Law Council
OF AUSTRALIA

Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012

Senate Committee on Legal and Constitutional Affairs

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GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

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Acknowledgement

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Introduction

1. The Law Council of Australia is pleased to provide the following comments to the Senate Legal and Constitutional Affairs Committee as part of its inquiry into the provisions of the *Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012* (the Bill).

2. The Bill is a private members Bill, introduced by Australian Greens Senator Sarah Hanson-Young. The Bill seeks to ensure that adverse security assessments (ASAs) issued by the Australian Security and Intelligence Organisation (ASIO) are subject to a greater level of transparency and scrutiny. Specifically, the Bill seeks to:

   - Amend the *Australian Security Intelligence Organisation Act 1979* (Cth) (the ASIO Act) to require internal review of an ASA every six months or on referral from the Department of Immigration and Citizenship (DIAC), where the person subject to the adverse assessment is in immigration detention and has been found to be owed protection obligations by Australia under international law;

   - Amend the ASIO Act to enable a person who is in immigration detention and who has been found to be owed protection obligations by Australia under international law to seek merits review of an ASA in the Security Appeals Division of the Administrative Appeals Tribunal (AAT);

   - Amend the ASIO Act to require that any person who is subject to an ASA and who is able to access merits review must, without exception, be notified of the assessment;

   - Amend the *Administrative Appeals Tribunal Act 1975* (Cth) (the AAT Act) to provide for the appointment of a Special Advocate who is able to access and challenge the reasons for, and evidence supporting, an ASA where the Attorney-General has certified that there are national security reasons which preclude the release of that information to the review applicant. The Special Advocate would be a security cleared third party appointed by the AAT upon need;

   - Amend the *Migration Act 1958* (Cth) (the Migration Act) to clarify that the Minister for Immigration and Citizenship (the Minister) is not precluded from considering community detention as an alternative to closed immigration detention where a detainee is subject to an ASA, but where conditions may be imposed to mitigate any potential threat to security.

3. The Bill was introduced on 10 October in response to increased public and official disquiet about the plight of a growing number of refugees stranded in indefinite, long-term, immigration detention as a result of receiving an ASA.[1] This group of people, found to be owed protection by Australia under the Refugees Convention, cannot return or be returned to their home countries where they face a well founded risk of persecution. However, to date, they have also been deemed ineligible for the grant of any visa and release into the Australian community.

4. By operation of section 36 of the ASIO Act, the same group, because they are not Australian citizens or permanent residents, are also currently not entitled to receive a copy of their ASA or to apply to the AAT for review of the merits of their

[1] As at 19 July 2012, there were 54 people in detention facilities in Australia who had been recognised as refugees, but who had received an ASA. There were also six children in closed detention who were living with their parents who had received ASAs.

assessment. This has compounded the hopelessness of their situation by denying them any meaningful opportunity to challenge the reason for their ongoing detention.

5. The majority of the Bill's provisions are very narrow in application and are designed to address the circumstances of this particular group. However, a few of the Bill's provisions, notably those which amend the AAT Act to establish the role of Special Advocate, are of broader application and are intended to reform proceedings in the Security Appeals Division of the AAT more generally.

6. The Law Council supports the legislative amendments proposed in the Bill to the extent that they are designed to give effect to the following principles:

- A person denied a visa and detained in immigration detention, effectively as a result of an ASA, should have the right to be notified that the assessment has been made and should have the opportunity to challenge the merits of the assessment before an independent authority.

- Meaningful review requires that a person subject to an ASA be given sufficient information to know the basis for their assessment. Where national security or public interest concerns preclude full disclosure of the reasons for, and evidence supporting, an ASA, mechanisms must be available to allow for partial disclosure, including through the use of redacted or summarised material. Further, a mechanism should be available to allow for the appointment of a security cleared advocate to view and make submissions in respect of pertinent, undisclosed material on an affected person's behalf.

- Irrespective of the availability of merits and/or judicial review, ASAs issued in relation to people in immigration detention should be subject to periodic internal review to assess whether the reasons for assessment remain extant in light of any new or changed information.

- No person should automatically be deemed ineligible for community detention, or other less restrictive forms of immigration detention, as a result of an ASA, particularly in circumstances where no consideration has been given to whether the perceived security threat posed to the community in the specific case might be addressed through the imposition of conditions.

