Australian Human Rights Commission

Inquiry into the Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012

AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Senate Standing Committee on Legal and Constitutional Affairs in its Inquiry into the Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012.

2. The Commission is established by the *Australian Human Rights Commission Act 1986* (Cth) and is Australia's national human rights institution.

2 Recommendations

Recommendation 1: The Commission recommends that the Bill be passed.

Recommendation 2: The Commission recommends amending s197AB of the Migration Act so that the Minister for Immigration must consider a residence determination for refugees with adverse security assessments in immigration detention and review their detention every six months.

3 Background

4 This submission draws on the substantive work the Commission has undertaken on the position of refugees with adverse security assessments. The work has included the following activities:

- intervening in the recent High Court case *Plaintiff M47 v Director General of Security* [2012] HCA 46
- investigating complaints made by individual refugees with adverse security assessments regarding acts or practices that may be inconsistent with or contrary to their human rights while in immigration detention (see *Sri Lankan refugees v Commonwealth of Australia (Department of Immigration & Citizenship)* [2012] AusHRC 56)
- making submissions on security assessment processes and outcomes to parliamentary reviews and inquiries, including to the 2011 Independent Review of the Intelligence Community and the 2011 Joint Select Committee Inquiry into Australia's Immigration Detention Network
- exchanging correspondence with Ministers highlighting issues facing refugees with adverse security assessments, including the Minister for Immigration and Citizenship and the current and former Attorneys-General
- conducting visits between 2010 and 2012 to immigration detention facilities where refugees with adverse security assessments are detained, including Christmas Island Immigration Detention Centre, Villawood Immigration Detention Centre, Sydney Immigration Residential Housing, Curtin Immigration Detention Centre, Maribyrnong Immigration Detention Centre and Melbourne Immigration Transit Accommodation, meeting in these places with refugees with

adverse security assessments and commenting on their situation in public reports of visits

- participating in fora at which security assessment processes and outcomes have been a key focus, including the 2011 United Nations High Commissioner for Refugees - International Detention Coalition Expert Roundtable on Alternatives to Detention and the 2012 UNHCR Expert Roundtable on National Security Assessments

5 The Commission understands that there are currently approximately 55 people in immigration detention who have received adverse security assessments from ASIO. There are also six children who remain in detention facilities because their parents have received adverse assessments. The Commission's key concerns include that:

- the conduct of security assessments by ASIO in relation to people in immigration detention is subject to limited transparency
- effective mechanisms for independent review of adverse security assessments by ASIO are generally not available to asylum seekers and refugees in immigration facilities
- people who have received adverse security assessments from ASIO continue to be subject to mandatory and prolonged detention in immigration facilities.

6 The *Migration and Security Legislation Amendment (Review of Security Assessments) Bill* 2012 (the Bill) proposes to reform the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act), the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) and the *Migration Act 1958* (Cth) (Migration Act) by:

- amending the AAT Act so that non-citizens who are eligible for a protection visa can seek merits review of their security assessment in the Administrative Appeals Tribunal (AAT)
- amending the ASIO Act to allow non-citizens to access a copy of the security assessment, unless certified public interest or national security exceptions apply
- amending the ASIO Act so that the Director-General of ASIO must conduct six monthly reviews of adverse or qualified security assessments where the affected person is in immigration detention
- establishing a role of a Special Advocate who can appear in the AAT where there is a public interest or national security reason to withhold part or all of the security assessment from the affected person
- amending the Migration Act so that when considering the making of a residence determination for a person who has received an adverse security assessment the Minister must have regard to whether any threat to security can be addressed at a place other than immigration detention.

7 Summary

3. The Commission supports the passage of the Bill.

4. The Commission welcomes the recent appointment of the Independent Reviewer for Adverse Security Assessments. However, for the reasons outlined in this submission, the Commission considers that the amendments proposed by the Bill will more effectively safeguard the rights of refugees with adverse security assessments without compromising Australia's national security.

5. The Commission would be willing to expand upon the points raised in this submission at any public hearing of the Committee into the Bill.

8 Transparency of ASIO security assessments for certain non-citizens

6. The Commission has serious concerns about the lack of transparency of the ASIO security assessment process for refugees in immigration detention.

7. The mechanisms proposed by the Bill to enhance transparency of security assessments need not compromise national or community security and, given the relatively small number of refugees who have received adverse assessments in Australia, they should not be unduly onerous on Australian Government resources.

