NSW Council for Civil Liberties Inc.

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14 December 2012

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

Dear Sir/Madam,

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

The New South Wales Council for Civil Liberties (NSWCCL) is one of Australia's leading human rights and civil liberties organisations. Founded in 1963, NSWCCL is a non-political, non-religious and non sectarian organisation that champions the rights of all to express their views and beliefs without suppression. To this end, the NSWCCL attempts to influence public debate and government policy on a range of human rights issues by preparing submissions to parliament and other relevant bodies.

NSWCCL thanks the Committee for the opportunity to make this submission.

Summary

NSWCCL respectfully submits that:

a. The Bill should clearly provide that detention of citizens and non-citizens alike should not be permissible solely on the basis of being issued an adverse security assessment.
b. A statement of reasons for an adverse security assessment is rendered ineffective without an acceptable avenue for appeal and an explicit minimum degree of content.
c. Merits review by way of expansion of the jurisdiction of the Administrative Appeals Tribunal is strongly preferable to the Independent Reviewer scheme.
d. The Special Advocate model as proposed in this Bill requires expansion in order to facilitate procedural fairness.
e. NSWCCL supports the provisions in the Bill for regular review of assessments on a prescribed basis, in order to ensure Australia complies with international human rights obligations.
f. A notable decrease in ASIO's disclosure reflects a lack of transparency and accountability, both of which are required from an organisation acting in the interest of national security. The Bill should mandate a minimum level of ASIO reporting.

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Submission

The Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012 addresses numerous voids in the current system in operation with regard to refugees classed as representing an adverse security risk. The NSWCCL welcomes the Bill as an initial step required to advance this necessary course of action. However, with respect, the Bill itself requires careful expansion in order to facilitate bona fide procedural fairness to individuals who are presently facing the prospect of indefinite detention as a direct consequence of such an assessment.

Most importantly, it is submitted that the Bill should clearly provide that detention of citizens and non-citizens alike should not be permissible solely on the basis of being issued an adverse security assessment.

The Government's current position

Furtherance of the Bill appears unlikely in light of the Government's current position concerning refugees with adverse security assessments. The statutory bar to merits review placed upon non-citizens subject to an adverse security assessment[1] is expected to remain in place as a result of the Government's refusal to expand the jurisdiction of the Administrative Appeals Tribunal.[2] The Government has implemented an alternative review mechanism in the form of the appointment of an Independent Reviewer of Adverse Security Assessments, a system which is inherently flawed upon consideration of the principles of independence and fairness required of a genuine merits review process.

Further, the role of a Special Advocate has not been accepted by the Government as a feasible role in conducting review of negative assessments.[3] Whilst the Special Advocate model has undoubtedly encountered several problems in the jurisdictions of the United Kingdom and Canada, the principles the model espouses should be taken into account when formulating a viable alternative. Consideration of such principles would guarantee dispersion of accountability in conducting the review process, and ensure maintenance of overarching independence in decision-making. Such integral factors are notably lacking in the Government's form of a viable alternative, the Independent Reviewer scheme, to the detriment of those seeking review.

The Government is relying on a narrow interpretation of the High Court judgment *M47*[4] as a justification for continued indefinite detention of refugees arriving by 'irregular maritime' means who have been issued with adverse security assessments.[5] The Government has deemed the judgment as being inapplicable to 'offshore entry' persons, as the applicant in M47 arrived to the mainland by air amidst the Oceanic Viking incident in 2009.

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[1] *Australian Security Intelligence Organisation Act* 1979 (Cth) s 36.
[2] Commonwealth, *Parliamentary Debates*, Senate, 29 November 2012, 112 (Senator Penny Wong).
[3] Commonwealth, *Parliamentary Debates*, Senate, 29 November 2012, 118 (Senator Penny Wong).
[4] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46.
[5] Harriet Alexander, 'Refugee lawyers challenge indefinite detention rule', *Sydney Morning Herald* (online), 12 December 2012 < http://www.smh.com.au/opinion/political-news/refugee-lawyers-challenge-indefinite-detention-rule-20121211-2b7lr.html>.

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Statement of reasons

The provision of a statement or redacted summary of reasons to individuals issued with adverse security assessments has been brought to fruition as a result of the commencement of the Independent Reviewer scheme. The length of time it has taken for such an outcome to be realised is a blatant reflection of the Government's enduring failure to uphold the human rights of individuals whom Australia is legally obligated to protect.