These principles align with Law Council's previous advocacy on this issue.[2]

7. However, while the Law Council supports the tenor of the reforms proposed in the Bill, the Law Council submits that certain provisions of the Bill need to be refined to take account of recent legal and policy developments. For example:

- the High Court's decision in Plaintiff M47/2012 v. Director General of Security and Ors3;

- the Government's appointment of an Independent Review tasked with examining ASAs issued in respect of people in immigration detention; and

- the tabling of the Report from the Australian Human Rights Commission (AHRC) on its inquiry into complaints by Sri Lankan refugees in immigration

[2] For example, the Law Council has written to the Attorney-General on three occasions in the last two years urging the Government to ensure that people who are facing potentially indefinite immigration detention, as a result of receiving an ASA, have access to meaningful review.
[3] *Plaintiff M47/2012 v. Director General of Security and Ors* [2012] HCA 46 (M47). This judgment, along with other materials, is available at http://www.hcourt.gov.au/cases/case_m47-2012

detention with adverse security assessments and the Government's response to that Report.

8. The Law Council also has some concerns about the provisions of the Bill which establish a role for a Special Advocate in the Security Appeals Division of the AAT. Ultimately the Law Council supports the proposed procedure, however, restrictions on the ability of the Special Advocate to communicate with a review applicant may undermine the ability of the Advocate to meaningfully scrutinise and challenge undisclosed material on the review applicant's behalf.

9. Finally, the Law Council urges caution about overstating the degree to which the amendments proposed in the Bill are likely to guarantee transparency and procedural fairness for those affected by an ASA. The reforms contained in the Bill do not address the manner in which ASIO security assessments are conducted, nor the adequacy of the information that is provided to affected persons before and during the process. These are separate matters of concern that have attracted significant criticism. In addition to providing avenues for review, further consideration must be given to how, without compromising national security, mandatory minimum requirements of procedural fairness may be imposed on ASIO at the decision making stage, before an ASA is issued.

Background to the Bill: the Joint Parliamentary Committee on Australia's Immigration Detention Network

10. The introduction of this Bill follows in the wake of a comprehensive parliamentary inquiry into all aspects of Australia's immigration detention policy.

11. On 16 June 2011, the Parliament established the Joint Select Committee on Australia's Immigration Detention Network (the IDN Committee).[4] The IDN Committee had broad terms of reference, which included inquiring into the management, resourcing, and potential expansion of Australia's immigration detention network, as well as possible alternative solutions, and the effect of detention on detainees.

12. The Inquiry received more than 3,500 submissions and held hearings around the country. The Law Council participated in the Inquiry, and made detailed written and oral submissions with the assistance of its Constituent Bodies. [5]

13. During the Inquiry there was wide spread support for the establishment of a merits review process for ASAs issued in respect of people in immigration detention and a number of different models were proposed to provide this review. For example:

    - Human Rights experts submitted that Article 9 of the International Covenant on Civil and Political Rights (ICCPR) requires that decisions to prolong detention require periodic reviews so that the grounds for detention can be

[4] The Committee was chaired by Mr Daryl Melham MP (ALP) and co-chaired by Senator Hanson-Young (Greens).
[5] The Law Council made a detailed submission on 17 August 2011 with contributions from the Law Institute of Victoria, the Law Society of South Australia, the Law Society of Western Australia and the Queensland Law Society. A copy of the Law Council's submission is available at http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/detention.cfm

assessed and so that indefinite detention does not automatically flow from the fact of original grounds justifying detention;6

- The United Nations High Commissioner for Human Rights (UNHCR) pointed to appropriate means of finding a balance between the competing interests of national security and fairness and made some suggestions around the possible use of a special advocate system, the use of redacted evidence that can be looked at, and the possible lifting of the restriction for refugee or asylum-seeker claimants to access an appeal mechanism, such as the AAT. [7]

14. The Law Council also supported the establishment of a merits review process for people in immigration detention who had received an ASA. [8]

15. On 30 March 2012 the IDN Committee released its Report (the IDN Report).[9] Relevantly for the present inquiry, the IDN Report included the following recommendations:

- that the Australian Government and ASIO establish and implement periodic, internal reviews of adverse ASIO refugee security assessments commencing as soon as possible;10

- that the ASIO Act be amended to allow the Security Appeals Division of the AAT to review ASIO security assessments of refugees and asylum seekers.[11]

16. When making these recommendations, the IDN Committee made the following observations:

- The indefinite detention of people without any right of appeal is resolutely rejected. The IDN Committee said that '[s]uch detention, effectively condemning refugees who have not been charged with any crime to detention for the term of their natural life, runs counter to the basic principles of justice underpinning Australian society.' 12

- ASIO already, on occasion, reviews particular cases if additional information comes to light and/or on referral from DIAC. ASIO could partly address community concerns by establishing periodic reviews of its ASAs for refugees.13

- Extending the right to merit reviews to refugees with ASAs is 'the most straightforward way of protecting against indefinite detention and ensuring probity.' 14