8.1 Information about the basis of an adverse security assessment for people who do not hold a valid visa

8. Under s 37 of the ASIO Act, a person who is the subject of an adverse security assessment is ordinarily provided with a statement that sets out information that ASIO has relied upon to make the determination. However, section 36 of the ASIO Act excludes this requirement from applying to a person who is not an Australian citizen or a permanent resident or who is not the holder of either a valid permanent visa or a special purpose visa. Accordingly, the vast majority of people in immigration detention are not entitled to any information regarding the basis on which an adverse assessment is made. This means that an affected person is not provided with the information necessary to contest an adverse security assessment.

9. The Commission is concerned that this could amount to a lack of procedural fairness and could prevent a blatant error, such as an error of identification, being identified. Furthermore, a failure to provide a statement of reasons may breach article 9(2) of the *International Covenant on Civil and Political Rights* (ICCPR) which requires a person who is arrested to be provided with reasons for their arrest. The United Nations Human Rights Committee has explained that the right to be provided reasons applies to detention for reasons of public security:

> Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5)[1]

10. The lack of information regarding the basis on which an adverse assessment is made is particularly concerning because of the consequences for the individuals concerned, which may include indefinite detention, potential removal from Australia, and separation from family members who may be released from detention into the community.

11. The Commission strongly supports the proposal in the Bill to amend the ASIO Act to ensure the requirement to provide a statement that sets out the information that ASIO has relied upon applies to 'a person who has been found to be in need of protection under the Migration Act under the Refugees Convention or complementary protection, and who is in immigration detention'.

12. On 16 October 2012 the Australian Government announced that it will provide an independent review process for refugees who have been refused a permanent visa as a result of an adverse security assessment by ASIO.

13. Under this review process ASIO is required to provide an unclassified written summary of reasons for the decision to issue an adverse security assessment to the independent reviewer on the basis that it can be provided to the eligible person.

14. The Commission welcomes this proposal to provide an unclassified written summary of reasons. However, there is limited information relating to the content of summary of reasons, for example, it is unclear whether it will set out information that ASIO has relied upon to make the assessment.

15. The Commission is of the view that refugees in immigration detention should be provided with a statement of reasons in accordance with s 37 of the ASIO Act. There does not appear to be any reasonable justification to withhold a statement of reasons from this group of non-citizens. The Commission considers that the public interest and national security are adequately safeguarded in the ASIO Act. For example, under s 38(2)(b) of the ASIO Act the Attorney-General can issue a certificate preventing the disclosure to a person of the statement of grounds contained in a security assessment if it would be prejudicial to the interests of security.

8.2 Review of adverse security assessments

(a) Merits review

16. While the Security Appeals Division of the AAT has the power to review adverse ASIO assessments, access to the AAT is denied to people who are non-citizens or not holders of either a valid permanent visa or a special purpose visa.[2] Accordingly, refugees with adverse security assessments

cannot access merits review in the AAT. In the view of the Commission, this is contrary to the basic principles of due process and natural justice.

17. The Commission strongly supports the proposal in the Bill to amend the AAT Act and the ASIO Act so that refugees in immigration detention can access merits review of adverse security assessments in the AAT.

18. As noted above the Australian Government has appointed an Independent Reviewer for Adverse Security Assessments. The Independent Reviewer is required to examine all the material relied upon by ASIO in making the security assessment, provide an opinion to the Director-General of Security on whether the assessment is an appropriate outcome based on the material ASIO relied upon and make recommendations to the Director-General.

19. The Commission considers the appointment of the Independent Reviewer to be a positive step towards promoting transparency of adverse security assessments. However, the Commission is concerned that the review process announced is not equivalent to the review offered in the AAT to other people in Australia who have received adverse security assessments. Importantly, there again appears to be no reasonable justification for excluding refugees with adverse security assessments from seeking review in the AAT.

20. The Commission's primary concern is that the Independent Reviewer's findings are not enforceable. The Independent Reviewer can only provide an opinion about whether the assessment is appropriate and make recommendations to the Director General of ASIO. Whereas in the AAT there are provisions for the findings of the Security Appeals Division to supersede ASIO assessments.[3] Furthermore, the Security Appeals Division's findings are able to be appealed to the Federal Court under section 44 of the AAT Act.

