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Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600
By online submission

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Dear Committee,

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

I welcome the opportunity to submit to this inquiry. I commend this Bill as a robust effort to improve the procedural fairness of ASIO's security assessment of refugees. This submission considers: (1) the need for the bill; (2) the impact of the High Court decision in *M47*; (3) the effect of the Independent Reviewer of security assessments; and (4) how to make the security assessment process fairer while protecting security, in the light of the procedures proposed by this Bill.

1. The Need for the Bill – Defects in the Current Regime

The defects of the current ASIO security assessment regime are well known. A refugee subject to a security assessment is not entitled to:

(a) A statement or redacted summary of allegations or reasons;

(b) Disclosure of relevant evidence or a redacted summary of evidence;

(c) Merits review in any administrative tribunal;

(d) Effective judicial review, because procedural fairness can be reduced to nothingness and public interest immunity can preclude any disclosure.

As a result, a refugee is often unable to effectively challenge adverse allegations and may not receive a fair hearing.

Where security assessments remain untested, Australians also cannot be confident that ASIO is making accurate decisions, that national security is being properly safeguarded, or that security agencies are acting accountably and within the law.

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Refugees with adverse assessments find themselves in indefinite detention because Australia will not admit them and no other country will accept them.

Indefinite detention as a result of adverse security assessments unquestionably violates Australia's obligations under article 9 of the *International Covenant on Civil and Political Rights* 1966, and may entail violations of articles 7 and 10 (inhuman treatment in detention) and articles 17(1), 23(1) and 24(1) (family and children's rights).

Three communications are currently before the United Nations Human Rights Committee on this basis, lodged by a total of 51 (of the 54) refugees with adverse assessments.[1] A copy of one complaint is on the website of the Joint Select Committee on Australia's Immigration Detention Network.[2]

For more legal details of the unfairness of the current regime, and how other democracies make security assessments more fairly, see these articles:

- Ben Saul, 'Fair Shake of the Sauce Bottle': Reform Options for Making ASIO Security Assessments of Refugees Fairer' (2012) 37(4) *Alternative Law Journal* 221 (**annexed**);
- Ben Saul, 'Dark Justice: Australia's Indefinite Detention of Refugees on Security Grounds under International Human Rights Law' (2012) *Melbourne Journal of International Law* (forthcoming; available from the author on request).

2. The Limited Impact of the High Court Decision of *M47*

In *M47 v Director General of Security*, in October 2012 the High Court invalidated the regulation under which ASIO made its security assessments of one refugee who had applied onshore for a protection visa. By a 4:3 majority, the Court found that the regulation empowering ASIO to conduct security assessments (via Public Interest Criterion 4002) was inconsistent with the *Migration Act*.[3] The regulation impermissibly subsumed the Minister's own statutory powers to exclude refugees for security reasons, which were based on articles 32 and 33 of the 1951 Refugee Convention. The Minister's powers were also subject to AAT merits review and greater accountability.

The decision in *M47* did not, however, alter the elementary unfairness of the current ASIO assessment regime nor rule out indefinite detention, as shown below.

(a) Procedural Fairness

In *M47*, the High Court found that the plaintiff on the facts of that single case had been afforded adequate procedural fairness (under the common law) because he had been alerted to specific allegations during his interview by ASIO.

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[1] Communication Nos. 2094/2011 (28 August 2011) (37 refugees), 2136/2011 (21 March 2012) (9 refugees), and a new communication pending registration (lodged 3 December 2012) (5 refugees).

[2] https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=229128ab-d97b-4dab-9b97-bcf31229b81c. I disclose that I act as counsel for all of these refugees in these complaints.

[3] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 (French CJ, Hayne, Crennan, Kiefel JJ).

But the High Court did not overrule the Full Federal Court's precedent in the *Leghaei* case by suggesting that procedural fairness would be denied if a person were not interviewed, or if allegations were not put to the person during interview, or if only highly generalised allegations were put in an interview and were insufficient to reasonably inform a person of the case against them.

The Court thus did not overturn the Full Federal Court's earlier finding in *Leghaei* that, in an appropriate case, procedural fairness could be reduced to 'nothingness'. All the Court held was that on the facts of this case, the particular allegations made in that particular interview accorded procedural fairness to that refugee.

The plaintiff's situation in M47 is not generalisable to all or even many of the 54 refugees with adverse security assessments. Some of the refugees were not interviewed at all and thus received no notice of any allegations, with ASIO relying on either secret intelligence or the refugees' own asylum applications. Those who were interviewed were not necessarily informed of specific allegations and the evidentiary basis of any specific or general allegations was rarely, if ever, disclosed, making it difficult for the refugees to contest the provenance or reliability of the case against them.

As such, oral assertions by interview, absent a more complete statement or summary of allegations or reasons, and a redacted summary of the evidence substantiating such allegations or reasons, still falls short of the minimum standard of disclosure in detention cases required by international human rights law.

(b) Indefinite Detention

In the absence of a valid ASIO security assessment, in *M47* the plaintiff's application for a protection visa became incomplete and the refugee was no longer subject to removal and detention pending removal. However, detention was still authorised under the Migration Act 1958 (Cth) because the refugee had not yet received a visa, irrespective of the lengthy period already spent in detention.

The High Court avoided answering whether indefinite detention *per se* is unlawful and refused to reopen its previous decision, *Al-Kateb v Godwin*, which upheld the constitutional validity of indefinite detention.[4]

To date, the 54 refugees with adverse security assessments have been administratively detained without charge or trial for between two and three and a half years, with no imminent prospect of release or removal to another country.

(c) The Government's Response to M47

The Government has not formally announced its response to *M47*. However, in late November / early December 2012, some of the refugees in detention were informed by DIAC that the new Independent Reviewer of security assessments, Margaret Stone, would be soon reviewing their ASIO assessments in December 2012.

[4] *Al Kateb v Godwin* [2004] HCA 37.

The commencement of reviews may imply that the Government believes that the decision in *M47* does not apply to at least some of the refugees, since it would not make legal sense to review assessments which are invalid as a result of *M47*.

This in turn may be based on a legal view that M47 does not apply to 'offshore entry persons' who, unlike the plaintiff in M47, are not eligible applicants for protection visas where the statutory bar to their application has not been discretionarily waived.