- Provisions effectively barring refugees from appealing against an ASA were inserted into the ASIO Act in 1979 and 'were designed for a different time, a time when Australia was not grappling with the challenges presented by large

[6] IDN Committee Report (31 March 2012) p. 169 para [6.125] referring to evidence from Professor Ben Saul.
[7] IDN Committee Report (31 March 2012) p. 170 para [6.130].
[8] IDN Committee Report (31 March 2012) p. 170 para [6.130].
[9] A copy of this report, and further information about the Inquiry, is available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=immigration_detention_ctte/immigration_detention/report/index.htm

[10] IDN Committee Report 31 March 2012 Recommendation 27.
[11] IDN Committee Report 31 March 2012 Recommendation 28.
[12] IDN Committee Report 31 March 2012 p. 176 para [6.148].
[13] IDN Committee Report 31 March 2012 p. 176 para [6.149].
[14] IDN Committee Report 31 March 2012 p. 176 para [6.149].

numbers of asylum seekers in detention. Those provisions have regrettably resulted in some dramatic, potentially life-shattering consequences for refugees who receive adverse security assessments'. 15

- The ASIO Act can be amended to allow for refugees and other non-citizens currently in indefinite detention to have access to relevant details of their case without impinging on national security. 16

17. The current Bill is ostensibly a response to these key recommendations of the IDN Committee.

Recent developments relevant to the provisions of the Bill

18. The Bill has been introduced in the context of a legal and policy framework which is both dynamic and contested. The Law Council submits that the provisions of the Bill may require further refinement in light of the developments discussed below.

High Court Decision in *M47/2012*

19. On 5 October 2012, days before the introduction of the Bill, the High Court handed down its decision in *Plaintiff M47/2012 v. Director General of Security and Ors.*[17] In that case, the High Court declared invalid the prescription, *by regulation*, of a stand alone, non-discretionary criterion for the grant of a protection visa which required that an applicant must not have received an ASA. Such a regulation was found to be contrary to the scheme of the Migration Act, which already separately provided for the Minister to make decisions to cancel or refuse protection visas on national security grounds and further provided for review of those decisions.

20. The practical and legislative implications of the decision are not yet fully understood, even for the applicant in that case. However, it is clear that the manner in which an ASA is taken into account within the current legislative scheme for assessing protection visa applications must change.

21. In practice, if a protection visa applicant has received an ASA, that is likely to remain determinative of whether a visa is granted. This is because the existence of an ASA is relevant to whether other criteria for a protection visa are met. However, the changed significance of the ASA in the legislative scheme may also mean that more meaningful review options become available for refugees denied a visa on security grounds. Although unlikely, if that is the case, consideration would need to be given as to how those alternative review options would interact with the provisions of this Bill.

[15] IDN Committee Report 31 March 2012 p. 176 para [6.150].
[16] IDN Committee Report 31 March 2012 p. 176 para [6.150].
[17] *Plaintiff M47/2012 v. Director General of Security and Ors* [2012] HCA 46 (M47). This judgment, along with other materials, is available at http://www.hcourt.gov.au/cases/case_m47-2012

Appointment of an Independent Reviewer for Adverse Security Assessments

22. On 16 October 2012, the Attorney-General announced that the Government will provide an independent review process for refugees who have been refused a permanent visa as a result of an ASA issued by ASIO.[18]

23. Under the scheme announced by the Government, a former Federal Court Judge has been appointed as an Independent Reviewer and tasked with examining each of the ASAs made by ASIO in respect of people who have been found by DIAC to be owed protection obligations by Australia under international law, but who are in immigration detention, having been refused a permanent protection visa, or had their visa cancelled, due to the ASA. The Independent Review will thereafter conduct regular 12 monthly periodic reviews of ASAs for refugees in immigration detention.

24. According to a press release issued by the Attorney-General, the review process will work as follows:

- Eligible people will be advised that they may apply for review within 60 days of being notified of their eligibility.
- Once an eligible person has requested a review, ASIO will provide an unclassified written summary of reasons for his or her adverse security assessment to the Independent Reviewer. The reasons will include information that can be provided to the eligible person without prejudicing the interests of security.
- In conducting her review, the Independent Reviewer will examine all the material that was relied upon by ASIO in making the assessment, including the unclassified written reasons provided by ASIO to the eligible person. The Independent Reviewer may also have regard to other relevant material, which may include submissions or representations made by the eligible person.
- The Independent Reviewer will also obtain ASIO's advice about whether it has any relevant new information and, if new information exists, will receive a report from ASIO on the conduct and conclusions of ASIO's reconsideration of the security assessment in light of the new information.
- The Independent Reviewer will then 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 referred to ASIO). This opinion will be provided to the Director-General, including recommendations as appropriate. A copy of this opinion will also be provided to the Attorney-General, the Minister for Immigration and Citizenship and the Inspector General of Intelligence and Security (the IGIS). The Reviewer will also advise the subject of the security assessment in writing of the outcome of the review.
- When conducting these reviews, the Independent Reviewer is bound to follow the Government's Protective Security Policy Framework and follow ASIO's security advice on the protection of ASIO's intelligence information when communicating to the public or the person subject to the adverse assessment.

