

Committee Secretary  
Parliamentary Joint Committee on Intelligence and Security  
Parliament House  
Canberra ACT 2600

27 February 2011

Dear Secretary,

**Submission in relation to the annual review of the administration, expenditure and financial circumstances of ASIO, ASIS, DSD, DIO, DIGO and ONA**

We would like to thank the Parliamentary Joint Committee on Intelligence and Security for the opportunity to make a submission in relation to its annual review (financial year 2009/10) of the administration, expenditure and financial circumstances of the six Australian security and intelligence agencies which make up the Australian Intelligence Community.

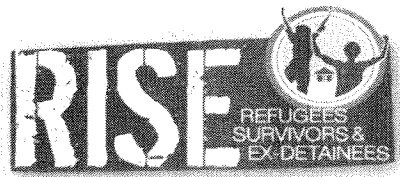
Our submission is in relation to only one of these agencies: the Australian Security Intelligence Organisation.

If you have any queries, please do not hesitate to contact us on [riseadvocacy@riserefugee.org](mailto:riseadvocacy@riserefugee.org).

Yours sincerely,

The R.I.S.E Advocacy team

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### **About R.I.S.E and the R.I.S.E Advocacy Team**

R.I.S.E is a not-for-profit incorporated organisation founded and overseen by refugees, asylum seekers and ex-detainees, with members representing over 30 migrant communities.

The R.I.S.E Advocacy team seeks to generate positive political and social change in relation to the attitudes and policies that impact refugees. We achieve this by advocating for refugee rights, putting forward suggestions for refugee policy reform and encouraging balanced and accurate media coverage of refugee issues.

The R.I.S.E Legal Advocacy team, in partnership with various legal service providers, provides ongoing confidential legal assistance for refugees. We also seek to educate refugee communities as to their rights and responsibilities under Australian law.

The R.I.S.E Governmental Advocacy team advocates for sensible, effective refugee policies and initiatives, by engaging the various federal, state and local governmental agencies. We lobby these agencies opposing unjust inhumane policies, whilst maintaining effective and constructive engagement to enhance refugee service standards and address deficiencies.

The R.I.S.E **Media Advocacy** team seeks to increase balanced and accurate media coverage of refugee and asylum migration in Australia by issuing media releases and developing good local links with journalists.

**The R.I.S.E Community Education team** seeks to educate the public and raise awareness about the various issues facing refugees. In doing so, we seek to address negative myths about refugees and the underlying cultural and racial tension within Australian society.

R.I.S.E also conducts independent in-depth research and publishes findings that are relevant to the various issues facing refugees. In doing so we strive to articulate and promote the refugee voice into wider political, academic and social frameworks.



## **I. INTRODUCTION<sup>1</sup>**

This submission relates specifically to the annual review of the administration, expenditure and financial circumstances of the Australian Security Intelligence Organisation (“ASIO”).

R.I.S.E is greatly concerned about the length of time it takes ASIO to advise the Department of Immigration and Citizenship (“DIAC”) of refugee security assessments (sometimes up to 10-12 months after DIAC has granted refugee status), despite its increasing budget. Detainees granted refugee status by DIAC cannot continue with their permanent visa applications without their security assessments.

R.I.S.E respectfully requests ASIO to (a) conduct the assessments within a timely manner or communicate why assessments take so long and (b) disclose what non-statutory criteria are used in making the assessments. We discuss these requests in Part A of this submission.

R.I.S.E is also concerned about ASIO’s failure to return important documents belonging to asylum seekers. We request that ASIO return such documents to their owners in a fast, efficient and transparent manner. We discuss this in Part B of this submission.

### *PART A: ASIO SECURITY ASSESSMENTS AND REFUGEES*

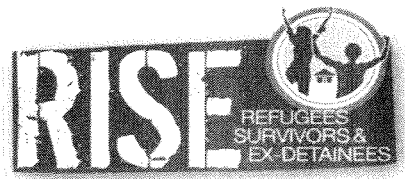
## **2. THE ROLE OF ASIO’S SECURITY ASSESSMENTS IN PERMANENT VISA CLAIMS**

One of the Public Interest Criteria that must be satisfied by an applicant for a permanent visa is Public Interest Criterion 4002 which states that “The applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (“ASIO Act”).

