

Human Rights Committee

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

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Submission by the NSW Young Lawyers Human Rights Committee

*Senate Legal and Constitutional Affairs Committee
By email: legcon.sen@aph.gov.au*

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Introduction

1. The NSW Young Lawyers Human Rights Committee (**YLHRC**) welcomes the opportunity to make a submission to the inquiry into the Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012.
2. The Bill, introduced to the Senate by the Hon. Senator Sarah Hanson-Young, proposes to amend the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**), the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) and the *Migration Act 1958* (Cth) (**Migration Act**) to provide for the review of security assessments for refugees who have received an adverse security assessment.

About NSW Young Lawyers and the Human Rights Committee

3. NSW Young Lawyers (**NSWYL**) is the largest body of young and newly practising lawyers, and law students in Australia. NSWYL supports practitioners in their early career development in numerous ways, including by encouraging involvement in its 15 separate committees, each dedicated to a particular area of practice. Membership is automatic for all NSW lawyers under the age of 36 and/or in their first five years of practice, as well as law students.
4. The YLHRC comprises of a group of over 600 lawyers and law students interested in Australian and international human rights issues. The objectives of the Committee are to raise awareness about human rights issues and provide education to the legal profession and wider community about human rights. Members of the Committee share a commitment to effectively promoting and protecting human rights.

Indefinite detention

5. The YLHRC is concerned about the current status of refugees who receive adverse security assessments (**ASA**) and the risk these refugees will be subject to arbitrary indefinite detention. In particular, the YLHRC expresses its concern that Australia is failing to comply with its obligation under Article 9, paragraph 1 of the International Covenant on Civil and Political Rights (**ICCPR**), which provides that people should not be unnecessarily detained or detained with greater restrictions than required by the circumstances. The Article states '[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'
6. Australia became a party to the ICCPR on 13 August 1980, subject to certain reservations. The Article 9 obligation is non-derogable except in times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed (Article 4 ICCPR). Such an emergency does not currently exist which means that Australia must ensure that it does not subject any person within its jurisdiction to arbitrary detention as provided by Article 9.
7. The YLHRC supports the Bill's proposed amendments to sections 197AB and 197AD of the Migration Act, which promotes a measured, fair and transparent system for refugees with an ASA, subject to the comments below.
8. Both the Australian Human Rights Commission¹ and the Joint Select Committee on Australia's Immigration Detention² have raised concerns about the lack of procedural safeguards in ASIO's decision making process in finding an ASA.
9. Currently, refugees who receive an ASA are not provided with information about the grounds on which the ASA is based and have limited access to independent review of the ASA.
10. The YLHRC expresses its concern for the health and wellbeing of refugees subsequently placed in closed detention centres after receiving an ASA. In July 2012 the Australian Human Rights Commission reported that "almost all refugees with ASA who elected to speak...spoke about dying... made a serious attempt at suicide and another had a panic attack which required his hospitalisation".³ The Commission held grave concerns for the immediate wellbeing and safety of refugees with an ASA.
11. Under Article 12 of the International Covenant on Economic Social and Cultural Rights, Australia has an obligation to ensure the right of everyone (including non-citizens) to the enjoyment of the highest attainable standard of

¹ Australian Human Rights Commission, "Part 6: Some barriers to use of community arrangements", *Community arrangements for asylum seekers, refugees and stateless persons: Observations from visits conducted by the Australian Human Rights Commission from December 2011 to May 2012*, July 2012, available online at http://humanrights.gov.au/human_rights/immigration/2012community-arrangements/summary.html#Heading70.

² Commonwealth of Australia, "Chapter 6: The assessment process", *Joint Select Committee on Australia's Immigration Detention Network: Final Report*, 12 April 2012, available online at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=immigration_detention_ctte/immigration_detention/report/index.htm.

³ See above, footnote 1.

physical and mental health. The YLHRC expresses its concern that Australia is failing to meet its Article 12 obligation under the current ASA regime.

12. The YLHRC notes the recommendations set out in the Australian Human Rights Commission's report, *Report of an inquiry into complaints by Sri Lankan refugees in immigration detention with adverse security assessments*.⁴ In particular, the YLHRC supports the Australian Human Rights Commission's findings that alternatives to indefinite detention must be considered for refugees who receive an ASA.⁵ The Commission's Report found that for 10 Sri Lankan refugees, assessments for alternative community detention could have been conducted within 24 hours however instead they were held in detention for between 5 to 21 months.⁶ The YLHRC submits that the Commission's recommendations strike an appropriate balance between national security risks, with the right not to be arbitrarily detained, in accordance with Australia's obligations under the international law.
13. In particular, the YLHRC submits that a more flexible assessment system is required – one which manages security risks, on a 'case-by-case' basis. This would ensure a proportionate response to the actual risk they pose to the community.
14. The YLHRC supports the proposed Bill subject to:
 - a. Replacing (or clarifying the meaning of) the term 'addressed' with 'mitigated' in sections 197AB(4)(a) and 197AD(4)(a). The term 'addressed' implies that a security threat must be completely avoided before a residence determination is made. This is an unreasonable threshold and does not reflect the intention of the Bill to have a response proportionate to the threat that the person poses.
 - b. Inserting a non-exhaustive list of matters that the Minister could consider relevant in sections 197AB(4)(b) and 197AD(4)(b), for example:
 - i. If the refugee was not at a detention centre at the time of the ASA, the length of time the refugee was outside detention and any threats to security that may have arisen. This is a factor which should be considered in determining the overall threat to security the person may pose in accordance with Article 31 of the 1951 Convention relating to the Status of Refugees. As a party to this Convention, Australia should only restrict the movement of refugees to what is necessary rather than a blanket approach to move all refugees who have received an ASA to a detention centre without consideration of necessity and alternatives.
 - ii. The appropriateness of alternatives to detention centres such as community housing, hotels, foster care, designated person at a private residence, workplaces, places of study or living in the community freely, with certain reporting requirements to an appropriate monitoring authority.