[18] Law Council Media Release, 'Law Council welcomes important step regarding refugees with adverse security assessments' (16 October 2012) available at http://www.lawcouncil.asn.au/media/news-article.cfm?article=6C8DA4C7-1999-B243-6EF7-445388BE8D32.

- The Independent Reviewer is also required to prepare and provide statistics annually, for inclusion in ASIO's unclassified report, on her review activities, including details regarding the number of adverse security assessments reviewed, whether the Independent Reviewer formed the opinion that any assessments were not appropriate and any recommendations that the Director-General should make a reassessment, and the number of cases, if any, where the outcome of any reassessment was different to the original assessment.

25. This internal review scheme is an administrative arrangement and the Government does not intend to amend the ASIO Act to provide a legislative basis for the respective duties and responsibilities of the Independent Reviewer and ASIO in relation to the review process.

26. The Law Council submits that the appointment of the Independent Reviewer does not render redundant the provisions of the current Bill which provides for refugees in immigration detention, who have received an ASA, to seek merits review in the AAT.

27. The nature of the review undertaken by the Security Appeals Division of the AAT is of a different character to that contemplated by the Government's internal review scheme. Proceedings in the AAT, where they are not frustrated by the issuance of a certificate by the Attorney-General precluding any meaningful disclosure to the applicant, are more adversarial in nature and allow the affected person a greater opportunity to directly challenge and contradict the evidence relied upon to support the ASA.[19] A further and more significant difference is that the outcome of a successful AAT review application is not necessarily only a non-binding opinion or recommendation. The findings of the AAT supersede any or part of the information which is part of ASA, if the Tribunal is of the opinion that the original information is incorrect, is incorrectly represented or could not reasonably be relevant to the requirements of security.[20]

28. For these reasons, the Law Council submits that the provisions of the Bill which provide for merits review in the Security Appeals Division of the AAT can and should operate in parallel with the Independent Reviewer scheme announced by the Government.

29. The provisions of the Bill which establish an internal, periodic review scheme will, however, require revision in light of the Government's announcement.

30. Items 21 and 22 of the Bill seek to amend the ASIO Act to compel the Director-General of ASIO (or his or her delegate) to conduct six monthly reviews of the security assessment of anyone who is eligible for a protection visa, but who remains in immigration detention on the basis of ASA. The Director General may affirm or vary the original assessment, or the Director-General may set aside the assessment and make an entirely new one. If the assessment is varied, or if it is set aside and reissued, the Director-General must write to the Minister for Immigration to advise of the variation or change.

31. The review scheme announced by the Government appears to prescribe a more complete and superior model for internal review. It involves the use of an independent reviewer, contemplates the participation of the affected person in the review, and provides for reporting to both the affected person and Parliament on the

[19] The procedures to be followed in hearings before the Security Appeals Division of the Administrative Appeals Tribunal are set out in AAT Act at s39A.
[20] AAT Act s43AAA and ASIO Act s61.

outcome of the review. The primary shortcoming of the Government's review scheme is that it has no statutory basis and, as such, the independence of the Reviewer cannot be guaranteed and his or her precise functions and access to relevant information remain subject to change by the Executive.

32. For those reasons, the Law Council submits that Items 21 and 22 of the Bill should be amended to codify the review scheme announced by the Government.

33. In the alternative, if the Committee does not support the passage of the Bill, the Law Council submits that, at a minimum, the Committee should consider recommending that the Government introduce legislation to codify the appointment, functions and powers of the Independent Reviewer.

AHRC Findings and IGIS Recommendations regarding ASIO security assessments and community detention

34. On 26 November 2012, a Report from the Australian Human Rights Commission (AHRC) on its inquiry into complaints by Sri Lankan refugees in immigration detention with adverse security assessments was tabled in Parliament.[21] The Government's written responses to the AHRC's findings, which are reproduced in the Report, reveal a significant difference of opinion between the AHRC and the Government about the precise nature of the exercise undertaken by ASIO when it performs a security assessment at the request of DIAC.

35. In particular, contradictory views were expressed about whether an ASIO assessment is designed to determine:

- whether a referred individual poses a security risk in the context of the specific administrative action or decision under consideration by DIAC; or
- whether a referred individual poses a generic security risk.