This means that if DIAC finds person X to be a genuine refugee under the *Migration Act 1958* (Cth) but ASIO determines person X as a risk to security under the ASIO Act, then X will not be

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<sup>1</sup> R.I.S.E would like to thank David Gilbert, Ian Rintoul and Bala Vigneswaran for their helpful feedback.



eligible, under Australian migration law, for a grant of a permanent visa to remain in Australia. Unless a third country accepts him, X will remain in detention indefinitely.

### 3. THE LENGTH OF TIME ASIO IS TAKING TO MAKE SECURITY ASSESSMENTS

As at 21 February 2011, there are around 900 detainees who have been granted refugee status by DIAC but are still waiting on their ASIO security clearance.<sup>2</sup> Because there is no time limit or time frame by which ASIO needs to deliver an answer on their security clearance, these 900 people are being held in detention indefinitely.<sup>3</sup>

It is our understanding that current Departmental policy requires protection visa applications to be processed within 90 days, or 3 months. The asylum seeker is able to seek a merits review of an unsuccessful application. This review process can take a further three months or more. Therefore, in most cases, an asylum seeker should be told conclusively of his refugee status within 6 months of their application. Despite this, there are currently 3111 people who have been held in detention between six months to 12 months, 422 between 12 months to 18 months, 34 between 18 months to two years and 25 people who have been in detention for over two years.<sup>4</sup>

R.I.S.E is aware of at least 16 Burmese detainees who were granted refugee status in May 2010 but are still waiting on ASIO for their security assessments.<sup>5</sup> We are also aware of at least 23 Sri Lankan detainees who have been waiting on ASIO for at least 10 months after being granted refugee status and Iranians who have been waiting for over 17 months in detention. We are aware of many more detainees who have been waiting on ASIO for at least 6 months after being granted refugee status.

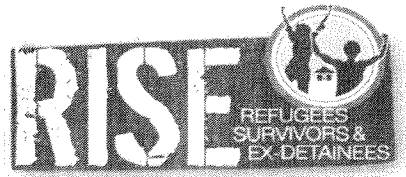
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<sup>2</sup> Commonwealth, *Parliamentary Debates*, Senate, 21 February 2011, L&C 92 (Mr Garry Fleming, First Assistant Secretary, Border Security, Refugee and International Policy Division). Available at: <http://www.aph.gov.au/hansard/senate/commttee/S13572.pdf> [accessed 25 February 2011]

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid, L&C 58 (Senator Cash), L&C 91 (Mr Garry Fleming).



R.I.S.E is of the strong opinion that it is unreasonable of ASIO to keep someone in detention for a further 10-12 months (and counting) *after* their refugee status has been determined. The unreasonableness of this is evident from the number of detainee protests, hunger strikes, self-harm and suicide attempts that have taken place directly in response to ASIO's failure to provide security assessments in a timely manner.<sup>6</sup>

#### 4. ASIO'S FINANCIAL CIRCUMSTANCES

The amount of time ASIO takes to determine security assessments is even more unreasonable when one considers ASIO's strong financial position. The following information is extracted from ASIO's Report to Parliament 2009-10.<sup>7</sup>

**Table 1:**

	2010	2009	
	<i>(\$ million)</i>	<i>(\$ million)</i>	<i>% change</i>
ASIO's revenue from AU government	406	353	15%
ASIO's expenses	367	336	
ASIO's surplus	39	17	

