Committee Secretary
Senate Committees on Legal and Constitutional Affairs
Inquiry into the Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012

Parliament House
Capital Hill
Canberra, ACT 0200

Urgent

26 October 2012

Dear Secretary,

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

Humanitarian Research Partners (HRP) is a non-profit human rights and humanitarian research organization that provides community support and specialized research and advocacy services for refugees, asylum seekers and NGOs in Australia. HRP is currently engaged in a project monitoring access to healthcare for asylum seekers living in the Australian community, with a particular focus on access to services and medication. HRP staff are also involved in multinational stakeholder submissions to UN Special Procedures mandate holders and Human Rights Treaty Bodies, as well as collaborative human rights research initiatives throughout the world.

The High Court's recent *M47*[1] decision held *ultra vires* a determination that was effectively made by unauthorized persons (a person other than the Minister for Immigration and Citizenship – in this case an ASIO officer) to deport the Plaintiff after he had been found to be a genuine refugee who did not fulfil PIC4002 due to an adverse security assessment. *M47* will have wide-reaching implications on the government's offshore processing arrangements.

We note that this Bill substantially remedies problems of the Minister's personal exercise of power and procedural fairness brought to light by the Court in *M47*. However, HRP has several concerns regarding the consequences of the proposed amendments. Our human rights-based analysis of the Bill is as follows:

[1] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 (5 October 2012) (*M47*).

1. Humanitarian Research Partners considers it essential the Government adopt *at least* sections 23 and 24 of the Bill (amendments to ss 197AB and 197AD of the *Migration Act 1958* (Cth)) to enable it to continue processing asylum seekers, with the Minister for Immigration once again taking control of protection visa determinations. These amendments alone would be sufficient to resolve the central problem identified by the High Court's decision.

2. Sections 1-13 of Schedule 1 establish the position of *Special Advocate* whose function is to protect the interests of the applicant to administrative reviews of adverse or qualified security assessments. HRP considers this measure to substantially ameliorate problems of procedural fairness and natural justice in the current regime.

3. Proposed amendments to s 39D(6) and (8) of the *AAT Act* could be implemented in a fashion that denied an applicant procedural fairness. Section 39D(6)(a) effectively gives the Attorney-General a non-reviewable power to deny a Special Advocate permission to communicate with the applicant they are advocating for, or the applicant's representative, if the Attorney-General has certified that the proposed communication would be prejudicial to national security, defence or international relations. Such a decision would not be reviewable.

   Section 39D(8)(a) should be deleted, and subs (b) should be expanded to include review of a subs 6 certificate based on subs 6(a) and (b) reasons to ensure the Attorney-General's decisions can be reviewed if they are outweighed by the interests of justice.

4. Proposed amendments to s 39D(10) of the *Administrative Appeals Tribunal Act 1975* (Cth) (*AAT Act*) may act to render an applicant unable to properly answer serious allegations as to their character and history. Although the applicant would initially have the right to communicate relatively freely with their Special Advocate, that right is severely curtailed from the time the Special Advocate receives s 39D(1) information regarding the proceedings. Free communication before receipt of s 39D(1) information and documents may not address the reasons provided for the adverse or qualified security assessment in question. A Special Advocate would be unable, under the proposed amendments, to ask even general questions that might enable an applicant to dispel concerns raised by any s 39D(1) document or piece of information.

   Although a Special Advocate would not be a representative of the applicant by virtue of amended s39C(4), the Special Advocate would be a *de facto* representative for the purposes of any part of the administrative proceedings where the applicant and their representative were required to be absent. This necessitates at least the possibility of conferral with the applicant in order for the Special Advocate to fully understand the nature and circumstances of the person for whom they were advocating.

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Denial of free communication with the applicant's Special Advocate would be contrary to requirements of procedural fairness, and would most certainly give rise to *practical injustice*[2] to an applicant who would be rendered unable to answer allegations made against them by virtue of these amendments.

5. Administrative reviews undertaken pursuant to proposed amendments to ss 39D(6), (8), (11) and (12) of the *AAT Act* would be effectively kept secret by all parties as a result of the duty of strict confidentiality imposed by those sections. This is an inversion of standard practice in the Australian judicial system, where only information that the court suppresses is kept confidential, as opposed to all information being kept confidential except by leave of the court.