36. This difference of opinion is significant because it goes to whether ASIO should be requested to provide separate security assessments in relation to a person's suitability for the grant of a visa and their suitability for less restrictive forms of immigration detention, such as community detention.

37. In her Report, former President of the AHRC, Ms Catherine Branson QC, found that ten Sri Lankan refugees who had received ASAs from ASIO were arbitrarily detained in closed immigration detention facilities. Ms Branson found that this occurred because, after the refugees received their ASA from ASIO, DIAC failed to assess whether the circumstances of each individual indicated that they could be placed in less restrictive forms of detention. Instead, the Minister determined not to allow anyone with an ASA *in relation to a visa application* to be placed in community detention.

38. In Ms Branson's view, this determination was based on an incorrect view that advice from ASIO about whether a visa should be granted also amounted to advice from ASIO about whether community detention was appropriate.

39. The failure of DIAC to assess the suitability of each individual refugee for community detention, once an ASA had been issued, raised the real possibility that any or all of the complainant refugees were either detained unnecessarily or detained in a more

[21] Sri Lankan refugees v Commonwealth of Australia (Department of Immigration & Citizenship) [2012] AusHRC 56.

restrictive way than their circumstances required. Therefore, Ms Branson concluded, the detention of the complainant refugees in these circumstances was arbitrary and in breach of article 9(1) of the International Covenant on Civil and Political Rights.

40. In its reply to the AHRC's Report, the Government expressed the view that, while ASIO may be requested to conduct a security assessment for the purposes of determining a person's suitability either for community detention or for the grant of a visa, in both cases the assessment process was the same. In the Government's view, although an ASIO assessment may be used for different purposes, ASIO does not, in fact, provide advice on whether a person should be granted a visa or released into the community. ASIO always and only advises on whether a person represents a security threat within the meaning of the ASIO Act.

41. In the Government's reply it was also stated that, 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 detention, rather than live in the community, until such time as resettlement in a third country or removal is practicable.

42. In late 2011, the IGIS also commenced an inquiry into the process by which ASIO conducts security assessments which are used by the Minister when deciding whether an individual in immigration detention is eligible to be transferred to a community detention arrangement.[22] A similar lack of concurrence about the precise function of ASIO in this context is evident in the exchanges between ASIO and the IGIS recorded in her Annual Report, tabled in Parliament on 10 October 2012.

43. The IGIS noted that, under current Ministerial Guidelines, the Minister can allow a person to be transferred from immigration detention to community detention if the Minister is satisfied that it is in the public interest, after having regard to a range of factors, including whether the person is a security risk, as well as other matters such as the person's health and welfare. The Minister requires DIAC to provide a submission setting out the circumstances of the individual case, and a risk assessment.

44. In cases where ASIO has assessed someone to be a risk to security, ASIO advises DIAC by way of a simple statement recommending that the Minister should not exercise his or her powers to allow community detention as it would not be in the 'public interest' to do so. No further information is provided, and as a result, the decision is 'in effect based only on ASIO's assessment'. [23]

45. The IGIS expressed the view that this process tends to 'conflict with the Ministerial Guidelines which require the balancing of a number of factors in the public interest test'. The IGIS suggested that it would be consistent with ASIO's broader statutory functions for ASIO to advise DIAC on the conditions for release into community detention that might be applied to individuals who have been assessed as security risks, and how such conditions might serve to mitigate the risk to security. [24] The IGIS said that 'this would allow DIAC officers to appropriately advise the Minister so that all relevant facts can be considered'. [25]

[22] A abridged version of its report is available at IGIS Annual Report 2011-2012 Annexure 4 available at http://www.igis.gov.au/annual_report/11-12/pdfs/IGIS_annual_report_11-12_part_5.pdf.
[23] IGIS Annual Report 2011-2012 Annexure 4 p. 77.
[24] IGIS Annual Report 2011-2012 Annexure 4 p. 77.
[25] IGIS Annual Report 2011-2012 Annexure 4 p. 77.

46. In its response to this Report, ASIO expressed the view that the role proposed for the Organisation may be 'outside its current legislative remit', however, ASIO also indicated the Organisation was 'open to dialogue with DIAC should the department wish to pursue this proposal with us'.[26]

47. These AHRC and IGIS reports, and the disparity of views they reveal, suggest that items 23 and 24 of the Bill may require further refinement to be effective.

48. These items of the Bill seek to amend sections 197AB and 197AD of the Migration Act. Currently section 197AB gives the Minister the power, if he thinks it is in the public interest to do so, to make a determination allowing a person to reside at a specified place instead of being detained at an immigration detention facility. The Minister is also empowered to specify conditions which must be complied with by the person subject to the determination. Section 197AD gives the Minister a corresponding power to vary or revoke a residence determination is he thinks it is in the public interest to do so.