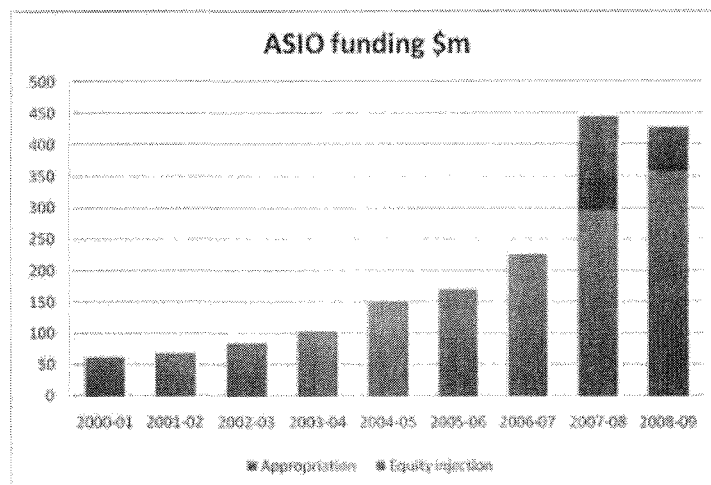
From Table 1, it is clear that ASIO's 2009-10 revenue from the Australian government increased by 15% from the government revenue it received in 2008-09.

<sup>6</sup> See for instance Asylum Seekers' Resource Centre's twitter updates available at <http://twitter.com/asrc1> (in particular the Jan 31st 2011 entries), Jane Bardon "Refugees caught in ASIO Security Wait", *ABC online news* (8 February 2011) available at: <http://www.abc.net.au/news/stories/2011/02/08/3132743.htm> [accessed 25 February 2011] and Violet Chu, "Australia Must End Indefinite Detention of Rohingya Refugees" *The Irrawaddy* (1 February 2011) available at: [http://www.irrawaddy.org/article.php?art\\_id=20647](http://www.irrawaddy.org/article.php?art_id=20647) [accessed 25 February 2011].

<sup>7</sup> Available at: <http://www.asio.gov.au/img/files/ASIO-Annual-Report-to-Parliament-2009-10.pdf> [accessed 25 February 2011].



The following is a graph released by Crikey on 1 May 2009.<sup>8</sup>



From the above graph, it is clear that ASIO's budget has increased dramatically since 2000-01 and continues to rise at a significant pace – jumping by 15% from 2009 to 2010 (as shown by Table 1).

From the above data, R.I.S.E draws the (widely shared) conclusion that ASIO is in a very strong financial position. It should not take ASIO between 10 to 12 months (or more) to determine security assessments.

## 5. RISK TO AUSTRALIAN SECURITY?

R.I.S.E. is directly aware of 18 refugees (17 Sri Lankan Tamil refugees and 1 Burmese Rohingya refugee) who have received adverse security assessments from ASIO. The Burmese refugee received his adverse security assessment after being in detention for 16 months. A significant number of the Sri Lankan refugees with adverse security assessments received their assessment at least 1 year after receiving their refugee status.

<sup>8</sup> See Bernard Keane, "Budget Countdown: ASIO Growth Freeze Imminent?", *Crikey* (1 May 2009), available at: <http://www.crikey.com.au/2009/05/01/budget-countdown-asio-growth-freeze-imminent/> [accessed 25 February 2011]



It is not clear to R.I.S.E how Sri Lankan Tamil and Burmese Rohingya refugees are directly or indirectly risks to Australian security, within the meaning of section 4 of the ASIO Act. Given the Sri Lankan Tamils have received the most number of adverse assessments (17 out of the 18 cases we are aware of), we will now critically consider whether they are risks to Australian security, within the meaning of section 4 of the ASIO Act.

Section 4 of the ASIO Act defines security as meaning:

*(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:*

- (i) espionage;*
- (ii) sabotage;*
- (iii) politically motivated violence;*
- (iv) promotion of communal violence;*
- (v) attacks on Australia's defence system; or*
- (vi) acts of foreign interference;*

*whether directly from, or committed within, Australia or not; and*

*(aa) the protection of Australia's territorial and border integrity from serious threats; and*

*(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).*

It is true that the Sri Lankan Tamil refugees with adverse security assessments have fled from an area in which internal armed conflict (and therefore politically motivated violence – s 4(a)(iii) of the Asio Act) recently took place. Until May 2009, the Liberation Tigers of Tamil Ealam (“LTTE”), a non-state political actor, was engaged in a civil war with the Sri Lankan Army.<sup>9</sup>

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<sup>9</sup> For an overview of the Sri Lankan civil conflict (current to January 2007) see section 3 of the Australian Tamil Rights Advocacy Council's submission to the Parliamentary Joint Committee on Intelligence and Security's 2007 review of the listing provisions of the *Criminal Code Act 1995* – the operation, effectiveness and implications of section 102.1(2), (2A), (4), (5), (6), (17) and (18). Available at: <http://www.aph.gov.au/house/committee/pjcis/proscription/submissions/sub8.pdf> [accessed 25 February 2011].



