Liberty Victoria

Submission to the Senate Legal & Constitutional Committee Inquiry into the

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

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14 December 2012

Dear Secretary,

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

Liberty Victoria welcomes the opportunity to contribute to the Senate Legal & Constitutional Affairs Committee inquiry into the Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012 (**"the Bill"**).

This submission is in three parts, being:

1. Statement of the current law concerning refugees and ASIO Security assessments;
2. Statement of the effect of the proposed Bill; and
3. Liberty Victoria's response to the Bill.

Part 1: Statement of Current Law

Asylum seekers who come to Australia are detained by operation of the *Migration Act 1958* (Cth) (**"the Act"**). If they are found to be refugees, they may be given a protection visa. However, about 15-20% of those found to be genuine refugees are then subjected to rigorous ASIO checks, to determine whether they are security threats. From January 2010-November 2011, 54 adverse security assessments were issued to asylum seekers. The issue of an adverse security assessment usually bars an asylum seeker from being granted a visa. This leaves asylum seekers in a precarious situation of potentially life-long immigration detention pursuant to the Act.

As Australia is a signatory to the UN Convention Relating to the Status of Refugees (**"the Refugees Convention"**), it has undertaken not to engage in the prohibited practice of *refoulement*, that is, returning people to a territory where their life or freedom may be threatened. Whilst Australia may wish to send adversely assessed asylum

seekers to other countries, other countries are often reluctant to accept people whom ASIO has judged to pose a threat to security.

There are a variety of legislative means by which refugees given adverse security assessments by ASIO can lawfully be detained. They may be detained under a range of provisions under ss 500-503 of the Act. These provisions allow for some limited forms of merits review, as the decision is made by the Minister, or a delegate of the Minister. However, the government has usually instead relied on prescribed regulations to deny the grant of visas, and thus, indefinitely detain refugees deemed to pose a threat to security. These prescribed regulations allow for even less merits review: the only question to be considered by the Refugee Review Tribunal is whether ASIO had issued an adverse security assessment, which would be determinative.

Due to this scheme for dealing with people found to be refugees, dozens of people are to be detained indefinitely, with little or no prospect of leaving Australian territory. They have no meaningful mechanism by which to seek review of their detention.

It may be argued that this has changed, with the *M47* decision, considered below. A majority of the High Court found that the prescribed regulations scheme was inconsistent with the legislative scheme of the Act, and was thus invalid. However, with Bell and Gummow JJ dissenting, the court held that the continuing detention of the plaintiff was lawful. It appears then that if alleged security risk refugees are denied visas under ss 500-503 of the Act, the High Court would regard this as acceptable.

Federal Attorney-General Nicola Roxon has recently created the position of Independent Reviewer (**"IR"**) of adverse security assessments by ASIO. The IR will conduct periodic reviews, and refugees can appeal their adverse security assessments to the IR. The IR's recommendations will be delivered to the Director-General of ASIO, 'for the Director-General's consideration'. The IR will provide the refugee with her opinion of the assessment, the Director-General's response and other relevant material, to the extent ASIO allows it to be disclosed.

Why is this an Issue?

In a frontier beyond even the injustice confirmed in *Al-Kateb v Godwin*[1], Australia now threatens to detain people recognised refugees for life. These refugees have little prospect of meaningfully challenging the grounds of their detention. Now that there is an Independent Reviewer, they may have more transparency as to the grounds of their detention, though this will depend in practice on how much relevant information ASIO decides the IR may release to the detainee. As the prescribed regulations scheme has been struck down, it is not clear precisely what legislation the government will rely on in future in relation to ASIO assessments.

In March this year, a Joint Select Committee on *Australia's Detention Network* critically evaluated this system. The majority Committee Members, composed of Labour and Greens Senators and Members of Parliament, urged that 'the Australian Security Intelligence Organisation (ASIO) legislation be amended to allow the Security Appeals

[1] [2004] HCA 37

Division of the Administrative Appeals Tribunal to review ASIO security assessments of asylum seekers and refugees.'[2]

Senator Sarah Hanson-Young has argued that the indefinite detention of these refugees is 'unsustainable and unworkable.' It arguably breaches international law. Furthermore, there are 'other, less invasive, means of managing and monitoring non-citizens to deal with any security risk they pose while still allowing them to live in the community'.[3] Liberty Victoria agrees entirely with this view.

When are Security Assessments Made?