49. Neither of these sections precludes the Minister from making a residence determination in respect of a person who has received an ASA. However, as outlined above, in practice, where a person has received an ASA, he or she is automatically deemed ineligible for a residence determination on the basis that it could not be in the public interest for him or her to reside in the community.

50. Items 23 and 24 of the Bill seek to overcome this automatic exclusion, which is based in policy rather than law, by amending section 197AB and 179AD to specify that, when the Minister is deciding whether it is in the public interest to make, vary or revoke a residence determination in respect of a person who has received an ASA, the Minister must have regard to:

    - whether any threat to security posed by the person can be addressed at a place specified in a residence determination; and
    - any other matters that the Minister considers relevant.

51. The Law Council strongly supports these proposed amendments which aim to clarify that the Minister retains a clear discretion to make a residence determination where a person has received an ASA, but where his or her circumstances nonetheless give rise to a compelling case for release from closed detention. This may include people who have young children or who have physical or mental health concerns that could be better managed in a community setting.

52. The Law Council is concerned, however, that these amendments may be of limited practical effect, in view of the position adopted by the Government and ASIO in response to the AHRC and IGIS Reports discussed above. If the amendments are premised on ASIO's ability to provide more nuanced and targeted advice about the nature of the potential threat posed by a person if released into community detention and about whether and how that risk might be mitigated, their implementation is likely to be frustrated.

53. For that reason, the Law Council recommends that, in addition to the amendments proposed, consideration should also be given to making complementary amendments to the ASIO Act to clarify its legal authority to provide advice on these matters.

[26] IGIS Annual Report 2011-2012 p. 11.

Provisions of the Bill requiring further consideration

Role of the Special Advocate in the Security Appeals Division of the Administrative Appeals Tribunal

54. The Law Council supports the proposed amendments to section 36 of the ASIO Act, which would allow a person who has been found to be owed protection obligations by Australia under international law, and who is in immigration detention, to apply to the Security Appeals Division of the AAT for review of an ASA.

55. However, the experience of Australian citizens, who are already able to seek review of an ASA in that forum, indicates that access to the AAT alone will not necessarily provide refugees with a substantive opportunity to contest the accuracy and appropriateness of their assessment.[27] For that reason the Law Council supports the broader reforms to the procedures of the Security Appeals Division of the AAT which are proposed in items 1 to 14 of the Bill.

56. Under the current provisions of the ASIO Act and the AAT Act, a person seeking to challenge an ASA may have their review rights frustrated, or at the very least compromised, in a number of ways.

57. The Attorney-General has power under s38(2) of the ASIO Act to limit the information that is provided to a person in relation to a security assessment. For example, the Attorney-General may exempt ASIO from providing notice to a person that an security assessment has even been made, by certifying that withholding notice of the assessment is essential to the security of the nation.[28] The Attorney-General may also certify that disclosure of one or more of the grounds for making the security assessment would be prejudicial to the interests of security. In that case, although the affected person will be notified of the assessment, the copy of the assessment will not contain any of the material covered by the certificate.[29]

58. Where an application for review has been made to the AAT and the Attorney-General has issued a certificate that disclosure of the complete statement of grounds contained in a security assessment would be prejudicial to the interests of security, the Director-General is required to send a copy of the certificate to the AAT and the complete assessment within 30 days of receiving notice of the application.[30] However, the AAT must not tell the applicant of the existence of, or permit the applicant to have access to, any copies of particulars of the certificate or any matter to which the certificate relates.[31]

59. The Director-General of ASIO is under a duty to present to the AAT all relevant information that is available to ASIO, whether it is favourable or unfavourable to the applicant.[32] However, that material will not necessarily be provided to the applicant. The Attorney-General may issue a certificate stating that the disclosure of particular information or the contents of certain documents would be contrary to the public

[27] See for example: *Hussain v Minister for Foreign Affairs & Anor* (2008) 169 FCR 241; *Traljesic v Attorney-General (Cth)* (2006) 150 FCR 199.
[28] ASIO Act s38(2)(a) and s38(4).
[29] ASIO Act s38(2)(b) and s38(5).
[30] AAT Act s38A(1).
[31] AAT Act s38A(2).
[32] AAT Act s39A(3).

interest.[33] In that case, the AAT must ensure that the specified material is not disclosed to the applicant and his or her representatives.[34] The AAT has a limited discretion to determine that material covered by a certificate should be released to the applicant.[35] The discretion is not available, however, if the certificate has been issued on the basis that disclosure would prejudice security or the defence or international relations of Australia or because it would involve the disclosure of deliberations or decisions of the Cabinet, a Committee of the Cabinet or the Executive Council.