What is important to note, however, is that the war was of a secular internal nature and, as a result, geographically confined to the island of Sri Lanka. The LTTE was never (and is never likely to be) a direct or indirect risk to Australia or Australian interests. The LTTE's politically motivated violence was directly in response to the Sri Lankan Government's discrimination against its minority Tamil population and as a result the political violence was only ever targeted at Sri Lankan state actors: the violence was never once targeted, directly or indirectly, at Australia or Australian interests.

It should be noted that the LTTE was never listed as a terrorist organisation under Australia's *Criminal Code* listing regime (Division 102 of the *Criminal Code*). This means that the Australian Government (on ASIO's advice) was never satisfied (on reasonable grounds) that the LTTE, even when it was militarily active, was "directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur)".<sup>10</sup> Further, ASIO was never convinced that the LTTE had "links" to Australia or that it posed a "threat" to "Australia" or "Australian interests".<sup>11</sup> As Justice Coghlan noted, the LTTE "has never actually been declared a terrorist organisation in Australia, although that was a matter within the power of the government".<sup>12</sup>

It is unclear, then, how Tamil refugees now, after the LTTE's defeat, pose risks (direct or indirect) to Australia's security.

R.I.S.E strongly supports DIAC's classification of the 17 Sri Lankan Tamil detainees with adverse assessments as genuine refugees. As Australian barrister Julian Burnside noted in July 2010, "[t]he Tamils from Sri Lanka are fleeing genocide".<sup>13</sup>

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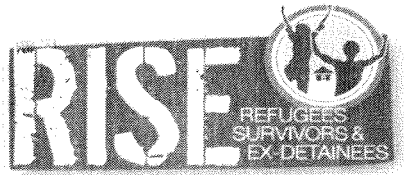
<sup>10</sup> Section 102.1(2) of the *Criminal Code*.

<sup>11</sup> Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code* (2007), 4.3.

<sup>12</sup> *R v Vinayagamoorthy & Ors* [2010] VSC 148 (31 March 2010), para 9.

<sup>13</sup> Julian Burnside, "Comfort all who flee fear", *The Age*, 6 July 2010. Available at: <<http://www.theage.com.au/opinion/politics/comfort-all-who-flee-fear-20100705-zxht.html>> [accessed 25 February 2011]





R.I.S.E is concerned, however, about the adverse assessments the 17 Sri Lankan refugees have received from ASIO. We are particularly worried about the biased nature and quality of the information that ASIO could be receiving from the Sri Lankan government (and its intelligence sources) that could lead to prejudicial findings against genuine refugees. As *The Age* journalists Nick McKenzie and Richard Baker accurately noted in March 2010, “[d]uring its conflict with the LTTE, the Sri Lankan government and its security forces engaged in repression, discrimination and human rights abuses that affected not only LTTE militants, but also the wider Tamil community in Sri Lanka, a community whose experience of repression had led to the creation of the LTTE in 1976”.<sup>14</sup> A government that continually engages in repression, discrimination and human rights abuses cannot be trusted at all to give reliable information as to whether those fleeing its rule pose security risks to the country in which they seek refuge.

Further, the report of the International Crisis Group in 2010,<sup>15</sup> addressing war crimes committed during the war with the LTTE, points out at length that the Tamil civilian population was essentially ‘trapped’ within LTTE territory in Sri Lanka’s North during hostilities. The report indicates that civilians were entrapped by the LTTE who sought to maintain the territorial integrity of their controlled area in the North, together with a fixed Tamil population. Civilians were forced to cooperate with the LTTE who were forcibly controlling the territory during the period. The report states that, particularly towards the end of the war, the line between the civilian population and LTTE functionaries became indistinct, given that all were enclosed in an ever-shrinking territory in the North. It is unclear whether, and to what extent, adverse security assessments by ASIO account for these historical nuances.