⁴ Australian Human Rights Commission, *Report of an inquiry into complaints by Sri Lankan refugees in immigration detention with adverse security assessments*, July 2012, [2012] AusHRC 56

⁵ *Ibid* at [8].

⁶ *Ibid* at [67].

Right to a fair hearing during merits review process

15. Sections 1 – 3 of Schedule 1 of the Bill amend the *AAT Act* to allow a ‘Special Advocate’ to appear before the Administrative Appeals Tribunal on behalf of an applicant who appeals a security assessment handed down by ASIO. The current legislative framework permits ASIO to issue a ‘Security/Defence Certificate’ in accordance with Section 39A(8) of the *Administrative Appeals Tribunal Act 1975 (Cth)*. The Certificate prevents applicants affected by a security assessment and their legal representative from being present when evidence or the submissions are made. The Bill will allow a Special Advocate to be present on behalf of the applicant when evidence and submissions are given during the appeal process.
16. The YLHRC considers that the Bill, to a limited extent, strengthens the right to a fair hearing for a refugee subject to an ASA. The Bill also provides more protection than the Attorney General for Australia’s recently established role of the Independent Reviewer.
17. However, the YLHRC submits that it is concerned that the proposed Bill falls short of meeting Australia’s obligation to provide a fair hearing under Article 14 of the ICCPR. The proposed Bill does not allow a refugee subject to an ASA the right to access all of the evidence used by ASIO to support its application for an ASA.
18. The YLHRC is concerned with the proposed s 39C(2) which restricts the applicant from consenting to the Special Advocate acting on their behalf. Similarly, s 39(4) proposes that the Special Advocate is not to be taken as the applicant’s legal representative.
19. Consequently, the Bill falls short of Article 14(c) of the ICCPR, which requires that a person be entitled to the right to ‘defend himself in person or through legal assistance of his own choosing’.
20. The Bill’s amendments to the merits review process by the AAT restricts the information available to the applicant or their legal representative.
21. The proposed s 39D(1) entitles the Special Advocate to review the security assessment handed down by ASIO, certificates relating to the security assessment, information relied on by ASIO, information provided to the Tribunal by ASIO and evidence or submissions. In accordance with s 39D(c), once the Special Advocate receives such certificates or documentation, they may no longer communicate freely with the applicant unless authorisation is given by the presidential member. Pursuant to s 39D(6) – (8) the Attorney-General can issue a certificate that such communication is contrary to the public interest.
22. Consequently, if no authorisation is given, or if the Attorney-General issues a certificate, there is no right for the applicant to ask for a review of those decisions. The limits placed on availability of information to the applicant, together with the control over communications the applicant or legal representative may have with the Special Advocate, fall short of Article 14(3)(b) of the ICCPR. Specifically, there is denial of the applicant’s right to ‘communicate with counsel of his own choosing’.
23. The YLHRC submits that this lack of complete disclosure of the case against the person is inconsistent with Australia’s obligation to provide a fair hearing

under article 14(3)(a) of the ICCPR. Article 14(3) states, in part: '[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him'. While a review of an ASA is not a criminal trial, the YLHRC submits that the procedural safeguards contained in Article 14 should apply to the merits review process because where the outcome of a review hearing has a similar effect on the liberty of a refugee where indefinite detention is ordered.

24. While the YLHRC is cognisant of the tension between disclosing classified information which is not in the public interest to be disclosed, the YLHRC is concerned that the Bill denies an applicant access to information that is within the public interest and non-prejudicial to the parties to the proceedings.
25. The restrictions placed on applicants to freely communicate with the Special Advocate and review information fall short of meeting Australia's obligations under Article 14 to ensure that an applicant is given a fair hearing during the merits review process.

The decision in M47/2012

26. The YLHRC support's the Bill's proposal to address aspects of the decision in *Plaintiff M47/2012 v Director General of Security* [2012] HCA 46 (*M47/2012*).
27. *M47/2012* concerned the lawfulness of the ongoing immigration detention and the lawfulness of any future removal to a safe third country in respect of a person who had been assessed to be a refugee, but had not been granted a permanent visa as a result of an ASA.
28. A majority of the High Court held that a visa determination could not be made finally by an ASIO officer by virtue of their power to return an adverse security assessment against an asylum seeker. The YLHRC supports the Bill's proposed ss 23 and 24 which ensure that the Minister determines the visa application of a person to whom an ASA applies.

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