60. The Minister administering the ASIO Act may also certify that disclosure of particular evidence or submissions would be contrary to the public interest on the basis that it would prejudice security or the defence of Australia.[36] Where such a certificate exists, the applicant is not allowed to be present when the evidence is adduced or the submission is made, and the applicant's representative may be present only with the Minister's consent.[37]

61. The effect of these provisions is that a review applicant will not necessarily know the reasons for their ASA nor the evidence relied upon to support those reasons. In cases where review applicants are unable to test undisclosed evidence, contradict it with other evidence, or make submissions about the use or misuse that has been made of it, the AAT can be left to scrutinise the correctness of an ASA in the absence of an effective contradictor.

62. To mitigate against this potential personal unfairness, without compromising the broader public interest objectives which require that certain sensitive information remain secret, the Bill seeks to amend the AAT Act to allow for the appointment of a security cleared advocate to view, and make submissions in respect of pertinent, undisclosed material on an affected person's behalf.

63. Specifically, item 13 of the Bill seeks to insert a new section 39C and 39D into the AAT Act. Proposed section 39C provides that a Special Advocate:

64. may be appointed by the presiding Presidential Member of the AAT, on the request of the applicant, if the applicant is not able to directly access the reasons for the adverse security assessment.

65. must be a security cleared, pre-approved and experienced legal advocate;

66. has the function of protecting the interests of the applicant when the assessment or other information has been withheld from the applicant or when the applicant is required to be absent during submissions or adducing of evidence;

67. is distinct from the affected person's lawyer – they will appear on behalf of the person, but not necessarily on their instruction;

68. may be present to access and hear all evidence and submissions and may inspect any document that the AAT proposes to have regard to in the proceedings, but must not communicate any classified details back to the affected person;

69. may make oral and written submissions in relation to any undisclosed documents or other undisclosed information and may participate in cross-examining witnesses

[33] AAT Act s39B(2).
[34] AAT Act s39B(3).
[35] AAT Act s39B(5).
[36] AAT Act s39A(8).
[37] AAT Act s39A(9).

who testify during any part of the proceeding where the applicant or their representative are not entitled to be present;

70. has immunity from civil action or any proceeding in relation to their performance of the role of special advocate;

71. is to be renumerated by the Commonwealth;

72. can be terminated on the applicant's request or for a range of other specified grounds, such as if he or she no longer holds a valid security clearance.

73. Proposed section 39D prescribes the information which must be provided to the Special Advocate by ASIO and how and when the Special Advocate may communicate with the applicant and their representative. Essentially, communications are unlimited before the documents for the proceeding are provided to the Special Advocate. After that time, the Special Advocate may only communicate with the applicant to confirm receipt of a written communication from the applicant. Any other communication between the Special Advocate and the applicant must first be authorised by the presiding Presidential Member of the AAT and is subject to a veto by the Attorney-General who may issue a certificate to bar the proposed communication. The Attorney-General's veto power is non-reviewable by the AAT, if it has been exercised on the basis that the communication would prejudice security or the defence or international relations of Australia or because it would involve the disclosure of deliberations or decisions of the Cabinet, a Committee of the Cabinet or the Executive Council. [38]

74. The manifest limitation with this proposed procedure is that, without the Attorney-General's consent, the Special Advocate is only allowed to communicate with the review applicant before the Special Advocate has any knowledge of the specific case against the applicant. Therefore, the Special Advocate's ability to identify factual inaccuracies in the evidence relied upon, or to deny or explain an activity or statement attributed to the applicant or to adduce evidence which contests a particular version or interpretation of events, is very restricted.

75. It might be said that such a role merely provides a veneer of credibility to an inherently unfair process. Reviews of a similar procedure in the United Kingdom, as detailed in the Gilbert and Tobin Centre for Public Law submission to the current Inquiry, indicate that opinion remains divided in that jurisdiction about the utility of a measure of this kind.

76. Nevertheless, the Law Council considers it desirable that a person affected by an ASA should have at least some opportunity, albeit through an uninstructed third party advocate, to challenge material adverse to his or her interests. Even in the absence of instructions, a properly qualified special advocate may be able to mount a credible contradictory position to that of ASIO. For example, material that was objectively unreliable or contradictory on its face, or was out of date, or had been superseded by objectively and widely known events, or was clearly irrelevant, or unreasonable, or illogical or irrational, particularly if the special advocate were permitted to adduce evidence in response to that produced by ASIO.

[38] Parliamentary Joint Committee on Human Rights Sixth Report to Parliament 31 October 2012, Chapter 4, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/reports/6_2012/c04.htm

77. For this reason, the Law Council supports the introduction of a Special Advocate procedure as proposed in the Bill, but submits that some refinement of the current provisions is required as discussed below.

