QUEENSLAND COUNCIL FOR CIVIL LIBERTIES
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The Committee Secretary
Standing Committee on Legal and Constitutional Affairs

By Email: legcon.sen@aph.gov.au

Dear Madam,

MIGRATION AND SECURITY LEGISLATION AMENDMENT (REVIEW OF SECURITY ASSESSMENTS) BILL 2012

I write to you on behalf of the Queensland Council for Civil Liberties ("the QCCL") to make a submission to the Committee in relation to the above Bill.

I thank the Committee for its short extension of time to make this submission.

ABOUT THE QCCL

The QCCL is a voluntary organisation established in 1967 which has as its principle purpose the implementation of the Universal Declaration of Human Rights in Queensland and Australia.

Article 9 of the Universal Declaration provides:-

> *"No one shall be subjected to arbitrary arrest, detention or exile."*

Article 10 of the Declaration provides:-

> *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him."*

The short effect of these Articles is that no person shall be deprived of their liberty without the opportunity of due process, to use the American expression. And yet, there are currently some 55 asylum seekers[1] detained, apparently for the rest of their lives in this country who have not only not had a hearing but who have in fact not been told in a meaningful way the reason why they have been detained.

STAR CHAMBER

Once upon a time such a situation would have evoked references to the Star Chamber, that gross weapon of the absolutist monarchs of England about which the complaint of arbitrary arrest was first made. Nowadays it would appear that the Star Chamber is once again an accepted part of the armoury of government in this country.

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[1] *"Refugee Lawyers Challenge Indefinite Detention Rules"* Sydney Morning Herald 12 December 2012

In more recent times such an arrangement would have received the description of Kafkaesque but now of course it would seem the notion that a person can be locked up without knowing why is perfectly acceptable so long as the person is given a particular label such as "terrorist" or "bikie gang member". Who will they come for next?

The Council is not aware of any example in which the traditional Common Law arrangements for the protection of sensitive national security information have been breached by some legal representative. We invite the committee to point to such an example.

In the Council's view the model of the special advocate contained in this legislation is an entirely unsatisfactory arrangement.[2]

We set out in detail our criticisms of The Special Advocate model and of secret evidence in general in our submission to the Queensland Parliament's Crime and Misconduct Committee[3].

In that submission, we identified the criticisms which have been made of the system of special advocates in the United Kingdom. We take the opportunity to repeat those criticisms below:-

> The use of Special Advocates has come in for significant criticism in the UK.
> In a report of the Joint Committee on Human Rights in February 2010 a number of very pertinent criticisms of the limitations of Special Advocates were made.....[4]
> The criticism by the Joint Committee on the role of Special Advocates is instructive, namely:
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> - ...it remains the case that Special Advocates continue to have no access in practice to evidence or expertise which would enable them to challenge the expert assessments of the Security Service, assessments to which the court is therefore almost bound to defer in the absence of any evidence or expert opinion to the contrary. The unfairness identified by the Constitutional Affairs Committee as long ago as 2005 therefore still persists: in practice, Special Advocates have no means of adducing any evidence which contradicts the evidence relied upon by the Secretary of State in closed proceedings, which give rise to a serious inequality of arms in those proceedings."[5]
>
> - The inability of Special Advocates to communicate with the controlee (in the current context substitute the term "asylum seeker") after seeing the closed material, identified as a source of unfairness by the Constitutional Affairs Committee in 2005, remains unchanged, notwithstanding the clear evidence that it seriously affects the Special Advocates' ability to discharge their function

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[2] It should be obvious that we consider the government's proposal for an independent review by Justice Stone to be entirely inadequate. In this regard we simply express our agreement with the criticisms of this model in the submission by Dr Ben Saul to this Committee.

[3] Submission in relation to the Criminal Organisation Amendment Bill 2011 dated 11 November 2011 to be found at http://www.qccl.org.au/documents/Sub_TOG_11Nov11_CrimOrgAmendmentBill.pdf

[4] See House of Lords and House of Commons Joint Committee on Human Rights 9th Report of Session 2009-2010 HL Paper 64 and HC 395 published 26 February 2010

[5] Ibid p.20

of representing the controlee's interests in the closed proceedings ... This inability of Special Advocates to take instructions on the closed case seriously limits the extent to which they are able to represent the interests of the controlled person and therefore the extent to which they are capable of mitigating the unfairness to the controlled person in the closed proceedings."[6]

The Joint Committee's comments in its 2010 report have to be read in conjunction with its comments in its earlier 2007 report dealing with the use of Special Advocates.[7]

