a dispute, but the litigant cannot compel production of those documents.
3. Production may not be to the litigant. A court may place confidentiality orders on the production of the discovered material, which may exclude the litigant from access.
4. The Attorney-General, using the discretion pertaining to the position, can prevent the assessments being provided under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (section 38F).
5. In situations where the assessments are finally disclosed, ASIO need only provide evidence that they perceived a risk to national security from a particular applicant. National security is extremely broadly defined in the legislation. ASIO does not have to prove criminal conduct of any kind.
6. Even if, at last, the litigant sees the documents and is exonerated by a court or tribunal, the intense media speculation around these cases may mean that permanent damage to that person's reputation has been done.[40]

Moreover, where there is a final High Court judgment against ASIO for discovery, the same long legal process could be commenced over the production of the documents. Legal processes are slow, which can be an important consideration if a client is in detention pending the outcome of a case. It may be more productive to investigate new ways of communicating the basic facts of the case against them to an applicant or their representative without divulging national security information.

The IGIS and Scott Parkin

The courts were not the only sources of scrutiny in these three cases. The IGIS has, pursuant to subsection 8(1) of the *Inspector-General of Intelligence and Security Act 1986* (Cth), conducted an investigation into the treatment of Mr Parkin by ASIO. The report of that investigation is dated 29 November 2005 and concludes:

(a) ASIO did not have, at the relevant time, information which would have justified recommending against the grant of a visa and took a close interest in Mr Parkin because of information received about his activities once he was in Australia.

(b) There is no evidence or reason to think that ASIO's security assessment in respect of Mr Parkin was influenced from elsewhere within the Australian Government or by external bodies.

(c) The security assessment was based on credible and reliable information and the legislative requirements were met.

'*Is Asio a Good Judge of Character?*' continued on page 123

34. *Parkin v O'Sullivan* [2006] FCA 1413.
35. *O'Sullivan v Parkin* [2006] FCA 1654.
36. *Parkin v O'Sullivan* [2007] FCA 1647.
37. *Parkin v O'Sullivan* [2007] FCA 1647.
38. *O'Sullivan v Parkin* [2008] FCAFC 134 at [35]
39. Communication with Anne Gooley, 19 March 2009.
40. Anne Gooley, 'How ASIO is eroding the rule of law: national security is being used as an excuse to abandon the presumption of innocence. Insight', *The Age* (Melbourne), 25 August 2007, 9.

that there are 'ways in which we can target the porn industry without violating the rights and freedoms of the individual. We must never forget that censorship only ultimately creates a society unable of exercising real discretion.'

In its final draft, two provincial legislatures (DPRDs) — the Bali and the predominantly Christian North Sulawesi — discussed and issued statements against the Pornography Bill. Since the passing of the Law, officials from other provinces, such as Yogyakarta and Papua, have stated their objections. One group in Bali has stated that it will file a judicial review with the Constitutional Court.

The interpretation of the courts is also still to be seen. In an earlier court case, charges of pornography were brought against the Indonesian version of the *Playboy* magazine (which does not contain images of nude people) under the Criminal Code. Judges ruled that the state prosecutors should have brought the case under the Press Law (which emphasises press freedom) rather than the Criminal Code, but added that under the Press Law, they would not have considered *Playboy* pornographic. It is as yet unclear whether judges would similarly decide that the Press Law rather than the Pornography Law should be used in making charges of pornography against a publication.

While the open, frank and at times heated discussions over the draft Bills demonstrated that freedom of speech is much greater in the reformasi period, the final Law was not an example of legislators choosing the middle-ground or of a liberal approach to censorship and public morality. In addition, the lack of clarity in the drafting of the Law leaves much interpretation to judges in the courts.

HELEN PAUSACKER is a PhD student at the University of Melbourne's Law School. She is also a research assistant with Professor Tim Lindsey's Federation Fellowship project, 'Islam and Modernity' in the same faculty.

email: h.pausacker@unimelb.edu.au

'*Is Asio a Good Judge of Character?*' continued from page 106

(d) ASIO did not act improperly in the course of speaking to Mr Parkin about the possibility of an interview with him.[41]

This finding by the IGIS suggests an uncertain outcome for the applicants. The Commonwealth will not be compelled to give them visas even in the situation that they are successful in seeing the adverse ASIO reports and in proving jurisdictional error. Under section 501 of the Migration Act, the Immigration Minister has complete discretion to refuse a person a visa on character grounds.

Conclusion: the need for accountability

This article has argued that, despite ASIO's disavowal, the ASIO assessment regime involves character issues and the process therefore requires greater transparency as to its operation. A more serious issue is the denial of natural justice when a person challenges an adverse assessment. Although the number of cases of adverse ASIO assessments is low, the impact on individuals so assessed is severe, as shown by the cases of Mr Parkin and the Iraqi refugees on Nauru.

There is a need, even if the final decision in the Parkin case is positive, to ensure that adverse ASIO assessments are made reviewable in substance not just in form, with a minimum requirement being that the affected person is given some indication of the basis of the adverse assessment by the tribunal or court. Measures to improve the review process could include: that the Inspector-General of Intelligence and Security (IGIS), assisted by the Administrative Review Council, hold an inquiry into the internal administrative processes by which ASIO assessments are made; that the IGIS is further empowered to review the propriety of ASIO assessments and the evidence on which they are based; and that as a minimum refugee applicants be allowed to access the Administrative Appeals Tribunal (AAT) to challenge a character finding.

SUSAN HARRIS RIMMER is an ARC-funded researcher with the Centre for International Governance and Justice, The Australian National University, and is President of national NGO Australian Lawyers for Human Rights.

41. Inspector-General of Intelligence and Security, 'Unclassified Report, IGIS inquiry into ASIO's treatment of Mr Scott Parkin, 29 November 2005'.