



Refugee Council  
of Australia

## **SUBMISSION TO THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS INQUIRY INTO THE *MIGRATION AND SECURITY LEGISLATION AMENDMENT (REVIEW OF SECURITY ASSESSMENTS) BILL 2012***

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, asylum seekers and the organisations and individuals who work with them, representing over 800 members. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members and refugee background communities and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback on the *Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012* (hereafter, the Bill). We believe this legislation could play a major role in addressing the situation of refugees who have received negative security assessments from the Australian Security and Intelligence Organisation (ASIO). In RCOA's view, the Australian Government's current approach to addressing this issue retains a non-statutory basis for reviews and so is unacceptable as a long term solution. There is an urgent need to explore alternative options for resolving the status of refugees in this situation. We therefore welcome the introduction of the Bill as a mechanism for improving procedural fairness in the security assessment process and encouraging consideration of alternatives to indefinite detention. We believe the Bill strikes an appropriate balance between managing risks to the community and ensuring fair and humane treatment of people seeking protection.

RCOA recommends that the Bill should be passed. This submission outlines the reasons why we believe the Bill to be necessary and puts forward some suggested amendments which we believe would further enhance its effectiveness.

### **1. The need to address prolonged indefinite detention**

- 1.1. RCOA welcomes the Australian Government's efforts over the past year to expand the use of community alternatives to detention for people seeking asylum, which have done much to reduce the human costs of immigration detention. Feedback from RCOA's member organisations indicates that the incidence of serious mental health issues amongst asylum seekers who have spent shorter periods in detention is far lower compared to those who have been detained for prolonged periods.
- 1.2. RCOA remains greatly concerned, however, that over 50 refugees who have received negative security assessments remain subject to prolonged indefinite detention, with no prospect of release in the foreseeable future. Many of these have already been detained for a number of years and are experiencing acute mental health issues. Of particular concern is that fact that several children have now been in this situation for an extended period.

- 1.3. The mental health impacts on prolonged indefinite detention have been well documented elsewhere and it is not the intention of this submission to reiterate these in detail. However, we wish to emphasise two key points which we believe are particularly pertinent to the situation of refugees who have received negative security assessments:
- a) There is a clear link between the length of detention and adverse mental health outcomes, in that the impacts of detention on mental health tend to worsen as detention becomes more prolonged; and
  - b) One of the key factors leading to these adverse impacts is the indefinite nature of immigration detention, in that detainees lack any certainty regarding their prospects of release.
- 1.4. Refugees who have received adverse security assessments are thus at extremely high risk of adverse mental health outcomes due to the highly protracted nature of their detention and constant uncertainty regarding if or when they will be released. Indeed, many are already experiencing these negative impacts. RCOA believes that the status of these individuals must be resolved as a matter of urgency and feel that the Bill could provide an important mechanism for addressing their situation.

## **2. Limited opportunities for third country resettlement**

- 2.1. The Australian Government continues to promote third country resettlement as its primary strategy for resolving the status of refugees subject to adverse security assessment. RCOA believes that this is an inadequate and impractical response to a serious and pressing issue.
- 2.2. The fundamental weakness of this strategy is that the prospects of third country resettlement are greatly reduced by the negative security finding itself. History demonstrates that there is very little appetite internationally to resettle those found to pose a threat to a nation's security, or even those later cleared of posing a threat (for example, certain detainees in the Guantanamo Bay facility).
- 2.3. Moreover, the third country resettlement strategy has proved thus far to be largely ineffective. RCOA is aware of only a single case – the resettlement of Mohammed Sagar in Sweden – in which a refugee deemed by Australia to pose a security risk has been resettled in a third country. We are perplexed that the Government continues to endorse a strategy which has been so patently unsuccessful.
- 2.4. There is a clear and urgent need to explore alternative strategies to third country resettlement given the lack of positive outcomes to date. We believe that the strategies introduced by the Bill – statutory review processes and consideration of community alternatives to detention – have a far greater chance of securing meaningful outcomes compared to third country resettlement.

## **3. Lack of transparency and procedural fairness in security assessment process**

- 3.1. RCOA has long voiced concerns about the lack of procedural fairness accorded to refugees who have been subject to negative security assessments.<sup>1</sup> We believe that it is unacceptable for any person, let alone a person towards whom Australia has

---

<sup>1</sup> See, for example, the letter sent by RCOA to Attorney-General The Hon Nicola Roxon in January 2012, available at <http://www.refugeecouncil.org.au/r/s&l.php>.

protection obligations, to remain in a situation of indefinite detention without having the opportunity to respond to the case against them or seek review of their circumstances, most particularly when they are currently able to be detained for the term of their natural life on the basis of these assessments. We consider their detention to be arbitrary and believe that there is a pressing need to enhance transparency in the security assessment process.

- 3.2. RCOA has previously endorsed the recommendation of the Inspector-General of Intelligence and Security to enable to Administrative Appeals Tribunal (AAT) to review security assessments made in relation to Protection Visa applicants. We therefore strongly endorse the provisions of the Bill which would extend the mandate of the AAT to Protection Visa applicants.
- 3.3. RCOA acknowledges that enhanced review processes would not necessarily resolve the situation of refugees who have received an adverse assessment, as the reviewer may uphold the original finding. However, we believe that the introduction of a statutory review process is essential to ensuring that these individuals are treated fairly and humanely, in line with Australia's international human rights obligations. We also believe that enhanced transparency in ASIO processes (with due regard for security concerns) would encourage better and more efficient decision-making within ASIO and foster greater public confidence in these decisions.

