



Submission to the Inquiry into the Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012

The Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012 ('the Bill') was introduced into Parliament on 10 October 2012. This was before the Government announced a new review process in relation to the same group of 'eligible protection visa persons'. On 15 October 2012, the Attorney-General announced the appointment of the Hon Margaret Stone as the Independent Reviewer of Adverse Security Assessments. Terms of Reference for the role were publicly released the following day on 16 October 2012 (see **Attachment A**). The Reviewer will provide independent primary review and independent periodic review of ASIO adverse security assessments in relation to people who have been found to be owed protection but remain in immigration detention.

The Bill being considered by the inquiry provides a different mechanism to achieve a review process for this same group – namely primary review by the Administrative Appeals Tribunal (AAT) and ASIO internal periodic review. While there will no doubt be differing views as to the review mechanism, we note that the Government considered a range of options for a review mechanism before deciding to establish the Independent Reviewer. In light of the establishment of the Independent Reviewer, the Department's submission to this inquiry will focus on outlining her role and noting the similarities with the key proposals in this Bill.

Primary Review

The Bill would enable 'eligible protection visa persons' to apply for review of an adverse security assessment by the AAT. These eligible people are those who are in immigration detention and are the subject of an adverse security assessment that recommended against the Minister for Immigration and Citizenship granting the person a permanent protection visa (or deciding to 'lift the bar' to enable the person to apply for a permanent protection visa). It also covers an adverse security assessment resulting in the cancellation of a permanent protection visa. The persons covered by this amendment would be the same people who would be eligible to apply for review by the Independent Reviewer.

The proposed AAT review process would be initiated by an application for review within the prescribed period, which is usually 28 days of being notified of the decision, although the AAT can extend the time for making applications.¹ Similarly, eligible persons may apply to the Independent Reviewer within 60 days of being notified that they are eligible for review (notification will be by way of letter providing them with an application form and details of the review process). The Reviewer also has discretion to accept late applications for review.

The Independent Reviewer will have access to all the material available to ASIO and capacity to receive submissions from the applicant and from ASIO. The Reviewer will have access to the same material that would be available to the AAT if it were conducting a review. It will be a matter for the Reviewer to determine how she conducts reviews, but it is envisaged that the Reviewer will be able to speak with relevant ASIO officers about the material and the original security assessment decision, and also check that there is no new information available that might have a bearing on the case. The Reviewer will also invite submissions

¹ *Administrative Appeals Tribunal Act 1975*, s29(7).

from the applicant, and may decide to seek further material or speak with the applicant should she consider it necessary for the purpose of her review. The review process is intended to be a relatively quick and informal process, with no formal hearings.

The Reviewer's role is to consider all the available material and form an opinion as to whether the adverse security assessment is an appropriate outcome. The Reviewer provides her opinion and any recommendations to the Director-General of Security. Unlike the AAT, the Reviewer's decision is not binding on ASIO. However, the Terms of Reference require a copy of the Reviewer's opinion to be provided to the Attorney-General, the Minister for Immigration and Citizenship and the Inspector-General of Intelligence and Security (IGIS). This reporting requirement ensures that ASIO is accountable to relevant Ministers and the IGIS for any subsequent decision as to whether or not to accept the Reviewer's findings. The Reviewer is also required to maintain statistics for reporting purposes, which will be included in ASIO's Annual Report to Parliament.

Copy of security assessment

The Bill proposes that amendments would be made to the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) and the *Administrative Appeals Tribunal Act 1975* so that a person would be given a copy of the security assessment, subject to capacity for the Attorney-General to issue a certificate where there are public interest or national security exceptions to withhold part or all of the assessment. The Terms of Reference for the Independent Reviewer also establish a process for the person to be provided with a summary of reasons for the adverse security assessment when they apply for review. The summary of reasons is to include information that can be provided to the eligible person to the extent able without prejudicing the interests of security. This will enable the applicant to consider whether to make a submission to the Reviewer addressing matters raised in the summary of reasons.

We note that the amendments proposed in Item 19 of the Bill would remove the current provision in the ASIO Act that enables the Attorney-General in limited circumstances to certify that withholding notice of the making of a security assessment with respect to the relevant person is essential to the security of the nation. Any proposal to repeal this long-standing provision would be problematic, because its application is broader than just in relation to the eligible protection visa applicants. We are not aware of any case where an eligible protection visa applicant has not been notified that they were the subject of an adverse security assessment. The sort of cases where such a certificate might be sought are cases where notification of a security assessment may have the effect of tipping off a person of security concern and causing them to engage in activities prejudicial to security, such as bringing forward plans to commit a terrorist attack.