It should be noted that only approximately 6 refugees in detention with adverse security assessments were potential onshore protection visa applicants, whereas the majority (about 48) arrived irregularly by sea and were thus ineligible 'offshore entry persons'.

The commencement of review further suggests that the Government intends to rely upon ASIO assessments rather than invoking the Minister's statutory security powers (two which give effect to articles 32 and 33 of the Refugee Convention, and a further wide statutory power to preclude granting a visa to someone of 'bad character').[5] The High Court in *M47* had emphasised that the existence and careful construction of those statutory powers were a key reason in invalidating the regulation for ASIO assessments). No statutory amendment to rectify the invalidity of the regulation for onshore protection visa applicants has yet been introduced to Parliament.

Finally, regrettably the Government does not appear to support the extensive and appropriate reforms proposed by this Bill, which would require periodic review of assessments, merits review, a right to reasons, use of a Special Advocate, and community release on security conditions.

3. The Limitations of the New Independent Reviewer

In October 2012 the Government announced that a new Independent Reviewer, a retired federal court judge, Margaret Stone, will conduct an 'advisory' review of ASIO assessments of refugees.[6] The Reviewer will have access to all material relied on by ASIO to determine whether the assessment is an 'appropriate outcome', and will provide her opinion and reasons to the person. The Reviewer is described by the Government as *not* being a response to *M47*.

Additional, external scrutiny of ASIO assessments is welcome, as is the possibility of increased disclosure and 12 monthly periodic reviews of assessments. However, the new procedure, as set out in its Terms of Reference, remains inadequate to provide a refugee with basic fairness, for the following reasons.

(a) Reviews are not binding

Unlike AAT review, the Reviewer's findings are not binding and are only recommendations to ASIO, which remains free to reject them. A refugee has no legal right to compel an inappropriate or inaccurate assessment to be overturned.

[5] *Migration Act*, s. 501.
[6] Attorney General, *Independent Review Function – Terms of Reference*, October 2012.

(b) The Reviewer is not truly independent

Unlike the AAT, the office of Reviewer is not established by legislation and operates as a matter of policy and within the executive government. As such, structurally its independence is compromised and its tenure is insecure, irrespective of the undoubted personal high standing of the Reviewer herself.

(c) Disclosure remains limited

In the Reviewer process, unclassified written reasons will be provided by ASIO but only where a person seeks independent review and then only to the extent not prejudicing security. Certainly disclosure may be improved in some cases.

However, there remains no requirement of disclosure prior to, or after the making of, an assessment by ASIO, but only upon review, which may be quite some time after the assessment is made to the detriment of the refugee.

Most importantly, ASIO may still determine that it is not possible to disclose *any* meaningful reasons or information to a person, just as can result from the common law procedural fairness test (set out in *Leghaei*).There is no minimum content of disclosure in all cases, potentially resulting in some refugees knowing nothing of the case against them, and limiting the effectiveness of their ability to defend themselves.

The Reviewer's decision also cannot disclose anything to the person that would prejudice security, so the person may remain in the dark even after their review.

(d) There is no Special Advocate

The Reviewer will have access to all information relied on by ASIO in making an assessment. However, it is far less protective than the Special Advocate procedure (such as is used in Britain, Canada and New Zealand) because it reposes in one inquisitorial person the task of both reviewing the materials and making decisions about them.

By contrast, a Special Advocate assists a tribunal or court to reach an independent decision in a more typical adversarial context. The Reviewer process is imbalanced because no-one with access to all of the information is advocating the cause of the person, and the person can remain largely in the dark about the evidence against them.

(e) The interval for periodic review is too long

The Reviewer will periodically review adverse assessments every 12 months. The Reviewer will ask ASIO whether any new information has become available, whereupon ASIO itself will also reconsider the assessment.

However, the increment of 12 monthly reviews is too long. Liberty is precious and where it is deprived by an executive decision, absent a criminal procedure or a judicial decision, the duration of detention needs to be closely circumscribed. An increment of six months is strongly preferable to ensure that Australia does not arbitrarily interfere in a refugee's freedom from arbitrary detention, particularly given the importance of protecting refugees under Australia's international law commitments.

(f) The critical date of the review is uncertain, <u>and</u> the refugee enjoys no clear right to provide new information

The Reviewer's Terms of Reference (TOR) primarily direct her to examine the information ASIO relied upon at the time of making the assessment and/or when it was notified to DIAC. Only the last dot point on page 4 of the TOR refers to the reviewer forming her contrary opinion 'based upon information that was not available to ASIO when the security assessment was furnished to DIAC'. That point contemplates the Reviewer considering new information arising after the making or notification of the assessment, and possibly including information provided by the refugee him or herself.

Since review of a security assessment also effectively controls whether a person remains detained, periodic review should always involve a review of whether grounds for an adverse assessment exist *at the time of the review*, and in the light of any relevant information at that time (including that not previously available to ASIO).

4. How to Make Assessments Fairer While Protecting Security

I strongly support the thrust of the Bill for the reasons given above and in my annexed academic article proposing a reform agenda (Ben Saul, 'Fair Shake of the Sauce Bottle': Reform Options for Making ASIO Security Assessments of Refugees Fairer' (2012) 37(4) *Alternative Law Journal* 221). Specifically, I support:

(a) Presumptive disclosure of the security assessment to the affected person;

(b) A right to AAT review of an adverse assessment;

(c) The establishment and use of a Special Advocate;

(d) Six monthly reviews of adverse security assessments;

(e) Notification of an assessment to the person within 14 days;

(f) A requirement on the Minister to consider a residence determination before resorting to detention.

I would, however, <u>recommend</u> the following improvements to the Bill:

(a) A requirement of a *minimum disclosure of allegations* to the person *personally*, in advance of making a security assessment, to enable the person to effectively respond. Such disclosure must give the person sufficient notice of the essence or substance of the case against them, and cannot merely consist of generalized allegations (further security information may remain classified as required).