Although we have focussed specifically on the Sri Lankan Tamil refugees, we are equally concerned about the adverse assessment the Burmese Rohingya refugee recently received from ASIO. Like the Sri Lankan Tamil refugees, the Burmese Rohingya refugees have come from

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<sup>14</sup> Nick McKenzie and Richard Baker, “Raising hackles”, *The Age*, 31 March 2010. Available at: <<http://www.theage.com.au/national/raising-hackles-20100330-rbit.html>> [accessed 25 February 2011]

<sup>15</sup> *War Crimes in Sri Lanka*, Asia Report No 191, 17 May 2010.



areas in which internal armed conflict has taken place (it should be noted, however, that there are no Rohingya armed groups currently active). Any conflicts taking place in Burma and involving the Rohingya people are geographically confined to Burma and pose no risks to Australian security. R.I.S.E strongly supports DIAC's classification of the Burmese Rohingya detainee with the adverse assessment as a genuine refugee. Rohingya people are fleeing wholesale persecution, including denial of citizenship and land confiscation.<sup>16</sup>

In summary, it is unclear to us how Sri Lankan Tamil and Burmese Rohingya refugees pose risks, in any way, to Australia and Australian interests. We respectfully request that ASIO does not determine security assessments based on biased information provided by repressive human-rights-violating governments.

#### **6. FULL DISCLOSURE OF SECURITY ASSESSMENT CRITERIA IS REQUIRED FOR CONSISTENCY AND TRANSPARENCY IN ASIO ADMINISTRATION**

In the interests of consistency, transparency and to ensure that findings are free from bias and error, R.I.S.E requests that ASIO makes a full disclosure of the non-statutory criteria it uses to determine security assessments.

ASIO has, on several occasions, identified the considerations it gives most weight to in deciding whether an organisation should be listed as a terrorist organisation.<sup>17</sup> In 2007, the Parliamentary Joint Committee on Intelligence and Security ("PJCS") stated that "[n]on-statutory criteria have been developed to guide the organisation [ASIO] in what should be taken into account when developing advice for the Minister".<sup>18</sup>

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<sup>16</sup> For an overview of the struggle of the Rohingya people in Burma see David Scott Mathieson's "Plight of the Damned: Burma's Rohingya" *Global Asia* 4:1 (Spring 2009) available at: [http://globalasia.org/pdf/issue9/David\\_Scott\\_Mathieson.pdf](http://globalasia.org/pdf/issue9/David_Scott_Mathieson.pdf) [accessed 25 February 2011].

<sup>17</sup> See for instance Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code* (2007), 4.3.

<sup>18</sup> *Ibid.*



The Deputy Director of ASIO said to the Parliamentary Joint Committee on Intelligence and Security that “[a]gainst the very large number of potential groups that may meet the legislative test, we have to work out where we start from. So the criteria simply have the status internally of a tool – an accountable tool rather than just a haphazard approach – as to where we start and, as we go through, what comes up next as the more likely ones that will meet the test”.<sup>19</sup> The PJCIS noted that ASIO was “open to considering...refinements to the criteria”.<sup>20</sup>

R.I.S.E is of the strong opinion that an analogous argument can be made in relation to refugee security assessments. In determining security assessments, ASIO requires criteria, an accountable tool, to ensure that it makes determinations in a fair and unbiased manner, and not in a haphazard approach that is heavily reliant on the advice of corrupt governments. Like it publicly disclosed its non-statutory criteria for listing organisations, we urge ASIO to disclose its non-statutory criteria for refugee security assessments.<sup>21</sup>

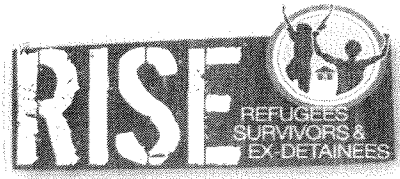
After disclosing its security assessment criteria, ASIO should be open to considering refinements to the criteria, like it is open to considering refinements to its listing criteria. Doing so will ensure greater overall consistency within ASIO’s administrative practices. Further, it will allow for greater transparency. As Dr Patrick Emerton noted in a submission to the PJCIS, “ASIO is not, and ought not to be, a secret police... ASIO’s culture as an organisation which is sympathetic to,

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<sup>19</sup> Parliamentary Joint Committee on *Intelligence and Security, Inquiry into the proscription of ‘terrorist organisations’ under the Australian Criminal Code* (2007), 4.5, citing *Committee Transcript*, Canberra, 4 April 2007, 67.

