Immigration Advice & Rights Centre Inc.

Introduction

1. The Immigration Advice & Rights Centre ("IARC") was established in 1986 as a specialist immigration law community legal centre. Due to its extensive knowledge of Australia's immigration law and policy, IARC has made contributions to law reform discussion enhancing the operation of migration and refugee law.

2. Drawing upon the Centre's experience in the provision of advice and casework we provide the submission below highlighting issues relevant to our clientele. IARC has first-hand knowledge regarding the serious impact that an adverse security assessment (ASA) has on an individual's claim for asylum, their liberty and their mental health.

Submission

3. IARC welcomes the Government's recent acknowledgement that greater independent scrutiny is required for those decisions made the Australian Security Intelligence Organisation (ASIO) that impact asylum seekers.[1] The current situation in which an asylum seeker with an ASA cannot access and challenge the case against them is unacceptable and has been widely criticised as being contrary to Australia's international law obligations.

4. IARC strongly support a Bill that aims to strengthen procedural fairness and transparency for asylum seekers who are the subject of an ASA. We endorse the main premise of the proposed Bill as it confers review rights previously not held by this group of asylum seekers.

5. Having said that, IARC would like to take this opportunity to request that the Bill be altered to better counter the criticisms of special advocate procedures which are currently in place in overseas jurisdictions, particularly the United Kingdom (UK).

6. Special advocates in the UK have labelled the UK special advocate system as "inherently unfair", raising the following difficulties with the underpinning statutory scheme:

> *(1) The prohibition on any direct communication with open representatives, other than through the Court and relevant Government body, after the SA has received the closed material;*
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> *(2) The inability effectively to challenge non-disclosure;*
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> *(3) The lack of any practical ability to call evidence;*
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> *(4) The lack of any formal rules of evidence, so allowing second or third hand hearsay to be admitted, or even more remote evidence; frequently with the primary source unattributed and unidentifiable, and invariably unavailable for their evidence to be tested, even in closed proceedings;* [2]

7. Amnesty International UK have recently conducted a detailed analysis of the use of secret evidence in 'closed material procedures' in the UK. Based on interviews conducted with a number of lawyers involved in such procedures, Amnesty reports that:

> *Difficulties raised by lawyers include: how to meaningfully respond to general allegations against your client; how to represent your client effectively when you simply do not have access to much of the evidence that underpins the government's case; problems developing legal strategy for the same reasons; the fear that adopting a certain line of questioning might result in negative consequences in the secret part of the hearing; challenges in maintaining the trust of their clients; difficulties properly advising their clients as to the likelihood of success in their case; a large disparity in terms of their ability, compared with the government lawyers, to effectively cross-examine witnesses; challenges instructing their own expert witnesses who are unable to access the secret evidence; not always understanding the reasons why a case has been lost because much of the reasoning is given in a closed judgment; and challenges in effectively appealing a case if part of the judgment is closed.*[3]

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[1] The Hon. Nicola Roxon M.P., 'Independent Review for Adverse Security Assessments' (Media release, 16 October 2012).
[2] Amnesty International UK, *Left in the Dark: the Use of Secret Evidence in the United Kingdom*, October 2012, p. 7.
[3] Ibid, p. 6.

8. In light of these criticisms, **IARC would prefer a system where the lawyer of an adversely assessed individual could be granted security clearance to view all classified material, as opposed to a system of special advocate engagement**. This arrangement would be consistent with security clearance procedures already in place for legal representatives of civil and criminal defendants under section 39 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*. Similar penalties for unauthorised disclosure of classified information would apply to a security-cleared lawyer under this arrangement as would apply to special advocates under the proposed Bill.

9. Within this model, attention must be paid to ensuring that security-cleared lawyers can access adverse and exculpatory evidence about their client; call their own witnesses; and meaningfully cross-examine witnesses.

10. This model would better uphold the lawyer/client relationship, which is widely criticised as being compromised in the special advocate model. We believe this arrangement would give clients a greater sense of control and transparency in what can be a long and stressful process.

11. The proposed special advocate system not only legitimises secrecy, but also curbs reassurance that only an applicant's lawyer can provide. Greater involvement of an applicant's lawyer can benefit the client's mental health while they continue to wait in detention during the appeal process.

12. Classified evidence can often only be meaningfully explained or challenged by the individual himself or herself. As such, where an individual must be absent from proceedings or excluded from viewing evidence, a security-cleared lawyer with intimate knowledge of the applicant's circumstances is the most appropriate person to investigate and challenge unfavourable evidence, and make exculpatory submissions.

13. The above point is even more important given the proposed Bill includes an executive-driven and bureaucratic process for authorising communications between the special advocate and applicant/applicant's lawyer after the special advocate has viewed classified material. In the UK, Canada and New Zealand, the extent to which the special advocate can communicate with an applicant after viewing classified material has been commonly scrutinised. If the right balance is not struck, there is a risk that special advocates will not communicate with the applicant all together in order to avoid the authorisation process.

14. Experienced special advocates in the UK have shown support for an alternative procedure where security clearance is given to the directly instructed lawyer based on their reservations with the current special advocate system.[4]

15. IARC strongly prefer the above described 'security-cleared lawyer' model. However, IARC has prepared the following **alternative recommendations** in the event that the Committee prefer the special advocate procedures in the proposed Bill:

    a. Appointment of a special advocate should only be on the request of the applicant only if they are legally represented. Where an applicant does not have a legal representative, IARC suggest that the onus for enlivening special advocate procedures should be on the presidential member of the AAT. This would account for the vulnerability of persons in detention and their limited access to legal services.

    b. Termination of a special advocate on the applicant's request should not mean that another special advocate cannot be appointed. This perpetuates the perception that a special advocate is on the Commonwealth's 'side' and does not factor in the genuine possibility that a special advocate could lack competence in representing an applicant's interests. IARC would instead support a maximum limit on the number of special advocates that can be successively appointed per applicant e.g. a maximum of 2 special advocates.

    c. There should be a mechanism in the proposed Bill to extend the 29 day time limit for free communication between the special advocate and applicant to accommodate the resource constraints and mental health pressures associated with living in detention.

[4] Special Advocate submission to Her Majesty's Government of the United Kingdom of Great Britain and Northern Ireland, *Justice and Security Green Paper*, 16 December 2011, p. 22.

d. The process to authorise special advocate communications with an applicant after the 29 day free communication period has the potential to lengthen proceedings and may provide little incentive for the special advocate to communicate with the applicant. The operation of this provision must be closely monitored in practice to ensure procedural fairness.

e. The Bill contemplates 6 monthly review cycles for ASAs but creates a scheme where review can only be undertaken after an assessment period of unknown length. IARC suggest this provision be amended to ensure that assessment *and* review take place within the 6-month period. This will provide adversely assessed individuals with the certainty that their ASA will be reviewed at 6-month intervals.

Conclusion

16. In summary, IARC welcomes steps to provide asylum seekers who are the subject of an ASA with review rights. The aim of this submission has been to emphasise that procedural fairness and fair trial rights must go hand in hand with rights to review. We believe the Bill does not go far enough in this regard and does not learn from the serious criticisms that have been raised toward the UK special advocate system.

17. As such, IARC would prefer a system where the lawyer of an adversely assessed individual could be granted security clearance to view all classified material, as opposed to a system of special advocate engagement. This approach would balance the procedural fairness interests of the applicant and the national security interests of the Government better than the special advocate system described in the proposed Bill. Under this arrangement, special attention must be given to the information available to security-cleared lawyers, as well as their ability to challenge adverse evidence.