(b) A requirement of a *minimum disclosure of reasons* to an affected person *personally* in all cases, namely, notification of the essence or substance of the grounds for the decision, beyond merely generalized allegations (while permitting further security information to remain classified);

(c) The above requirements must be understood to operate to ensure that procedural fairness can never be reduced in content to 'nothingness', whether in administrative or judicial review proceedings, *and* to preclude a successful claim of public interest immunity from shielding *all* relevant evidence from a person;

(d) The Special Advocate procedure should also be mandated for judicial review proceedings involving adverse security assessments, including to both challenge arguments against disclosure to the person and to challenge the reliability of any evidence relied upon which is not disclosed to the person.

Federal courts should issue adverse security assessments on application by ASIO

Finally, I would encourage the Parliament to consider more robust reform of the ASIO security assessment procedure by empowering the federal courts with original jurisdiction to issue adverse security assessments. On this (more protective) model, ASIO would apply to a federal court (just as in control order proceedings) for the issue of an adverse security assessment, in a fair hearing involving adequate notice, disclosure and reasons, a special advocate, and limits on public interest immunity. This proposed procedure is explained in my annexed article at pages 226-7.

Conclusion

I urge the Parliament to bring to an end the current legal-black hole faced by refugees denied a fair hearing and subjected to indefinite detention, and which is increasingly producing mental illness, self-harm and suicide attempts. I also **attach** a recent opinion article from the *Sydney Morning Herald* outlining the situation of the refugees.

Please be in touch if you require any further information.

Yours sincerely

Professor of International Law

Counsel for 51 refugees before the UN Human Rights Committee

Annexes follow

'FAIR SHAKE OF THE SAUCE BOTTLE'

Fairer ASIO Security Assessments of Refugees

BEN SAUL

The issuing of adverse security assessments by the Australian Security Intelligence Organisation ('ASIO') often denies basic procedural fairness to those who are not Australian citizens, permanent residents or special purpose visa holders. Over the years the problem has been exposed by cases in the federal courts,[1] the Australian Law Reform Commission (calling for an inquiry in 2004),[2] and academics.[3]

From 2009 to the present, the problem has been felt most acutely by 54 irregularly arrived refugees who were refused protection visas after receiving adverse security assessments, and found themselves in indefinite detention. Their situation has been highlighted by the Australian Human Rights Commission, complaints to the United Nations Human Rights Committee, a Joint Select Committee on Australia's Immigration Detention Network, a UNHCR expert roundtable, and two High Court challenges.[4] The Australian Labor Party conference in 2011 suggested referring an inquiry to the Independent National Security Legislation Monitor, but that had not occurred by late 2012.

This article briefly describes how the current legal regime under the *ASIO Act 1979* (Cth) ('ASIO Act') and *Migration Act 1958* (Cth) combine to produce procedural unfairness and indefinite detention in refugee cases. The article then focuses on options for reforming the current law to make it fairer. To date, little attention has been given to how the current law could be reformed to provide affected persons with a fair hearing and relief from indefinite detention while ensuring that national security is not compromised. Reform proposals so far have been sporadic, limited in scope, and lacking in detail, and have principally suggested, for instance, extending the merits review jurisdiction of the Administrative Appeals Tribunal ('AAT'), which is insufficient to address the problem.

The question of how to adequately reform the law became even starker after a narrow High Court decision of October 2012, *M47 v Director General of Security*, which invalidated the regulation under which ASIO made its security assessments. Unlike comprehensive reforms proposed by a Green's bill in October 2012, the government's limited response — appointing a retired federal court judge to review ASIO assessments — still does not establish a sufficiently fair procedure or end indefinite detention. This article accordingly proposes a more comprehensive suite of intersecting reforms which is necessary to provide a fair hearing while protecting national security, addressing issues of notice, reasons, the degree of disclosure, merits review, a special advocate procedure, periodic review, and alternative security measures to detention. It also suggests a more ambitious proposal to transfer the power to issue security assessments from ASIO to the courts.

The problem

Before a protection visa can be granted, a person must be assessed by ASIO as not being 'directly or indirectly a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*'.[5] ASIO applies a wide definition of security (on an unclear standard of proof) under section 4, which includes protecting Australia and its people from domestic or external (i) espionage; (ii) sabotage; (iii) politically motivated violence; (iv) promotion of communal violence; (v) attacks on Australia's defence system; or (vi) acts of foreign interference. The definition also refers to 'the carrying out of Australia's responsibilities to any foreign country' in relation to the forgoing threats, and to 'the protection of Australia's territorial and border integrity from serious threats'.

In *M47* in October 2012, the High Court invalidated the regulation under which ASIO made its security assessments of refugees. The regulation was inconsistent with (by circumventing) the Minister for Immigration's own statutory powers to exclude refugees who present security risks, which in turn were based on the security provisions of the 1951 *Refugee Convention* (namely, in articles 32 and 33). The Minister's powers were importantly subject to AAT review and greater accountability to parliament. In response, the government appeared determined to preserve ASIO's powers to security assess refugees, most likely by amending the Act. It did not indicate any willingness to instead apply the Minister's existing security powers under the Act.

It is well accepted that Australia should be protected from serious foreign security threats, even if a person is technically a refugee. However, the central flaw in the current regime is that adverse security assessments issued to refugees deny basic procedural fairness and go further than is necessary to protect security. Section 36 of the ASIO Act provides that the procedural fairness protections of Part IV of the ASIO Act, including a statement of reasons, and merits review (that is, review of the facts) before the AAT,[6] do not apply to a person who is not an Australian citizen, permanent resident or special purpose visa holder.

REFERENCES

1. For example, *Sagar v O'Sullivan* [2011] FCA 182; *Parkin v O'Sullivan* (2009) 260 ALR 503; *Leghaei v Director General of Security* (2007) 241 ALR 141.

2. Australian Law Reform Commission ('ALRC'), *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report 98 (2004), 408.

3. Ben Saul, 'The Kafka-esque Case of Sheikh Mansour Leghaei: The Denial of the International Human Right to a Fair Hearing in National Security Assessments and Migration Proceedings in Australia' (2010) 33 *UNSW Law Journal* 629; Keiran Hardy, 'Adverse Security Assessments, and a Denial of Procedural Fairness' (2009) 17(1) *Australian Journal of Administrative Law* 39; Caroline Bush, 'National Security and Natural Justice' (2008) 57 *AIAL Forum* 78.