Special advocates

The Bill proposes a regime for special advocates to have a role in AAT proceedings where the Attorney-General has issued a public interest certificate preventing the person from being given a copy of all or part of the security assessment or preventing the disclosure of evidence or submissions of the Director-General or other Commonwealth agency. While the Special Advocate can take instructions from the applicant initially, once the Special Advocate has been given access to classified material, he or she is not able to further communicate with the applicant, other than to acknowledge correspondence from the applicant. Therefore, the Special Advocate may have limited capacity to seek instructions and respond to any new

issues raised in the classified material. We note that the role of the AAT is to act as an independent decision maker and it is arguable that such an independent body will be just as well placed to consider all the material and the applicant's interests as a Special Advocate who is unable to seek instructions from the applicant once he or she has seen the classified material.

The Independent Reviewer is similarly placed as an independent body, able to consider all material as well as the interests of the applicant. The Terms of Reference provide a mechanism to enable the Reviewer to engage with the applicant even after she has seen classified material. They also provide that the Reviewer should engage with ASIO and seek advice on the protection of ASIO capability when the Reviewer is communicating with the applicant.

Periodic Review

The Bill provides for ASIO to conduct periodic reviews of adverse security assessments for the eligible protection visa persons every six months. The Terms of Reference for the Independent Reviewer also provide for the Reviewer to conduct periodic review every 12 months. Unlike the primary review function, periodic review by the Independent Reviewer will be automatic and the applicant does not need to apply for review. The 12 month timeframe was considered to be an appropriately regular timeframe for periodic review, having regard to the caseload and the resources that will be required to undertake these periodic reviews.

The Terms of Reference for the Independent Reviewer provide that a periodic review will involve inquiring of ASIO as to whether there is any new material relevant to the security assessment and reviewing the original assessment along with any new material to form an opinion as to whether the adverse security assessment continues to be an appropriate outcome. The applicant will also have the opportunity to make a submission to be considered as part of the periodic review. While the periodic review function is to occur at 12 monthly intervals, this would not preclude ASIO from considering new relevant information at any time and issuing a new security assessment in the event that the new information changed ASIO's original assessment. This has always been the case. Having a specific periodic review process just provides a mechanism to ensure that there is a formal process to check for any new relevant information and review of the security assessment where people remain in immigration detention pending third country resettlement.

Residence Determinations

The Bill proposes amendments to the *Migration Act 1958* in relation to the Minister for Immigration and Citizenship's non-compellable power to make residence determinations, which enable a person to reside at a specified place in the community rather than in immigration detention facilities. The Bill proposes that the Minister must consider alternatives to held detention for managing the security concerns. Current policy does not include use of residence determinations for those with adverse security assessments. Any placement of persons of security concern into the community raises complex issues that would need to be carefully considered, including consideration of how compliance with conditions would be monitored and enforced to mitigate risk to the Australian public.

Independent Review function – Terms of Reference

Role

The role of the Independent Reviewer ('Reviewer') is to conduct an independent advisory review of Australian Security Intelligence Organisation (ASIO) adverse security assessments (ASAs) furnished to the Department of Immigration and Citizenship (DIAC) in relation to those persons who remain in immigration detention, having been found by DIAC to be owed protection obligations under international law and to be ineligible for a permanent protection visa or who have had their permanent protection visa cancelled because they are the subject of an ASA ('eligible persons').

The Reviewer is required to examine all material relied upon by ASIO in making the security assessment, provide an opinion to the Director-General of Security ('Director-General') on whether the assessment is an appropriate outcome based on the material ASIO relied upon and make recommendations accordingly, for the Director-General's consideration.

The Reviewer will also conduct a periodic review of ASAs on eligible persons every 12 months.

Functions

Primary review function

The Reviewer's primary function will be to conduct a review of ASAs furnished to DIAC in relation to eligible persons who request the Reviewer to undertake a review in accordance with this process. In carrying out this function the Reviewer will:

- Conduct an independent review of an ASA furnished to DIAC in relation to an eligible person, where that person has made an application to the Reviewer within 60 days of receiving notice that the person is an eligible person to seek independent review of the ASA under this process.
 - If an application is received after 60 days, the Reviewer may use his or her discretion in deciding whether to conduct a review.
 - All eligible persons who are subject to ASAs furnished to DIAC prior to the engagement of the Reviewer will be advised that they may apply for review within 60 days of being notified of their eligibility.
- Examine all of the ASIO material that was relied upon by ASIO in making the ASA, including unclassified written reasons provided by ASIO for the eligible person, as well as other relevant material, which may include submissions or representations made by the eligible person. Where a submission from an eligible person contains new information or claims, this information should be referred to ASIO for consideration before the review proceeds.
- Upon conclusion of every review, 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 referred to ASIO) and provide such opinion to the Director-General, including recommendations as appropriate.

- Provide a copy of that written opinion to the Attorney-General, the Minister for Immigration and Citizenship and the Inspector-General of Intelligence and Security (IGIS).
- Advise the subject of the security assessment in writing of the outcome of the review. This will include providing a document in unclassified form, to the extent possible without prejudicing national security² as advised by the Director-General, the Reviewer's opinion, reasons and any recommendations made and the outcome of the Director-General's consideration of the opinion and recommendations.