21. In April 2012 the Joint Select Committee on Australia's Immigration Detention Network comprehensively considered the transparency of adverse security assessments for people in immigration detention. The Committee considered a number of review mechanisms and sought views on ways to balance the situation of refugees in indefinite detention with national security considerations. The Committee recommended extending the existing review framework for adverse security assessments (in the AAT) to refugees and asylum seekers:[4]

> Fundamentally, however, the Committee believes that extending the right of merit reviews to refugees with adverse security assessments is the most straightforward way of protecting against indefinite detention and ensuring probity. Provisions effectively barring refugees from appealing adverse security assessments were inserted into the ASIO Act in 1979 and were designed for a different time, a time when Australia was not grappling with the challenges presented by large numbers of asylum seekers in detention. Those provisions have regrettably resulted in some dramatic, potentially life-shattering consequences for refugees who receive adverse security assessments. The Committee is firmly of the view that the ASIO Act can be amended to allow for refugees and other non-citizens currently in indefinite detention to have access to relevant details of their case without impinging on national security. Merit reviews are currently available for Australian residents

> who receive similar adverse security assessments. On the balance of evidence gathered during the course of this inquiry, the Committee sees no compelling reason to continue to deny non-residents the same access to procedural fairness.

22. Similarly, in previous years the Inspector-General of Intelligence and Security has also recommended that access to AAT review should be extended to refugee applicants.[5]

23. The Commission supports the recommendations of the Joint Select Committee on Australia's Immigration Detention Network and the Inspector-General of Intelligence and Security that the existing review framework for adverse security assessments in the AAT be extended to refugees in immigration detention.

8.3 Special advocate

24. The Commission welcomes the proposal in the Bill to establish the role of a Special Advocate who can appear in the AAT where there is a public interest or national security reason to withhold part or all of the security assessment from the affected person. The Commission considers a Special Advocate to be crucial in safeguarding the rights of an individual where they are unable to access relevant information. Special Advocates exist for this purpose in the United Kingdom, Canada and New Zealand.

2 Mandatory, prolonged and indefinite detention

25. The Commission has serious concerns about the mandatory, prolonged and indefinite detention of people who have been found to be refugees but who have received adverse security assessments.

26. The Commission is concerned that there does not appear to be a clear framework for considering placement options for such people while their immigration status is resolved. While some people with adverse security assessments are detained in low security immigration detention facilities, others are detained in high-security immigration detention centres such as Villawood IDC; extremely restrictive environments in which to hold people who could be facing a very long period in detention.

27. People in this situation should not be returned to their country of origin according to Australia's *non-refoulment* obligations, and current government policy is that it is not appropriate for individuals who have received an adverse security assessment to live in the Australian community.[6] Consequently they are effectively indefinitely detained. The Commission is of the view that the current situation may constitute arbitrary detention contrary to article 9(1) of the ICCPR.

28. United Nations bodies have issued several statements on the practice of administrative detention. The United Nations Working Group on Arbitrary Detention has stated that:

> The use of "administrative detention" under public security legislation, migration laws or other related administrative law, resulting in a deprivation of liberty for unlimited time or for very long periods without effective judicial oversight, as a means to detain persons suspected of involvement in terrorism or other crimes, is not compatible with international human rights law.[7]

29. While the United Nations Human Rights Committee has found that administrative detention on national security grounds does not result *ipso facto* in arbitrary detention,[8] it has stated that:

> if so-called preventive detention is used, for reasons of public security, it must be controlled by [article 9 of the ICCPR], i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5).[9]

30. The United Nations Human Rights Committee has also stated that detention for immigration purposes without reasonable prospect of removal will constitute arbitrary detention in breach of article 9(1) of the ICCPR, for example in *Baban v Australia*[10]and *Jalloh v The Netherlands*.[11] Detention in these circumstances will fail to meet the proportionality test, which imposes a requirement that detention not continue 'beyond the period for which a State can provide appropriate justification' or if it is 'not necessary in all the circumstances of the case': see *A v Australia*;[12] *C v Australia*[13] and *Baban v Australia*.[14]

31. As each individual's circumstances are unique, the level and nature of the risk that each person is believed to pose will be different. In the Commission's view, there should be an accordingly nuanced response to each person's situation, rather than the imposition of mandatory, indefinite detention in a secure facility. That a person has received an adverse security assessment from ASIO for the purposes of a permanent visa does not necessarily mean that they pose a sufficiently significant risk to the Australian community to justify their continued detention in a restrictive facility. An individual assessment of the risk each person poses to the community is required to avoid arbitrary detention.

