



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HumanRights:JD:VK:675000

13 December 2012

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100, Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary,

Senate Committee Inquiry: Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012

The Human Rights Committee of the Law Society of NSW ("Committee") has responsibility to consider and monitor Australia's obligations under international law in respect of human rights; to consider reform proposals and draft legislation with respect to issues of human rights; and to advise the Law Society on any proposed changes. The Committee is a long-established committee of the Society, comprised of experienced and specialist practitioners drawn from the ranks of the Society's members who act for the various stakeholders in all areas of human rights law in this State.

The Committee welcomes the opportunity to make submissions to the Senate Committee Inquiry into the Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012 ("the Bill"). The Committee understands that the Bill seeks to:

- Amend the *Administrative Appeals Tribunal Act 1975* (Cth) to allow non-citizens who are eligible for a protection visa access to merits review of their security assessment in the Administrative Appeals Tribunal (AAT). The Committee understands the right of review will also be afforded to an off-shore entry person and to persons otherwise prevented by the *Migration Act 1958* (Cth) from making a valid application;
- Provide the affected person, unless certified public interest or national security exceptions apply, access to a copy of the security assessment where there has been an adverse or qualified finding;
- Establish a new role of Special Advocate who can appear before the AAT and will have access to all evidence and submissions. The Special Advocate, however, may not communicate any classified details back to the affected person;
- Amend the *Australian Security Intelligence Organisation Act 1979* (Cth) ("ASIO Act") to require reviews every six months of the security assessment of anyone who is detained on the basis of an adverse or qualified security assessment;
- Impose a requirement on the Minister for Immigration and Citizenship to consider community release in appropriate cases and impose a requirement on the Minister to revisit a decision about the refusal or cancellation of a protection visa where an adverse security assessment is overturned by an internal review at ASIO or through merits review at the AAT.

THE LAW SOCIETY OF NEW SOUTH WALES

170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966

T +61 2 9926 0333 F +61 2 9231 5809
www.lawsociety.com.au



The Committee continues to have serious concerns about the indefinite detention that may result for refugees following an adverse security assessment and commends the Bill for its attempt to introduce fairness and transparency in appropriate cases. The Committee's view is that while indefinite detention has not been found impermissible under Australian law, it may fall foul of Australia's obligations under Article 9 of the *International Covenant on Civil and Political Rights*. The Committee notes that an adverse security assessment can change in time and in light of new information. The Committee's view is therefore that the introduction of regular internal reviews; merits reviews; and, the release of affected persons into the community in appropriate cases would greatly reduce the risk of arbitrary detention and breaches of Australia's international obligations. The Committee urges that the Bill be adopted and makes the following additional submissions.

The ASIO Act currently denies persons who are not Australian citizens, holders of permanent visas, special category visa and special purpose visas the right to be provided with a statement of the grounds for the assessment made against them and denies a right of merits review to the AAT¹. The Committee welcomes amendments which seek to address this by broadening the category of people to whom Part IV of the ASIO Act applies, but submits that the Bill should go further and provide for a requirement that an affected person, prior to an assessment being made, and where appropriate, be given clear particulars (either orally or in writing) of any information that would be the reason, or part of the reason, for making an adverse security assessment against them. It is the view of the Committee that an affected person should be given a real and meaningful opportunity to respond to information on which their assessment will turn. This would accord with the ordinary principles of natural justice and in particular the *audi alteram partem* rule.

There are circumstances, of course, where the disclosure of particular information may not be appropriate as it may compromise national security². The Courts, while acknowledging that the ASIO Act does not exclude requirements of procedural fairness, have considered that a decision against disclosure in the interest of national security may "*reduce the content of procedural fairness, in practical terms, 'to nothingness'*"³. It may be open to the Director General, however, in giving genuine consideration to issues of disclosure and national security, to reveal the general nature of information or the substance of the allegations and what conclusions may be drawn from them in a manner that leads to no prejudice to national security but puts an affected person on notice as to the case against them.

The Committee, mindful that some information in its entirety cannot for reasons of national security be disclosed, welcomes the creation of the new role of Special Advocate before the AAT. The Committee notes that the Bill intends for the Special Advocate to have access to all evidence and material relevant in making the security assessment, in order for the Special Advocate to make submissions and provide assistance to the AAT in forming an independent assessment. While the ability of the Special Advocate to conduct its role is somewhat diminished by restrictions imposed on seeking instructions after gaining access to the relevant material, the Committee nevertheless welcomes the role as of great assistance to the person affected and to the Tribunal.

The Committee is particularly concerned that ASIO may have made some of the negative security assessments without conducting interviews. The Committee is also concerned with knowledge that in some matters legal representatives have been denied the opportunity to attend interviews to provide support and representation; having been advised that an interview may not proceed should the representative insist on being present. It is the view of

¹See sections 36, 37 and 54 of the ASIO Act.

²As envisaged by the ASIO Act.

³See *Leghaei v Director-General of Security* [2007] FCAFC 37 at [30] and *Leghaei v Director-General of Security* [2005] FCA 1576.

the Committee that all affected people should be invited to an interview to give evidence and present arguments in defence of allegations made against them and be given the opportunity to have a legal representative present. This is a basic right in circumstances where procedural fairness may, in practical terms, have already been reduced to 'nothingness'.

The Committee thanks you again for the opportunity to comment. If your office has any questions please contact Vicky Kuek, policy lawyer for the Committee, on

Yours sincerely,

Justin Dowd
President