#### **4. Limitations of independent reviewer process**

- 4.1. RCOA acknowledges that the Government has already taken steps to enhance review of ASIO decision-making through the appointment of an Independent Reviewer to assess adverse security findings made against refugees. While we believe that this process could play an important role in assisting to resolve the status of refugees facing indefinite detention in the short term, we submit that it does not provide an adequate substitute for a statutory review process.
- 4.2. One of the key weaknesses of the Independent Reviewer process is that any recommendations made will not be binding. Given that, in cases where an adverse security assessment is found to be unwarranted, the Independent Reviewer cannot compel any form of redress (including release from detention), it is questionable whether this process can ensure meaningful outcomes. This issue is of particular concern given that similar mechanisms for independent review and oversight of detention facilities and conditions have proven inadequate in safeguarding the rights of asylum seekers subject to indefinite mandatory detention, in large part because the recommendations made are not binding.
- 4.3. Over a number of years, for example, the Commonwealth Ombudsman has prepared detailed reports taking into account the mental and physical health and wellbeing of individuals detained, many of which have recommended the individual be released from immigration detention. However, the Government is not obliged or compelled to act on the recommendations the Ombudsman, and most recommendations for release have not been acted upon until the person is granted a substantive visa. Similarly, while the Australian Human Rights Commission conducts inspections of immigration detention facilities, its reports on detention conditions are advisory in nature and its recommendations are frequently disregarded, even when issues of serious concern are raised.

- 4.4. Additionally, as a non-statutory process, the Independent Reviewer model cannot provide a consistent or long-term solution to the lack of procedural fairness in decision-making on security assessments. Such review processes are far too important to be treated merely as a matter of policy and should be embedded in law.
- 4.5. RCOA believes that only a statutory, binding review process linked to clear avenues for redress, such as that available through the AAT, can ensure procedural fairness and provide meaningful outcomes for refugees who have received adverse security assessments.

## **5. The need to explore community alternatives**

- 5.1. As noted in Section 3.3, review processes alone will not necessarily resolve the situation of refugees subject to adverse security assessments. As such, there is a need to explore alternative community-based arrangements for individuals who are found to pose an ongoing security risk. RCOA therefore welcomes the provisions of the Bill which require the Minister for Immigration and Citizenship to consider community-based alternatives for refugees who have received adverse security assessments.
- 5.2. Through its immigration detention network and Bridging Visa regime, Australia already has in place a suite of options to manage risks to the community, with the level of surveillance, freedom of movement and reporting required varying in accordance with the nature of the risk. RCOA sees no reason why a similar risk-management approach could not be applied to individuals who have received negative security findings.
- 5.3. In its response to the findings of the Joint Select Committee on Australia's Immigration Detention Network, the Australian Government noted the limitations of the control order regime as a mechanism for resolving the status of refugees subject to negative security assessments:

*Control orders are only available where a person has trained with a terrorist organisation listed under the Criminal Code or where a control order would substantially assist in preventing a terrorist act. The conditions attached to the control order must each be necessary to protect the community from a terrorist act. These are high legal thresholds, and it is not expected that Criminal Code control orders would be readily available.<sup>2</sup>*

- 5.4. We believe that these limitations in fact highlight the viability of community-based alternatives for these individuals. If such alternatives are considered appropriate for managing the risk of terrorist acts, similar options could surely be considered for individuals who, as the Government seems to imply, are deemed to pose a risk on less serious grounds.
- 5.5. RCOA believes that the most appropriate option for resolving the status of refugees subject to adverse security findings would need to be determined on a case-by-case basis. As a general principle, however, we would encourage the Government to employ the least restrictive option possible to ensure adequate risk management, in light of the fact that more restrictive options tend to have more serious mental health consequences for the individual concerned.

---

<sup>2</sup> See the Government Response to Recommendations by the Joint Select Committee on Australia's Immigration Detention Network, issued November 2012, p. 20, <http://www.immi.gov.au/media/publications/pdf/2012/response-recommendations-joint-select-committee-aust-immi-detention.pdf>.

## **6. Suggested amendments**

- 6.1. While RCOA supports the Bill, we believe that its effectiveness could be further enhanced through some minor amendments.
- 6.2. RCOA supports the recommendations put forward by Professor Ben Saul regarding the minimum disclosure of reasons for an adverse security finding to the individual affected, beyond generalised information. We believe this amendment would be a further step towards ensuring procedural fairness in a manner which still allows for management of risk.
- 6.3. RCOA also supports the recommendation put forward by the Australian Human Rights Commission on amending the *Migration Act 1958* to require the Minister for Immigration to consider a residence determination for refugees with adverse security assessments in immigration detention and review their detention every six months. We believe that this amendment could help to minimise prolonged indefinite detention by establishing a regular, compellable mechanism whereby the situation of these individuals can be reviewed and changing circumstances taken into account.