4. Respectively, Australian Human Rights Commission ('AHRC'), Submission to the Independent Review of the Intelligence Community, April 2011; UN Human Rights Committee, Communication Nos 2094/2011 (28 August 2011) and 2136/2011 (21 March 2012); Joint Select Committee on Australia's Immigration Detention Network, *Final Report*, March 2012; UNHCR, 'Chair's Summary', Expert Roundtable on National Security Assessments for Refugees, Asylum Seekers and Stateless Persons in Australia, Canberra, 3 May 2012; *M47/2012 v Director General of Security* [2012] HCA ; *Plaintiff S138/2012 v Australian Security Intelligence Organisation & Ors* (28 May 2012) (pending).

5. Under the *Migration Regulations 1994*, Schedule 4, Public Interest Criteria 4002; *Migration Act 1958* (Cth), s. 65(1).

6. *ASIO Act 1979* (Cth), s 54.

While procedural fairness technically remains available at common law, the full Federal Court confirmed in *Leghaei* that the content of procedural fairness owed to an affected person can be reduced to 'nothingness' where the ASIO Director General determines that nothing can be safely disclosed without prejudicing security.[7]

At most, a person may be made aware of certain allegations during questioning by ASIO, as was the case on the facts in *M47*. But not all refugees were interviewed by ASIO, and some of those interviewed were not notified with adequate particularity of the substance of the case against them, so as to enable them to effectively respond. In *M47*, the High Court did not overturn the full Federal Court's finding in *Leghaei* that procedural fairness could be reduced to 'nothingness' in the appropriate case. There is no minimum degree of disclosure that must always be given to an affected person.

After *M47*, however, in October 2012 the government announced that a new Independent Reviewer, a retired federal court judge, will conduct an 'advisory' review of ASIO assessments of refugees.[8] The Reviewer will have access to all material relied on by ASIO to determine whether the assessment is an 'appropriate outcome', and will provide her opinion and reasons to the person. While independent review is an improvement, it remains an inadequate form of merits review. Unlike AAT review, the Reviewer's findings are not binding and only take the form of recommendations to ASIO. While disclosure to a person may be improved in some cases, as discussed further below there remains no minimum content of disclosure in all cases, limiting the effectiveness of the person right to make submissions to the Reviewer.

Judicial review (that is, review for errors of law) of ASIO decisions is technically available but may be practically ineffective. If the refugee does not know the grounds of the assessment, it is very difficult to identify a legal or 'jurisdictional' error to legitimately commence proceedings. In addition to the diminution of procedural fairness, public interest immunity may also be invoked to preclude the disclosure of sensitive information to a person and its admission in court,[9] impeding the person's ability to respond to prejudicial material upon which non-disclosed security sensitive information is based. A person's lawyers are also typically not given access to the security sensitive information.

The result is that an affected person can find themself in a legal black hole, unable to know the case against them and thus unable to effectively challenge the unknown allegations; enjoying no right at all of merits review; and enjoying only a legal fiction of judicial review. On receiving adverse assessments, the Department of Immigration and Citizenship refuses to grant the recognised refugees protection visas and administratively detains them ostensibly pending removal from Australia 'as soon as reasonably practicable'.[10]

The problem then is that as refugees they cannot be safely returned to their home countries of persecution, and no safe third country has agreed to take any — not least because they have been adversely assessed as security risks by Australia. In *Al-Kateb v Godwin*, the High Court confirmed the constitutional validity of indefinite detention,[11] such that most of the 50 refugees in detention have now been there between two and three years since the first arrivals in 2009. In *M47* in October 2012, the High Court avoided reopening *Al Kateb*, though a number of judges incidentally suggested it might be decided differently on these facts. The stress of indefinite detention in sub-optimal conditions compounds the pre-existing stresses of persecution and family separation, producing high levels of mental anxiety and self-harm.[12]

Essential reforms to security assessments

The more difficult question is how to improve the current procedures to provide a fair hearing for an affected person without jeopardising national security. The Australian government's view is that giving reasons or providing merits review would risk jeopardising security, because it may disclose confidential intelligence sources, capabilities and methodologies.[13]

Yet experience elsewhere (as in Canada, the United Kingdom, and New Zealand) demonstrates that this is simply not inevitably the case,[14] and suggests just how blunt, extreme and disproportionate is Australia's procedure. It is possible to pursue modest reforms which make the process fairer and preclude indefinite detention, while still meeting national security concerns. Some improvements are possible without legislative amendment, while others require new laws. The final part of this article suggests an even more radical reform proposal which provides stronger judicial protection of fair hearing rights.

Adequate notice and reasons must be provided

An affected person is only able to adequately respond to the case against them if they know the essential substance of that case. Currently, at the decision-making stage, ASIO need not disclose anything that it reasonably believes would prejudice national security. Refugees are typically not given formal notice of particular allegations or adverse evidence, and may not be aware of the significance of particular questions or statements put to them during ASIO interviews. No reasons are automatically provided to substantiate an adverse assessment once it has been made, frustrating the ability to seek effective judicial review.

Since the appointment of the Independent Reviewer in October 2012, unclassified written reasons will be provided by ASIO but only where a person seeks independent review and then only to the extent not prejudicing security. It remains conceivable that it in a given case, ASIO may determine that it is not possible to disclose any meaningful reasons to a person, just as currently may result from the common law procedural fairness test. Refugees may also continue to receive no notice of allegations prior to decisions being made.

The first element of a reformed procedure should accordingly be that, at a minimum, *a redacted summary of allegations must always be provided to an affected*

7. *Leghaei v Director General of Security* [2005] FCA 1576, paras 83–88, affirmed on appeal in *Leghaei v Director General of Security* (2007) 241 ALR 141, at 146–147.

8. Attorney General, Independent Review Function — Terms of Reference, October 2012.

9. *Sagar v O'Sullivan* [2011] FCA 182 at 73 (Tracey J).

10. *Migration Act 1958* (Cth), ss 196 and 198.

11. *Al-Kateb v Godwin* [2004] HCA 37. *Al-Kateb* is being reopened in the High Court in 2012: above n 4.

