

REVIEWABILITY OF DECISIONS BY NON-DIAC OFFICERS

3 November 2011

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

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

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

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

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

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

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

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