Although provision of a statement of reasons is a long-awaited outcome in the view of the NSWCCL, it is dismally apparent that provision of such a statement is rendered a deficient means of challenging detention in Court under current merits review arrangements. The statement of reasons is rendered virtually ineffective as a result of the Government's apparent refusal to extend the jurisdiction of the Security Appeals Division of the Administrative Appeals Tribunal to non-citizens wishing to challenge their adverse security assessment.[6]

Further, disclosure of a statement of reasons may not be possible as a result of the possibility of prejudicing security. As a minimum degree of content of disclosure is not explicitly specified, it is probable individuals with information unable to be disclosed as a consequence of such information being classified will continue to languish in indefinite detention with little or no prospect for review.

This emphasises the need to deal explicitly with the consequences of an adverse security assessment. The NSWCCL maintains, as outlined in greater detail within the final heading of the submission, that detention should not be a permissible outcome of adverse security assessments.

Merits review

The Bill proposes the expansion of the jurisdiction of the Administrative Appeals Tribunal (AAT) to ensure that non-citizens who have received an adverse security assessment are able to seek merits review of their security assessment, which is an entitlement Australian citizen counterparts are currently afforded under legislation.

Such an approach is preferable to the non-statutory scheme introduced by the Government in October 2012, in which the Independent Reviewer operates to conduct 'independent advisory'[7] reviews of eligible individuals' adverse security assessments. The maintenance of independence in such a scheme would appear to be merely superficial. Furthermore, as recommendations are made for the Director-General of ASIO's consideration and need not be accepted, the effectiveness of such a mechanism of review in carrying out and achieving its purpose is to be questioned.

Independence is inherently precluded as a result of the Independent Reviewer operating within the executive arm of government. New information or claims submitted by the eligible

[6] Commonwealth, *Parliamentary Debates*, Senate, 29 November 2012, 112 (Senator Penny Wong).
[7] Attorney-General, *Independent Review Function – Terms of Reference*, October 2012, 1.

person must be referred to ASIO for consideration before the review proceeds. Further, in the event that the Reviewer arrives at an opinion that ASIO furnished the adverse security assessment inappropriately upon consideration of information available at the time of assessment and new information subsequent to assessment, the Director-General is to be provided with 'a reasonable opportunity to comment, before finalising the opinion'.[8]

The use of the word independent within the role of Independent Merits Reviewer was held to misrepresent the partial status of the position in a 2011 Federal Court decision, as a result of the role having been contracted by the Department for Immigration and Citizenship.[9] It would follow that the title of Independent Reviewer would be found to be similarly misleading to the reader by 'suggesting a term of engagement' the Reviewer does not in fact possess.

Expansion of the jurisdiction of the AAT with respect to adverse security assessments would allow a truly independent review of the initial decision made by ASIO, approaching the matter afresh, within a quasi-judicial setting and handing down a binding decision. Whilst the AAT remains a body under the executive arm, the Tribunal operates as independent from ASIO as the original decision-maker and such independence is required upon consideration of repercussions of an adverse security assessment.

Unsurprisingly, concerns have been voiced in relation to the cost of allowing non-citizens with an adverse security assessment access to the AAT for the purposes of review. Mr. David Irvine, Director-General of ASIO, has expressed concern that conferral of such a right of appeal would result in 'significant resource implications'.[10] Although monetary and resource considerations are factors to be taken into account upon assessing the feasibility of expanding the AAT's jurisdiction, it is not clear that the resource implications for ASIO are greater than the savings which would result from not detaining non-citizens with adverse security assessments. Further, the nature of fundamental freedoms at stake is such that resource concerns are secondary.

Special Advocate

The Special Advocate model is currently in operation within the jurisdictions of the United Kingdom,[11] Canada,[12] and New Zealand.[13] Such a mechanism provides for review of a matter in its entirety in the event that certain documents are classified for security reasons.