12. Peak bodies that have criticised the adverse mental health consequences of protracted immigration detention include the: Australian Medical Association, Royal Australian and New Zealand College of Psychiatrists, Royal Australian College of General Practitioners, Royal Australian College of Physicians, Committee of Presidents of Medical Colleges, Alliance of Health Professionals concerned about the Health of Asylum Seekers and their Children, Australian College of Mental Health Nurses, Australian Psychological Society, and Australian Human Rights Commission.

13. Letter from Commonwealth Attorney-General Nicola Roxon to the author, dated 25 May 2012, on file.

14. See Ben Saul, Supplementary Submission to the Joint Select Committee on Australia's Immigration Detention Network, *Final Report*, March 2012.

… the central flaw in the current regime is that adverse security assessments issued to refugees deny basic procedural fairness and go further than is necessary to protect security.

person, where full disclosure of all of the allegations and evidence (including sources) would prejudice national security. Once an adverse security assessment is made, a second element of a reformed procedure should be that *the affected person must be provided with a statement of reasons substantiating the basis of the assessment*. Such reasons would confirm the allegations which were earlier notified and found to be substantiated, specify the standard of proof applied, dismiss any unfounded allegations, and deal with any objections raised during the hearing.

Neither providing a notice summarising the allegations nor a statement of reasons requires legislative change. The ASIO Act does not *require* ASIO to withhold notice or reasons from a person. It provides only that ASIO is not statutorily *required* to do so. There is thus no legislative impediment to ASIO determining in its operational discretion to provide a person with notice, reasons and supporting evidence, consistent with the usual expectation of procedural fairness at common law.

It would, of course, be preferable to amend the ASIO Act to expressly provide that ASIO is required to give notice and reasons, *and* to specify its minimum content, to ensure certainty and prevent policy back-sliding by ASIO in future. As discussed below, the required disclosure could be independently determined by the merits tribunal or court on review, according appropriate weight to ASIO's expert security judgments.

The minimum content of disclosure

Notice, disclosure of information and evidence, and reasons can only serve their purpose in enabling a fair hearing if their content is fit for purpose. European practice in security cases is instructive here. In *A and others v United Kingdom*, the Grand Chamber of the European Court of Human Rights held that the 'dramatic impact' of lengthy and potentially indefinite administrative detention of non-citizen suspected terrorists, not capable of removal, demanded the importation of 'substantially the same fair trial guarantees' of a criminal trial into proceedings challenging the lawfulness of detention.[15]

In particular, such guarantees were found to include a minimum degree of disclosure *personally* to a detainee, as determined by the relevant court or tribunal. While the protection of classified information may be justified to protect national security, the European Court held that it must be balanced against the requirements of a fair hearing. The starting point is that it is 'essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others'. Where 'full disclosure' is not possible, however, a person must still enjoy 'the possibility effectively to challenge the allegations against him'.

Thus, 'where all or most of the underlying evidence remained undisclosed', 'sufficiently specific' allegations must be disclosed to the affected person to enable that person to effectively provide his representatives (including security-cleared counsel) 'with information with which to refute them'. The provision of purely 'general assertions' to a person, where the decision made is based 'solely or to a decisive degree on closed material' will not satisfy the procedural requirements of a fair hearing.

A third element of a reformed Australian procedure should be that *an affected person must be entitled to a minimum, irreducible content of disclosure, sufficient to reasonably inform them of the case against them*. Notice and reasons must be as specific and substantiated by evidence as possible, consistent with not *unduly* prejudicing national security (in contrast to the current standard of *any* 'prejudice' to security). Highly generalised allegations lacking adequate specificity should not be permitted. Where ASIO refuses to disclose an adequate summary of the allegations, ASIO should not be entitled to rely upon the underlying classified information or evidence.

Contrary to the Australian government's claim, disclosure of the essential allegations will not necessarily jeopardise national security, because a redacted summary need not disclose sources, informants or intelligence gathering methods. To give an example, at present a refugee receives a letter merely asserting that s/he is a risk to security. Yet, it would be perfectly possible for ASIO to include in such letter some basic particulars as to why a person is a security risk — for example: 'You are considered a security risk because in January 2008 you joined the Tamil Tigers and in September 2008 you killed four civilians in village X in Sri Lanka'. Such reasons do not usually prejudicially disclose methods or sources.

This modified approach better balances the public interest in national security against other important public interests, including the individual right to a fair hearing and ensuring the democratic imperative of the accuracy and accountability of ASIO decisions (which can only be ensured if the information ASIO relies on is tested and challenged). As a matter of policy, it should

15. *A and others v United Kingdom*, ECHR App No. 3455/05 (19 February 2009), paras 217–220.

be accepted that security interests cannot prevail over all other considerations at the discretion of the security agency alone, which has an inevitable self-interest in maximising security and little interest in balancing competing public interests.

Admittedly there may be rare hard cases where *any* disclosure would tip off a person to intelligence methods — as where information could only have come from a particular source — and disclosure may not only compromise intelligence methods by endanger an informant. Such cases are the exception not the rule. It may be that requiring minimum disclosure in such cases remains a necessary trade off to ensure fairness, accurate decision-making, and accountability, and ASIO would always have the option of not issuing an adverse assessment to protect its sources, or utilising other means (such as surveillance) to address the threat.

Genuine merits review must be available

As noted earlier, the new Independent Reviewer process is non-binding and insufficient to safeguard the interests of an affected person. The Review's decision also cannot disclose anything to the person that would prejudice national security, so the person may remain in the dark after their review. The fourth element of a reformed procedure is that, at a minimum, *an administrative tribunal should be empowered to independently review the merits of ASIO's security assessment.* The simplest reform would be to extend the jurisdiction of the Security Appeals Division of the AAT, as is already available to Australian citizens, permanent residents and special purpose visa holders under section 54 of the *ASIO Act 1979* (Cth).

However, given the serious consequences of an adverse assessment, and the vulnerable position of refugees in detention, it should not be incumbent on affected persons to *elect* to commence proceedings. Rather, to borrow a Canadian device (albeit in a judicial process),[16] AAT review should be *automatic* once an assessment is made. A more efficient procedure would be to vest the primary security decision in the AAT, responding to an application from ASIO to issue an adverse assessment. Providing AAT jurisdiction of any kind would require a legislative amendment to the ASIO Act.