In that report in dealing with concerns about Special Advocates the Joint Committee made the following observations:

- We were concerned to find that the Special Advocates from whom we heard had a number of very serious reservations about the fairness of the system to the people whose interests they are appointed to represent. Indeed, we found their evidence most disquieting, as they portrayed a picture of a system in operation which is very far removed from what we would consider to be anything like a fair procedure. We were left in no doubt by their evidence that proceedings involving Special Advocates fail to afford a substantial measure of procedural justice.[8]

- Our consideration of the way in which the Special Advocate system operates in practice has confirmed our concerns about the difficulty a controlled person may have contesting the allegations made against him. In the absence of any requirement to provide the individual with even the gist of the case against him in the closed material, he is at the enormous disadvantage of not knowing what is alleged against him and therefore not only unable to provide explanations himself in the open hearing, but unable to provide any explanations to the Special Advocate whose task it is to represent his interests in the closed proceedings, We recommend that there be a clear statutory obligation on the Secretary of State (here read ASIO) always to provide a statement of the gist of the closed material. We also recommend that consideration be given urgently to allowing the court to carry out a balancing between the interests of justice and the risk to the public interest when deciding whether closed material should be disclosed.9

- In our view it is essential, if Special Advocates are to be able to perform their function, that there is greater opportunity than currently exists for communication between the Special Advocate and the controlled person. We were impressed by the preparedness of the Special Advocates to take responsibility for using their professional judgment to decide what they could or could not safely ask the controlled person after seeing the closed material. With appropriate guidance and safeguards, we think it is possible to relax the current prohibition whilst ensuring that sensitive national security information is not disclosed. We therefore recommend a relaxation

6 Ibid p.24
7 See 19th Report of the UK Joint Committee on Human Rights July 2007
8 Ibid paragraph 192
9 Ibid paragraph 199

of the current prohibition on any communication between the Special Advocate and the person concerned or their legal representative after the Special Advocate has seen the closed material.[10]

- After listening to the evidence of the Special Advocates, we found it hard not to reach for well worn descriptions of it as "Kafkaesque" or like the Star Chamber. The Special Advocates agreed when it was put to them that, in light of the concerns they had raised, "the public should be left in absolutely no doubt that what is happening ... has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system." Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is-very much against basic notions of fair play as the lay public would understand them.[11]

- In response to the relevant UK Minister's comments in relation to the use of secret evidence that he thought that the procedure is "as fair as it can be", the Committee noted that "The evidence of the Special Advocates has confirmed us in our previously expressed view that the Special Advocate system, as currently conducted, does not afford the individual the fair hearing, or the substantial measure of procedural justice, to which he or she is entitled under both the common law and human rights law. In short, as we heard in evidence, the system frustrates those who have been through it who do not feel they have had anything like a fair crack of the whip because they still do not really know the essence of the case against them".[12]

In our view, the correct standard of disclosure is that set out by the House of Lords in *The Secretary of State for the Home Department v AF*[13]:-

> *"The controlee (read The asylum seeker) must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the details of the sources of the evidence forming the basis of the allegation. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on the closed material the requirements of a fair trial will not be satisfied however cogent the case based on the closed materials may be."*

The Court went on at paragraph 66 to accept that:-

> *"It may be acceptable not to disclose the source of evidence that founds the grounds of suspecting that a person has been involved in terrorism related activities."*

This is of course in effect the test suggested in the 2007 report. It is clear that the disclosure requirements in the Bill do not meet this test. Unless the Bill is amended to impose the rights and

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[10] Ibid paragraph 205
[11] Ibid paragraph 210
[12] Ibid paragraph 212
[13] [2009] UKHL 28 at paragraph 59

obligations in relation to disclosure recommended by the 2007 Committee as set out the above it will not fulfil its stated object of ensuring fairness in Australian Law for refugees. The legislation is fundamentally flawed because it accepts the logic of the Star Chamber.

It is also our submission that these reviews should be carried out by a Judge and not by the Administrative Appeals Tribunals. Whilst we accept that the AAT has a long standing jurisdiction in relation to security matters, it has been our equally long standing position that the AAT because of its lack of constitutional independence should not be given jurisdiction dealing with matters affecting the liberty of persons.

In short, whilst the model proposed in the Bill represents a quantum leap forward over the present arrangements it is our view that it does not go far enough. Having said that, we would prefer to see this Bill passed than either the current system or the government's proposed independent reviewer being left in place.

We trust this is of assistance to you in your deliberations.

Yours faithfully

Michael Cope
Executive Member
For and on behalf the
Queensland Council for Civil Liberties
19 December 2012

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