<sup>20</sup> Parliamentary Joint Committee on *Intelligence and Security, Inquiry into the proscription of ‘terrorist organisations’ under the Australian Criminal Code* (2007), 4.6, citing *Committee Transcript*, Canberra, 4 April 2007, 67. [Emphasis added]

<sup>21</sup> We note that in its submission to the PJCIS’s 8<sup>th</sup> review of administration and expenditure – Australian intelligence agencies, ASIO stated that “[i]n making a security assessment, ASIO draws on relevant classified and unclassified intelligence and considers the person’s activities, associates, attitudes, background and character, and the credibility and reliability of any information available to ASIO”. We feel that this “criteria” is much too broad to play the role of an “accountable tool” and still seems to us to be a very “haphazard approach”. ASIO’s submission is available here: < <http://www.aph.gov.au/house/committee/pjcis/adminexp8/subs/Sub%209.pdf> [accessed 25 February 2011].



*and not hostile to, the values of democracy...can only be taken seriously if ASIO is prepared to be open about the general nature of its intentions with respect to the exercise of... [its] ... powers".<sup>22</sup>*

## *PART B: ASIO'S POSSESSION OF IMPORTANT ASYLUM SEEKER DOCUMENTS*

### **7. ASIO'S POSSESSION OF ASYLUM SEEKER DOCUMENTS**

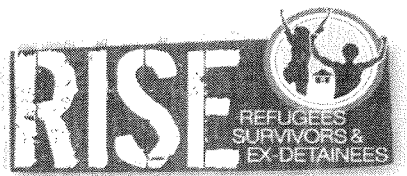
R.I.S.E is greatly concerned about ASIO's continued possession of important documents belonging to asylum seekers, despite numerous requests by the owners of these documents and by us that they be returned.

ASIO takes many important documents from asylum seekers. These include, but are not limited to, birth certificates, drivers' licences and university/school certificates. ASIO does not give receipts to the asylum seekers making it difficult for asylum seekers to locate where these items are being held.

These documents are critical for refugee cases and for those refugees who have been granted protection visas, they are critical for employment and training purposes. Many refugees have been delayed in finding work and applying for courses for this reason. Most states in Australia allow people to drive with their overseas licence for six months after being granted a protection visa. Some of R.I.S.E's refugee members have not been able to drive their licence documentation has not been returned to them; some of them were professional drivers in other countries but cannot obtain a full licence when they pass the test here since they do not have proof of previous driving experience – again, because relevant documents have not been returned. We are also aware of a refugee, currently indefinitely detained due to an adverse security assessment, who worked for an international humanitarian organisation in his country but no longer has any proof of this as ASIO has not returned the relevant certificates and reference letters to him.

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<sup>22</sup> Dr Patrick Emerton's Submission to the Parliamentary Joint Committee on Intelligence and Security in relation to the listing of al-Qa'ida and other groups as 'terrorist organisations' under the *Criminal Code*, 2005, 1.3. Available at: < [http://www.aph.gov.au/house/committee/pjcaad/terrorist\\_listingsa/subs/sub12.pdf](http://www.aph.gov.au/house/committee/pjcaad/terrorist_listingsa/subs/sub12.pdf)>. [accessed 25 February 2011].



These documents are irreplaceable because refugees are not in a position to source them in the countries from which they fled persecution and fear.

R.I.S.E requests that as a matter of urgency ASIO works with other relevant agencies to implement a more efficient, transparent and secure system to keep track of documents belonging to asylum seekers and return them to their owners as required.