Extending AAT jurisdiction alone would not be sufficient to provide a fair hearing. At present, even where the AAT's security jurisdiction is available (for instance, to citizens), it is still possible that essential information or evidence can be withheld as prejudicial to national security, whether through statutory exceptions to the requirement to give reasons or the operation of ministerial certificates,[17] because common law procedural fairness can still be reduced to nothingness, or where public interest immunity precludes the admissibility of relevant security evidence.[18] The AAT may not therefore be able to review the merits based on all of the relevant information, or may be reviewing the merits in circumstances where the affected person received inadequate disclosure and cannot effectively defend themselves.

Accordingly, further legislative amendments are required to ensure that once AAT jurisdiction is activated, it provides real and effective merits review. There are a number of ways to achieve this goal. In the first place, the AAT must (by statute) always be given full access to *all* of the security sensitive information on which ASIO seeks to rely — even that which is not disclosed the affected person and, where necessary, by overriding public interest immunity. It is difficult to see why tribunal members (or federal judges) could not be safely entrusted with information which public servants at ASIO are entitled to handle. Where ASIO refuses to disclose information to the AAT (or to a federal court), ASIO should not be entitled to rely upon such evidence. In addition, a related matter is pertinent to the fairness of merits review and/or judicial review proceedings.

A special advocate must be appointed

While the appointment of a 'special advocate' has been contemplated in the different context of Australian criminal proceedings,[19] they have been neither used nor statutorily required in ASIO security assessments. Where ASIO seeks to rely upon any information not disclosed to the affected person or their lawyers in merits review before the AAT, or in subsequent judicial review proceedings, a (security cleared) 'special advocate' should be appointed under statute (based on the UK, Canadian and New Zealand approaches)[20] as a fifth component of a reformed Australian process. As in other jurisdictions, the special advocate would be entitled to see all of the information upon which ASIO seeks to rely, and must keep such information in confidence (unless authorised by ASIO, the AAT or a federal court to disclose it).

The overall purpose of the special advocate is to assist the tribunal or the court to review (on the merits and law respectively) the evidence against a person, by independently testing it when the affected person and their lawyers cannot see all of it for security reasons. It is a mechanism for balancing the individual's fair hearing rights with security concerns.

The special advocate ideally should be empowered to perform three functions: (1) to make submissions on the adequacy of the notice and/or reasons provided to the person; (2) to test ASIO's claims that information may not be safely disclosed to the person; and (3) to make submissions on the substance of any evidence which cannot safely be disclosed to the person.

The principal limitation of a special advocate is that s/he cannot communicate confidential information — or even at all — to the affected person, and therefore cannot receive instructions on how to deal with it.[21] Also, their appointment assumes that the person's regular lawyer or barrister cannot be safely entrusted (in confidence) with the evidence, whereas it may be enough to empower a person's lawyers with the special advocate's functions — particularly when any breaches of confidence by them could incur criminal penalties.

However, a special advocate might acquire special expertise in repeatedly dealing with security information and intelligence methods and thus be a

16. *Immigration and Refugee Protection Act* (2001) (Canada), s 77(1).

17. *ASIO Act 1979* (Cth), ss 37(2) and 38.

18. See *Parkin v O'Sullivan* (2009) 260 ALR 503; *Sagar v O'Sullivan* [2011] FCA 182.

19. *R v Lodhi* [2006] NSWSC 586 (21 February 2006), paras 28–42.

20. *Immigration and Refugee Protection Act* (Canada), s 85; *Special Immigration Appeals Commission Act 1997* (UK), s 6; Immigration Act 2009 (New Zealand), s 263.

21. Aileen Kavanagh, 'Special Advocates, Control Orders and the Right to a Fair Trial' (2010) 73 *Modern Law Review* 836, 838; Amnesty International (Canada) 2007, in *Bill C-3: An Act to amend IRPA* (2007), 22.

Detention pending removal … does not meet the requirements of human rights law where there is no imminent reasonable prospect of removal.24 The immigration removal powers have become a proxy for what is in reality administrative security detention.

stronger safeguard than less experienced lawyers. The position is also designed not as the person's legal representative, but as an independent office at greater arms-length. It might also meet the concerns of intelligence agencies about giving security clearance to too deep a pool of lawyers — even if such concern registers considerable distrust for the professionalism of lawyers.

The Independent Reviewer process of October 2012 gives a retired judge access to all information relied on by ASIO in making an assessment. However, it is less protective than a special advocate procedure because it reposes in one inquisitorial person the task of both reviewing the materials and making decisions about them, whereas an Advocate assists a tribunal or court to reach an independent decision in a more typical adversarial context. The process remains imbalanced because no-one with access to all of the information is advocating the cause of the person, and the person remains in the dark about the evidence against them.

The adverse security assessment must be periodically reviewed

Currently ASIO has no policy of periodically or automatically reviewing adverse security assessments once made, unless new information comes to light. This is plainly inadequate, because it means that once a person has been found to pose a security risk, in legal terms they remain a security risk for the rest of their lives, unless the assessment is later removed. Such process is excessive and overbroad, and means ASIO is not limiting its assessments only to those who *continue* to remain a security risk.

From October 2012, the new Independent Reviewer will periodically review adverse assessments every 12 months. The Reviewer will ask ASIO whether any new information has become available, whereupon ASIO itself will also reconsider the assessment. Sychronising periodic reviews in this way helps to ensure that the reviews stay on track and the introduction of reviews is an important improvement in the process that existed to late 2012.

However, the Independent Reviewer's periodic reviews are also non-binding and the increment of 12 monthly reviews is too long. A legislative amendment should instead require ASIO to automatically and periodically review adverse assessments at least every six months. Australia's international human rights law obligations require the grounds of detention to be periodically re-assessed.22 Liberty is precious and protracted administrative detention risks undervaluing liberty. Further, any review should reconsider not only the basis of the security assessment, but as importantly what measures are necessary to contain any security risks — in particular, whether measures less invasive than detention can be utilised. It would also be preferable for an adverse assessment to automatically lapse after the expired period, so that the onus is on ASIO to remake it (rather than it continuing until ASIO confirms or withdraws it). This would provide an incentive for reviews not to be delayed and to avoid backlogs of reviews.