Whilst the Special Advocate model has encountered issues in relation to engagement with the affected individual and the requirement that information be withheld, the process seemingly affords the eligible person with a superior level of advocacy in the event that access to documentation by the individual or their legal representation is excluded for security reasons. Such advocacy would arguably result in a more just outcome than would

[8] Attorney-General, *Independent Review Function – Terms of Reference*, October 2012, 4.
[9] *Minister for Immigration and Citizenship v MZYLE (No 2)* [2011] FCA 1467, 4.
[10] Mr. D Irvine, Director-General of ASIO, *Transcript*, 16 June 2011, 17.
[11] *Special Immigration Appeals Commission* 1997 (UK) s 6.
[12] *Immigration and Refugee Protection Act* 2001 (Canada) ss 83-85.
[13] *Immigration Act* 2009 (NZ) ss 263-271.

occur under the Independent Reviewer scheme in which the Reviewer makes a sole determination on the basis of a review process which is seemingly not absolute.

The Bill proposes that a Special Advocate appear in merits review proceedings on behalf of the eligible person, although not necessarily on their instruction. Prior to receipt of the security assessment, the Special Advocate is afforded 29 days to take instructions from the eligible person. After receipt of documents, the communication between the eligible person and their advocate is severely limited. Further, the insertion of new provisions allows the Director-General to bar carefully managed communication if such discourse would prejudice security.[14]

Although free communication is allowable in the 29 days prior to receipt of classified documents, limitations placed upon communication subsequent to such receipt severely hinders the ability of the Special Advocate to extract further information which may have been overlooked in previous dialogue. If classified documentation provided misinformation or misidentified the eligible person as carrying out certain actions, neither the individual nor their Special Advocate would not be afforded the opportunity to counter such contentions.

As the Government has implemented the Independent Reviewer scheme in the period of time which has lapsed since the Bill was introduced, it is submitted that as an alternative to the AAT review, this Bill should be amended to provide a statutory basis for the Independent Reviewer system, enabling a secure tenure and findings which are binding, as opposed to having merely recommendatory status. Following such an adjustment, the Special Advocate process could operate effectively within the Independent Reviewer scheme, allowing for procedural fairness, transparency and dispersion of responsibility in a task of significant consequence to human liberties. Anticipation of the nature of the matters to be considered would indicate that an adversarial process would be a far more appropriate system than the Independent Reviewer scheme currently operating as the sole form of merits review available to individuals with an adverse security assessment.

Individuals within the community who commit heinous crimes are entitled to a fair hearing, are able to communicate with their legal team without restraint, and are deemed innocent until proven guilty. Refugees with adverse security assessments are disallowed the opportunity to defend themselves on the basis that disclosure of relevant information would present a risk to security, and deemed guilty until innocence can be established. Without careful expansion of such a scheme, it is probable that many refugees will languish in detention without prospect of release, denied the opportunity to state their case.

Review of assessments

The Bill makes provision for Ministerial consideration for residence and protection visa determination of refugees with an adverse security assessment. Further, the requirement of 6 monthly reviews of adverse security assessments is proposed by way of insertion of a new

[14] Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012 s 39D(6).

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Division into the *Australian Security Intelligence Organisation Act* 1979 (Cth). Both proposals are welcomed by the NSWCCL as measures which will somewhat diminish arbitrary restraints placed upon the liberties of refugees.

The current system of the Independent Reviewer proposes periodic reviews on a 12 month basis.[15] Upon consideration of mandatory detention by reason of a judgment formed by ASIO, without the prospect of review for a period of 365 days, a review period of 6 months conforms more readily to Australia's obligations under Article 9 of the International Covenant on Civil and Political Rights 1966 and is to be supported. Understandably, it would be preferable for such an independent merits review to occur, in such a timeframe, within the ambit of a judicially binding mechanism in order to maintain a high threshold of independence and procedural fairness.

ASIO and adverse security assessments

Statistics with respect to visa attainment or revocation:
Australian Security Intelligence Organisation, *Annual Report to Parliament 2009-10*:
In 2009-10, 19 adverse security assessments were issued, with 14 in relation to counter-terrorism grounds, and the remaining 5 on espionage or foreign-interference grounds.[16]

Australian Security Intelligence Organisation, *Annual Report to Parliament 2010-11*:
In 2010-11, 45 adverse security assessments were issued, with 40 in relation to counter-terrorism grounds, 2 in relation to involvement in people-smuggling, and the remaining 3 on espionage or foreign-interference grounds.[17]

Australian Security Intelligence Organisation, *Annual Report to Parliament 2011-12*:
Since 2009, a total 63 irregular maritime arrivals have been subject to adverse security assessments, 'with the majority issued in relation to politically motivated violence'.[18]

With respect to the statistics presented above, it is clear that ASIO is becoming increasingly reluctant to provide information with respect to reasons for issuing adverse security assessments. The provision of such information ensures accountability and transparency of decision-making, both of which are expected from a body responsible for the oversight and maintenance of national security. Moreover, the provision of such information is necessary when individuals are stripped of their liberties on the basis of such an assessment being handed down.