   HRP submits that it is against the public interest to routinely prohibit the release of information that goes to the nature of security assessments that are judged as *non-prejudicial*, *qualified*, or *adverse* pursuant to s 35 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (*ASIO Act*). Although some information should certainly be kept secret in the national interest, we submit that such *absolute secrecy* is contrary to the public interest, and is repugnant to the doctrines of legal certainty and *stare decisis*.

6. Proposed amendments to ss 197AB(4)(a) and (b), and s 197AD(4)(a) and (b) of the *Migration Act 1958* (Cth) are ambiguous. It should be explained what is meant by the possibility of a *threat to security* posed by a person being '*addressed'* at a place specified in a residence determination. The current wording is unclear and could point to two mutually exclusive legislative intentions, to determine:

   a. whether the conditions of a residence determination (community detention order) could completely negate any threat to security the person might pose; or

   b. whether that person being moved into the community under a residence determination could partially or substantially negate any threat to security the person might pose.

   Providing clarification on this matter, as well as examples of other considerations to which the Minister might have recourse under ss 197AB(4)(b) and 197AD(4)(b), would promote uniform decision making and, ipso facto, predictability of outcomes according to the doctrine of legal certainty.

[2] *M47* at §139 per Gummow J, explaining the implications of *Plaintiff S157/2002 v Commonwealth* (2002) 211 CLR 476, §513 (per Gleeson CJ).

7. Amendments that refer to the concept of *a threat to security* rely on definitions of *threats* and *security* in s 4 of the *ASIO Act*. As no information is currently available on security assessment determination procedures and internal policy, it is impossible to ascertain how the *ASIO Act* definitions are applied in practice.

   The most concerning definition in the *ASIO Act* is ***"politically motivated violence"***.[3] Sub-sections (a) and (b) refer to acts performed by the person in question or by another person, that are intended, or likely to involve or lead to violence, for the purpose of influencing government policy either in Australia or *anywhere else*.[4] All that is required here is a 'reasonable likelihood that the activity will produce violence from others' for an adverse finding to be made.[5]

   This open definition leaves too much discretionary power in the hands of the decision maker. According to the High Court in *M47*, such broad-based powers are *ultra vires* for the purposes of making a visa determination under the *Migration Act*. Ambiguity in this most important provision works against predictability and uniformity in application of the law, and is contrary to international law and standards.

Conclusions

Although the Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012 is a significant step towards reintroducing transparency and procedural fairness into the operation of the *Migration Act*, the Bill **must** be re-tabled with changes to the above-mentioned sections. This would avoid any unintended and internationally unlawful curtailment of the rights to liberty and security, and to equality before the law.[6] Further changes are required to bring ASIO security assessment powers *intra vires* in terms of authority to make a final visa decision under the *Migration Act*.

The Government must consider 'the courts' traditional deference to the Executive on matters of national security' when drafting security assessment regulations, as it makes successful judicial review of security decisions 'highly unlikely in practice'.[7] The Government **must** ensure the positive measures allowing

[3] s 4 *ASIO Act*.
[4] The *ASIO Act* uses the term 'elsewhere', s 4(a) and (b)(i), (ii) of the *ASIO Act*.
[5] Attorney-General's Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its function of obtaining, correlating, evaluating and communicating intelligence relevant to security (including politically motivated violence), available online at: www.asio.gov.au/img/files/AttorneyGeneralsGuidelines.pdf, accessed 25 October 2012, paragraph 15.5.
[6] Articles 9 and 14 of the *International Covenant on Civil and Political Rights*, 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (1967); CCPR *General Comment 13*: Equality before the law and the right to a fair and public hearing by an independent court established by law, 21st Session, 13 April 1984.
[7] Kieran Hardy, *ASIO, adverse security assessments, and a denial of procedural fairness*, (2009), 19 AJ Admin L 39, [40].

review of adverse security assessments contained in this Bill create more than a mere illusion[8] of the right to judicial review for refugees subject to adverse or qualified security assessments.

All persons found to be refugees who are subject to an adverse or qualified ASIO security assessment can be indefinitely detained by Australia with little to no possibility of release. HRP urges the Government to consider ways to end this inhumane and internationally unlawful[9] practice.

Respectfully,

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[8] Ibid.

[9] See for example Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention, Addendum: Visit to Australia*, UN Doc E/CN.4/2003/8/Add.2 24 October 2002, Pt. III A.