Reforming indefinite detention risks

As noted previously those who receive adverse security assessments are indefinitely detained under the *Migration Act 1958 (Cth)* pending removals elsewhere which are not realistically available. For reasons given in the UN complaints earlier, indefinite detention is inconsistent with Australia's obligations under article 9 of the International Covenant on Civil and Political Rights ('ICCPR'). The legal solutions are not difficult assuming the political will for reform can be mustered.

First, it cannot be assumed that all persons with adverse security assessments require automatic detention. The nature of the threat posed by a person must be carefully considered and the range of less invasive alternatives considered, so that a proportionate and not excessive means is adopted in responding to the security risk posed. Such is the obligation on Australia under international human rights law; it also makes sense to ensure that scarce public resources are spent on detaining only those who in fact require it.

Second, many of the available means already exist: (a) surveillance by police or security agencies; (b) anti-terrorism control orders; (c) criminal prosecution for terrorist offences or other international crimes under the federal Criminal Code; or (d) release into 'community' detention with any number of administrative 'conditions' imposed by the Minister of Immigration and Citizenship.[23] Such conditions could conceivably include regular reporting to authorities, residing in certain places, restrictions on communication and association, GPS-tracker bracelets and so on. Conditions such as these are preferable to indefinite detention, but entail lesser procedural protections than, for instance, control orders, which entail judicial safeguards not found in the *Migration Act* regime of administrative community detention.

22. *A v Australia* (UNHRC 560/1993), 3 April 1997, para 9.4; *Shafiq v Australia* (UNHRC 1324/2004), 13 November 2006, para 7.2.

23. Respectively, *Criminal Code Act 1995* (Cth), Schedule 1: Criminal Code, Division 104; Division 101; and *Migration Act 1958* (Cth), s 198AB (a 'residence determination').

24. *Jalloh v The Netherlands* (UNHRC 794/1998), 26 March 2002, para 8.2; *Chahal v UK* (1996) 23 EHRR 413, para 112–113; *A and ors v UK*, ECHR App. No. 3455/05 (19 February 2009), para 167.

25. *Criminal Code Act 1995* (Cth), Schedule 1: Criminal Code, Division 104.

26. *Thomas v Mowbray* [2007] HCA 33.

27. ASIO Director General, quoted in Joint Select Committee on Australia's Immigration Detention Network, above note 4, p. 161.

28. See, eg, *ASIO Act 1979* (Cth), ss 37(2) and 38.

Third, if persons with adverse security assessments continue to be detained because of the personal risk they pose, stronger safeguards on detention are essential: (a) detention should only continue as long as active, pending removal proceedings with a particular country are actually on foot; (b) there should be a maximum time limit on detention of three (or at most, six) months, beyond which a person must be released absent any exceptional circumstances (such as unforeseen delays in the active removal proceedings); and (c) any renewal of an expired period of detention should be based on a fresh assessment by ASIO that the person remains a security risk and that their detention remains necessary.

Fourth, where it is indeed necessary to detain a person because of the threat they pose, the legal fiction should not be maintained that they are being detained for immigration purposes — that is, pending removal — when removal is not realistic. Detention pending removal, in comparable democracies, does not meet the requirements of human rights law where there is no imminent reasonable prospect of removal.[24] The immigration removal powers have become a proxy for what is in reality administrative security detention.

In principle, there are two legal options where a person cannot be realistically removed and immigration detention is no longer justified. First, the authorities can utilise the various alternative measures already mentioned, from surveillance through to prosecution. Second, parliament could take the extreme step of legislating for administrative security detention — that is, empowering the authorities to detain people without charge or trial to contain the security risk they pose. In theory, such detention could commence upon an order from a federal court, following an application from ASIO or the Australian Federal Police (not the Department of Immigration and Citizenship, which is *not* an expert security agency).

Legislating for administrative security detention would, however, be a very serious and unjustifiable step at present. After 9/11, the UK government believed that it was necessary to declare a 'public emergency' in order to derogate from (suspend) its obligation under the ICCPR to guarantee freedom from arbitrary detention. Security detention of this kind would only be lawful if Australia faced a public emergency, which is almost certainly not the case at present.

This precisely indicates the importance of liberty and freedom from arbitrary detention under international law, which should not be lightly interfered with — and certainly not as Australia's current procedures do. It is difficult to see why the alternatives mentioned above are not capable of meeting the threats posed by people with adverse security assessments.

Conclusion: The case for 'Rolls-Royce' reform

The above proposals are modest in that they essentially preserve the existing institutional structure of the security assessment procedure. Allowing judges or AAT members to confidentially see security information, coupled with the use of a special advocate to independently test it, and minimum disclosure of the essence of the case to the person, would preserve national security interests while giving the person a reasonably fair procedure, and improving the accuracy and accountability of ASIO decisions.

It is, of course, possible to pursue more robust reform of the current procedure, which has an in-built structural flaw which irremediably limits its fairness. Currently ASIO is the agency which both gathers intelligence and uses it to issue adverse security assessments. Few doubt ASIO's right intentions; and ASIO certainly has special expertise in the area. But the fact remains that ASIO is simultaneously investigator and judge, a structure which by its nature cannot provide independent decision-making or avoid conflicts of interest.

Deeper structural reform could potentially improve the quality, accuracy and fairness of decision-making about adverse security assessments, but would require courage from the legislature. A federal court (such as the Federal Magistrates Court) could be statutorily empowered with original jurisdiction to issue adverse security assessments. On this (more protective) model, ASIO would apply to a federal court for the issue of an adverse security assessment, in a fair hearing involving adequate notice, disclosure and reasons, a special advocate, and more calibrated limits on public interest immunity. Federal judges would be given full access to all of the security sensitive information upon which ASIO seeks to rely, or else it would be excluded.

There is no constitutional impediment to this procedure, because it is not proposing merits review in the guise of judicial review, but rather endowing original jurisdiction to determine the facts. There is good precedent for it in the security area. The federal courts can issue civil control orders to prevent terrorism on application from the Australian Federal Police.[25] The High Court upheld that scheme[26] and observed that empowering judges to issue orders brings the safeguard of an independent and impartial judge and judicial procedures.