78. Given the inherent limitations of the Special Advocate procedure, the most complete possible disclosure of material to a review applicant should still be required. The Law Council recommends that consideration be given to amending sections 39A and 39B of the AAT Act to allow for redacted or summarised information to be provided to a review applicant where full disclosure of a document or submission has been declared against the public interest for security or other reasons. It is important that the creation of a Special Advocate role does not lead to the perverse result that review applicants are provided with less information about the case against them, because of a false assumption that the appointment of a Special Advocate will overcome any procedural unfairness which flows from non-disclosure of relevant material.

79. There is ambiguity in the current provisions about the ability of the Special Advocate to adduce evidence and call witnesses. Items 4 to 11 of the Bill propose consequential amendments to section 39A of the AAT Act which assume that the Special Advocate will have this right. However, proposed subsection 39C(5), which lists the powers of the Special Advocate, is silent on whether he or she may call witnesses and adduce evidence. The Law Council recommends that proposed subsection 39C(5) should be amended to include this power. The Law Council notes that this may require further amendments to allow for, and facilitate, communication between the Special Advocate and third parties for this purpose.

80. Proposed subsection 39C(1) provides that a Special Advocate will be appointed by the presiding Presidential Member on request by the applicant. There is a risk that an applicant in such a situation might not be aware of his or her rights to be so represented. The Law Council recommends that the Presidential Member be obliged to inform the applicant of that right.

81. Proposed subsection 39C(2) provides that, although a Special Advocate is appointed at the request of the review applicant, he or she need not consent to the Special Advocate appointed. Subsection 39C(11) provides that the appointment of a Special Advocate may be terminated at the request of the review applicant, but that, if this occurs, no further Special Advocate may be appointed. The Law Council accepts that there are necessary limitations in this context on the applicant being able to pick and choose the Special Advocate who appears on his or her behalf. However, the Law Council submits that the current provisions may be unduly restrictive in not allowing the applicant any choice at all. The Law Council recommends that the Presidential Member should, at the very least, retain the discretion to appoint a new Special Advocate, if the applicant chooses to request the termination of the first Advocate.

82. Proposed section 39D(12) provides that a Special Advocate may not, and cannot, be compelled to disclose any information obtained by reason of his or her appointment in any proceedings before a court. The Law Council submits that this prohibition on further disclosure is unjustifiably broad. The Law Council recommends that the court, in any proceedings before it, should always retain the ultimate discretion to determine whether and how particular information should be admitted into evidence in the interests of justice. Of course, the court may be guided in its deliberation by directions from the legislature as to the matters to be taken into account and the weight to be afforded those matters.

Conclusion

83. Current Australian laws and policies have allowed a situation to arise whereby some 50 adults and six children are being held in indefinite immigration detention on the basis of security assessments that they have never seen and have never had the opportunity to challenge.

84. This Bill represents an attempt to break the current impasse. It seeks to provide these stranded detainees with an opportunity to seek independent merits review of their assessment. It seeks to ensure that this review is meaningful by providing for the appointment of a Special Advocate to view and make submissions on material the detainee is prevented from accessing. It seeks to amend the Migration Act to ensure that, regardless of whether their ASAs are successfully challenged, these detainees are not automatically regarded as ineligible for community detention. It seeks to ensure that ASAs issued in respect of immigration detainees are subject to periodic internal review.

85. While the improvements to transparency and procedural fairness delivered by the Bill may in practice prove modest, the Law Council supports the objects of the Bill and recommends that it be passed subject to the following revisions:

- Items 21 and 22 of the Bill should be redrafted to codify the superior aspects of the internal, periodic review scheme announced by the Government;

- Complementary amendments to the ASIO Act should be considered to clarify ASIO's legal authority to provide a specific assessment of the potential threat posed by a person if released into community detention and to provide advice about whether and how that risk might be mitigated;

86. Further amendments to sections 39A and 39B of the AAT Act should be considered to allow for redacted or summarised information to be provided to a review applicant where full disclosure of a document or submission has been declared against the public interest for security or other reasons;

87. Proposed subsection 39C(5) should be amended to include the power to adduce evidence and call witnesses. If necessary, further amendments should be considered to allow for, and facilitate, communication between the Special Advocate and third parties for this purpose;

88. Proposed subsection 39C(11) should be amended to allow the presiding Presidential Member the discretion to appoint a new Special Advocate, if the review applicant chooses to request the termination of the first Advocate; and

89. Proposed section 39D(12) should be amended so that the court, in any future proceedings before it, retains the ultimate discretion to determine whether and how particular information should be admitted into evidence in the interests of justice.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.