32. Courts in other national jurisdictions have considered the broad nature of any definition of 'national security' and the need for a nuanced approach to responding to security risks. For example, in New Zealand, the Court of Appeal discussed the meaning of 'national security' and concluded that while a:

> wide spectrum of interests [may] fall under the 'national security' umbrella; these certainly do not all relate to 'national security in its strictest sense'. It is obvious that all risks to national security do not call for equal treatment. It is also apparent that different security interests can be identified and distinguished.[15]

33. In the Commission's view, alternative placement options should be considered for refugees who have received adverse assessments, including less

restrictive places of detention and community detention with the imposition of conditions if necessary to mitigate any identified risks.

34. The Commission supports the proposal in the Bill to require the Minister for Immigration when considering a residence determination under s197AB of the Migration Act to have regard to whether any threat to security can be addressed at a place other than immigration detention.

35. However, the Bill does not require the Minister to consider a residence determination under s197AB for individuals with adverse security assessments in detention. Therefore, the Bill does not address the current situation where as a result of the government's blanket policy not to place individuals with adverse security assessment into the community affected individuals are facing prolonged, indefinite detention in restrictive facilities.

36. The Commission is of the view that the Minister's non-delegable and non-compellable power to make a residence determination under s197AB does not sufficiently protect individuals with adverse security assessments from arbitrary detention. In the Commission's view the Minister should have a compellable power to consider making a residence determination for individuals with adverse security assessments.

37. The Commission recommends amending s197AB of the Migration Act so that the Minister for Immigration must consider a residence determination for refugees with adverse security assessments in immigration detention and review their detention every six months.

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[1] United Nations Human Rights Committee, General Comment 8 (1982), at [4].
[2] Although s 54 of the *Australian Security Intelligence Organisation Act 1979* (Cth) allows for an application to be made to the Administrative Appeals Tribunal, the operation of s 36 excludes people who are not Australian citizens, or the holders of a valid permanent visa or a special purpose visa from making such an application.
[3] See s 61 of the *Australian Security Intelligence Organisation Act 1979* (Cth) and s 43AAA(3) of the *Appeals Tribunal Act 1975* (Cth).
[4] Joint Select Committee on Australia's Immigration Detention Network, *Final Report,*(2012) Australian Government, Canberra, p 175.
[5] Inspector-General of Intelligence and Security *Annual Report 2006-2007* (2007). At http://www.igis.gov.au/annual_report/index.cfm, p 12 and Inspector-General of Intelligence and Security *Annual Report 1998-1999* (1999). At http://www.igis.gov.au/annual_report/98-99/asio.cfm, paras 89-91.
[6] Australia has binding *non-refoulement* obligations under the *Convention Relating to the Status of Refugees*, the *International Covenant on Civil and Political Rights*, the *Convention on the Rights of the Child*, and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984), at http://www2.ohchr.org/english/law/cat.htm (viewed 19 November 2012).
[7] *Report of the Working Group on Arbitrary Detention,* UN Doc E/CN.4/2005/6 (2004), para 77.
[8] United Nations Human Rights Committee, *Mansour Ahani v Canada*, Communication No 1051/2002, UN Doc CCPR/C/80/D/1051/2002 (2004), para 10.2.
[9] United Nations Human Rights Committee, *General Comment No 8: Right to liberty and security of persons (Art. 9),* para 4. See also *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile*, UN Doc E/CN.4/826/Rev.1, paras 783-787.
[10] United Nations Human Rights Committee, *Baban v Australia*, Communication No 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003).

[11] United Nations Human Rights Committee, *Jalloh v The Netherlands*, Communication No 794/1998, UN Doc CCPR/C/74/D/794/1998 (2002).
[12] See United Nations Human Rights Committee, *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997).
[13] United Nations Human Rights Committee, *C v Australia*, Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002).
[14] United Nations Human Rights Committee, *Baban v Australia*, Communication No 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003).
[15] *Choudry v Attorney General* [1999] 2 NZLR 582, 595.