For the same reasons, it is good policy to involve the courts in issuing adverse security assessments, rather than continuing to permit ASIO to decide that its own opinion is correct. The consequences of an adverse security assessment are grave — at least as grave as, and often worse than, the restrictions of a control order — and include exclusion from protection as a refugee in Australia, protracted indefinite detention, and potential return to persecution.

Such seriousness of consequences make a judicial process more appropriate, and suggest that executive decision-making is less appropriate. While judges have been somewhat reluctant to intensively review security evidence, there is no impediment to judges readily acquiring expertise — just as they exercise expertise in many other technical areas of the law, from mergers and acquisitions to making predictive orders to prevent terrorism.

But the fact remains that ASIO is simultaneously investigator and judge, a structure which by its nature cannot provide independent decision-making or avoid conflicts of interest.

The courts would also not be overburdened by the volume of cases — ASIO has issued around 54 adverse assessments out of 7000 cases since 2010[27] — roughly 20 per year. Fewer applications would likely be brought by ASIO before a court, as it would know that its case would need to bear up to independent scrutiny of all relevant facts and evidence by a court. This approach is also preferable to merits review by the AAT because it streamlines a two-step process into one (by eliminating the primary decision by ASIO followed by AAT merits review), thus saving scarce public resources, improving access to justice for affected persons, and improving the integrity and accountability of decisions. That judges are involved should also assuage ASIO's security concerns about the integrity of the process.

Whether a modest or more ambitious reform agenda is ultimately pursued, it should be noted that the defects of the current regime do not only affect irregular arrivals. In fact, the statutory procedural fairness guarantees accorded to Australian citizens and permanent residents can also be virtually eliminated, by additional statutory means, where national security is at risk.[28] The issue is not only a marginal one confined to 'illegal' outsiders or refugees, but also goes to the heart of how the Australian government is prepared to treat its people.

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Trapped in the puzzle of security

Ben Saul
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THE focus on offshore processing has overshadowed a quieter humanitarian crisis in Australia's immigration detention centres. More than 50 refugees have been languishing in detention for between two and three years, after being refused visas on security grounds.

All were recognised by Australia as refugees, most after fleeing from the Sri Lankan government - which indiscriminately butchered Tamil civilians during the civil war.

ASIO later summarily declared them to be security threats, without reasons or evidence, or any fair opportunity to test the case against them. Sri Lanka's ambassador admitted recently that Sri Lanka has even provided intelligence to Australia on Sri Lanka's enemies.

Their detention is indefinite because it is unsafe to return them to Sri Lanka, and no other country will accept them because Australia says they are threats. Australia's solution is simply to lock them up forever, without charge or trial. The High Court will decide today whether this is lawful. It previously found in the Al-Kateb case in 2004 that indefinite detention is permitted.

The human consequences of the legal black-hole are profoundly damaging. The expert medical consensus is that protracted detention inflicts or aggravates serious mental harm, including depression, post-traumatic stress, self-harm and even suicide.

Like other lawyers, I have watched helplessly as our clients have tried to kill themselves. One man drank bleach. Another overdosed. Yet another tried to electrocute himself. Detention without end brings a numbing, spirit-crushing existence, a life without hope or purpose.

We have expert psychiatric reports stating that the detention of children severely impedes their development. One boy in Villawood is abnormally sad and anxious, cries a lot, and has trouble eating. A young girl is withdrawn and feels grief, loss and hopelessness. Another boy wets himself during the day. One child has spent his whole life of two years in detention. Their mother is distraught.

Our government is making refugees mentally ill, and abusing children. It has ignored the pleas of the Australian Medical Association, Australian Human Rights Commission, and the Ombudsman. Even the United Nations recently demanded that Australia protect their mental and physical health.

The Attorney-General wrote to me recently that the laws are necessary for security. The government is unmoved because of the toxic politics of border protection, public disinterest and its own lack of moral courage. The security agencies have the government's ear and have misled it into terrible policy.

Denying refugees a fair hearing and indefinitely detaining them is not necessary to protect security. Other liberal democracies do it differently yet are no less safe.

In Britain, Europe, Canada, and New Zealand, laws allow people to know and test the case against them, but without disclosing sensitive information. That delicate balancing of interests is a sign of living in a fair society bound by the rule of law. It also makes those places safer because testing the evidence ensures that security decisions are correct and avoids miscarriages of justice.

In those democracies, too, indefinite detention is not permitted because it is seen to violate human rights. Liberty is precious, all the more so for refugees who have fled persecution by vicious governments. Instead, a range of alternatives is used to deal with security threats, from prosecution to surveillance, reporting to police and community residency orders.

We do not indefinitely detain Australians without trial. The very idea would shock most Australians, yet we casually allow it for foreigners. Our lack of empathy is striking.

One can well understand the instinct of law-makers and security agencies to do whatever is necessary to protect Australians from harm. Ensuring the security of its people is a basic duty of government, vital to its legitimacy and the stability of our democracy.

There is a world of evil out there - from death squads, torturers, and jihadists to fascist Breiviks and those committing genocide. Human rights lawyers know this. We are curiously enough on the same page. Democracies are locked in a struggle for humanity, even if threats are often exaggerated as existential when they are not.

But our government should only do what is necessary for security, and no more. National security cannot be allowed to stand on the shoulders of everything else, including the right not to die in a detention centre, or the right to know why the government claims you are a threat. Otherwise our hard-won liberties dissolve into the muck of doing whatever it takes.

Decent democracies do not tolerate indefinite detention without trial, based on secret evidence, merely because it is convenient, and whatever the human costs. Even "terrorists" do not forfeit their humanity. The Australian approach is excessive, paranoid and extreme, and sacrifices everything else for a mirage of absolute security.

The struggle to bring our security agencies within the rule of law and to make them accountable for the vast powers they exercise over us has far to go. The current law does not make us safer. It does irreparable harm to those it indefinitely detains. It shames our government, demeans our democracy, and trumpets the poverty of our values.

It is time for the Parliament to bring ASIO's shadow justice further into the sunlight - and quickly, before we kill any more refugees.

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