In 2010-11, ASIO issued adverse security assessments in respect of 7 Australian passport holders. Tellingly, ASIO did not provide comparable statistical data was provided for the period of 2011-12. However, ASIO did note available information that in 2011-12 the AAT

[15] Attorney-General, *Independent Review Function – Terms of Reference*, October 2012, 1.
[16] Australian Security Intelligence Organisation, *Annual Report to Parliament 2009-10*, xvii.
[17] Australian Security Intelligence Organisation, *Annual Report to Parliament 2010-11*, 26.
[18] Australian Security Intelligence Organisation, *Annual Report to Parliament 2011-12*, 19.

heard 3 challenges to adverse security assessments, with the Tribunal affirming one and reserving its decision on the remaining two.[19]

Individuals issued an adverse security assessment with respect to passports, or attainment of citizenship, are allowed to move freely within the community. However, simply as a result of seeking asylum by 'irregular maritime means', refugees with an adverse security assessment are detained indefinitely. Such detention is deemed mandatory by way of policy despite the fact that the risk posed may be significantly smaller than the risk associated with alternate classifications of adverse security assessment.

NSWCCL submits that the Bill should be amended to require ASIO to disclose in a consistent manner, on an arrival basis, information concerning adverse security assessments issued in respect of citizens and non-citizens.

Alternatives to indefinite detention

At present, 55 refugees are being held in indefinite detention as a result of classification as representing a threat to security. The Government continues to maintain, as a matter of policy, that all individuals who have been furnished an adverse security assessment 'should remain in held detention, rather than live in the community, until such time as resettlement in a third country or removal is practicable'.[20] As resettlement in a third country is implausible, and removal is contrary to non-refoulement obligations under the Convention on the Status of Refugees, the only remaining option available to the Government, in light of policy considerations, is mandatory detention.

Therefore, to all intents and purposes, the Government's policy is simply to detain individuals with adverse security assessments for an indefinite period of time, with minimal consideration of durable alternatives. Although security considerations are to be given appropriate weight, individual interests must not be stifled by such concerns, particularly when such individual interests pertain to the maintenance of fundamental human rights. It is submitted that balance can be struck between the preservation of national security and allowing individuals with an adverse security assessment to retain their liberties.

It is widely documented that immigration detention induces and fosters mental illness. Such mental distress often culminates in suicide attempts and self-harm. At 31 October 2012, 9069 irregular maritime arrivals were subject to immigration detention, with an overwhelmingly large number having spent in excess of a year in detention.[21] Mental health consequences of detention would be ameliorated significantly through allowance of individuals with adverse security assessments to be released into the community under a residence determination, or alternatively be transferred into community detention.

[19] Australian Security Intelligence Organisation, *Annual Report to Parliament 2011-12*, 22.
[20] Sri Lankan Refugees v Commonwealth of Australia (Department of Immigration and Citizenship) [2012] Aus HRC 56, 173
[21] Department of Immigration and Citizenship, *Immigration Detention Statistics Summary*, 31 October 2012.

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The NSWCCL maintains that imposition of conditions on visas, dealing with supervision requirements, would represent a viable alternative to indefinite detention. Furthermore, the current criminal law system adequately deals with inchoate acts.

It is to be noted that there are instances of individuals having been released into the community, only to be re-detained upon being deemed a 'threat',[22] and a further instance of a family, having been issued adverse security assessments, being released into the community in 2002 without further issue.[23]

Kind regards,

Stephen Blanks
Secretary
New South Wales Council for Civil Liberties

[22] *Leghaei v Director General of Security* [2005] FCA 1576.
[23] Joint Select Committee on Australia's Immigration Detention Network, Parliament of Australia, *Final Report*, 167.