Periodic review function

The Reviewer will, after commencement of the Review mechanism, conduct a periodic review every 12 months of ASAs in relation to eligible persons, from either the more recent of:

- the date of the commencement of the Review process, or
- if an ASA is issued after the commencement of the Review process, the date that the ASA was furnished to DIAC, or
- from the time the Reviewer completed an independent review of an ASA at the request of the eligible person.

In carrying out this function the Reviewer will:

- Obtain ASIO security advice on whether ASIO holdings contain any new information relevant to the eligible person that was not available when the ASA was furnished to DIAC. Where ASIO identifies new information, the Reviewer will obtain ASIO advice on the relevance of that information to the ASA.
- Where ASIO advises the Reviewer that there is new information that is relevant to the ASA, ASIO will reconsider the ASA in light of the new information and advise the Reviewer of the outcome of the reconsideration.
- The Reviewer will receive a report from ASIO on the conduct and conclusions of ASIO's reconsideration of the ASA in light of the new information. The Reviewer will maintain discretion to request further information if the Reviewer thinks appropriate.
- The Reviewer will form and record in writing an opinion as to the status of the ASA and where relevant, whether the conclusion ASIO made on any new material was an appropriate outcome, and provide such opinion to the Director-General, including recommendations as appropriate.

Requirements in performing functions

- The Reviewer will apply the Protective Security Policy Framework ('PSPF') at all times during the review process.

² Throughout this document the word 'security' is a reference to 'security' as defined in section 4 of the *ASIO Act 1979*.

- Throughout the review process, the Reviewer will obtain and adhere to ASIO's security advice on the protection of ASIO's intelligence capability when the Reviewer is communicating, either orally or in writing, within the public domain including directly with the eligible person, when carrying out his or her function.³
- In forming an opinion the Reviewer will take into account ASIO's role and statutory functions including ASIO's mission to identify and investigate threats to security and provide advice to protect Australia, its people and its interests and that, therefore, ASIO's security assessments are anticipatory in nature, enabling preventive action to be taken.
- The Reviewer will take into account that security assessments are made in the interests of security and any relevant legislative test ASIO was required to consider in making the security assessment.
- Independent advisory review will be available to eligible persons who are the subject of ASAs furnished to DIAC prior to the appointment of the Reviewer. Upon commencement in the position, these persons will be notified of their eligibility to request a review under this process.
- The Reviewer will prioritise the review of security assessments for eligible persons furnished prior to the appointment of the Reviewer as expeditiously as possible. For future cases, once the Reviewer has completed reviews for the pre-existing caseload, the Reviewer will seek to complete reviews within three months.
- The Reviewer will work with ASIO, the Department of Immigration and Citizenship and the Attorney-General's Department to ensure appropriate materials are provided to eligible persons when they are notified of an ASA, outlining their rights to seek review. The materials will use simple language and be translated into foreign languages.

Reporting

The Reviewer is required to prepare and provide statistics annually for inclusion in ASIO's unclassified report on the following:

- The number of adverse security assessments reviewed during the preceding financial year;
- Of those adverse security assessments, the number of assessments where the Reviewer formed the opinion that the assessment was/was not an appropriate outcome based on the material relied upon by ASIO and the number of times the Reviewer recommended that the Director-General review the security assessment;
- The number of occasions where the Director-General has/has not accepted and actioned the recommendations of the Reviewer

³ ASIO will provide security advice on the intended content of external communications within the public domain including directly with an eligible person, to ensure those communications do not prejudice security through the disclosure of ASIO's capabilities including the identity of its officers, sources, operational methodologies, operations, investigations and liaison partners.

- The number, if any, of cases where the outcome of any reassessment was different to the original ASA; and
- The number of periodic reviews conducted by the Reviewer in the preceding financial year.

Engagement with ASIO

- When an eligible person makes a request for independent review, ASIO will provide an unclassified written summary of reasons for the decision to issue an adverse security assessment to the Reviewer on the basis that it will be provided to the eligible person. The reasons will include information that can be provided to the eligible person to the extent able without prejudicing the interests of security.
- ASIO will endeavour to provide the Reviewer with the necessary support and assistance to enable him or her to carry out the function independently together with the use of secure ASIO premises. This support will include the initial provision of all information relied upon by ASIO in making the assessment for every review commenced under this process at the request of an eligible person.
- Where it appears to the Reviewer that he or she may arrive at an opinion that it was not an appropriate outcome that ASIO furnished the ASA on the material ASIO relied upon, including where that opinion is based upon information that was not available to ASIO when the security assessment was furnished to DIAC, the Reviewer will provide the Director-General with a reasonable opportunity to comment, before finalising the opinion.