The Department of Immigration and Citizenship (**"DIAC"**) decides when and whether to refer people to ASIO for security assessment. This is a 'matter of government policy' – it is not mandated by legislation.[4] When DIAC determines that someone qualifies for refugee status, they are measured against the triaging process. The triaging process results in 80-85 percent of refugees going 'through required immigration processes and to a recommendation to the Minister.' The remaining 15-20 percent of refugees are referred to ASIO for a 'more rigorous security assessment'. Those who pass the more rigorous security check then go through the same process as the other 80-85 percent.[5]

The process of determining who will be sent to ASIO for more extensive security assessments is largely determined by ASIO. According to DIAC Secretary, Andrew Metcalfe, 'ASIO determines what goes to ASIO.'[6] The Joint Select Committee found that 'DIAC officers are involved in measuring people against criteria, determined by ASIO, to assess which cases need to move to a more in-depth security check.'[7] ASIO explained that 'all triaging pursuant to the framework is undertaken by ASIO; this includes establishing the security criteria as well as implementing and applying the criteria for security assessment referral.'[8] The Joint Select Committee found that:

> DIAC provides feedback on security assessments, but it was not entirely clear when and if DIAC officers make referral assessments without involvement from ASIO. The Committee was informed by DIAC that the two organisations work closely together in this regard, and that 'there is a symbiotic interdependency' between them.[9]

ASIO has refused to disclose the criteria it uses for this triaging process.[10]

There is also a security evaluation process for anyone DIAC releases into the community. It typically takes around 24 hours.[11]

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[2] Joint Select Committee, Parliament of Australia, *Australia's Immigration Detention Network* (2012) xii, [6.152]. Liberal Senators and MPs issued a Dissenting Report.

[3] Commonwealth, *Parliamentary Debates*, Senate, 10 October 2012 (Senator Sarah Hanson-Young) 7854-5.

[4] Joint Select Committee, Parliament of Australia, *Australia's Immigration Detention Network* (2012) [6.62].

[5] Joint Select Committee, Parliament of Australia, *Australia's Immigration Detention Network* (2012) [6.72]-[6.73]

[6] Mr Andrew Metcalfe, Secretary, DIAC, *Proof Committee Hansard,* 16 August 2011, p. 12.

[7] Joint Select Committee, Parliament of Australia, *Australia's Immigration Detention Network* (2012) [6.78].

[8] ASIO, *Question on Notice 315* (received 16 December 2011), p. 2. Cited in Joint Select Committee, Parliament of Australia, *Australia's Immigration Detention Network* (2012) [6.79].

[9] Joint Select Committee, Parliament of Australia, *Australia's Immigration Detention Network* (2012) [6.80].

[10] Joint Select Committee, Parliament of Australia, *Australia's Immigration Detention Network* (2012) [6.81].

[11] Joint Select Committee, Parliament of Australia, *Australia's Immigration Detention Network* (2012] [6.83].

Evaluation Process

Security threats are evaluated in light of s 4 of *Australian Security Intelligence Organisation Act 1979* (Cth) (**"ASIO Act"**), which provides:

> ***security*** means:
>
> (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 directed 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).

ASIO has three types of findings from its security assessments:

> (a) non-prejudicial finding, which means there are no security concerns that ASIO wishes to advise;
> (b) a qualified assessment, which means that ASIO has identified information relevant to security, but is not making a recommendation in relation to the prescribed administrative action; or
> (c) an adverse assessment in which ASIO recommends that a prescribed administrative action be taken (cancellation of a passport, for example), or not taken (not issuing access to a security controlled area, for example).[12]

Adverse Security Assessments

As noted by the Joint Select Committee, 'ASIO does not decide what action to take once it makes an adverse security assessment. ASIO simply provides advice to DIAC, which acts on an assessment'.[13] This advice of an adverse security assessment is provided to DIAC under the ASIO Act.[14] Refugees also receive a letter informing them of the adverse security assessment. They state: 'ASIO assesses [name] to be directly (or indirectly) a risk to security, within the meaning of section 4 of the Australian Security Intelligence Organisation Act 1979.'[15]

Under the ASIO Act, a person who is not a citizen or does not have a relevant visa is excluded from the Act's usual protections.[16] These include the right to apply to the Administrative Appeals Tribunal for a review.[17] Thus, refugees with an adverse security assessment are not entitled to a merits review of the decision.

An unlawful non-citizen is detained under s 189 of the Migration Act. He or she 'must be kept in immigration detention until' he or she is 'removed from Australia', 'deported', or 'granted a visa'.[18]

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[12] Joint Select Committee, Parliament of Australia, *Australia's Immigration Detention Network* (2012) [6.65].
[13] Joint Select Committee, Parliament of Australia, *Australia's Immigration Detention Network* (2012) [6.99].
[14] *Australian Security Intelligence Organisation Act 1979* (Cth) s 37(2).
[15] Joint Select Committee, Parliament of Australia, *Australia's Immigration Detention Network* (2012) [6.115].
[16] *Australian Security Intelligence Organisation Act 1979* (Cth) s 36(b).
[17] *Australian Security Intelligence Organisation Act 1979* (Cth) s 54(1).
[18] *Migration Act 1958* (Cth) s 196.

The grant of protection visas is provided for in the Migration Act.[19] The Minister is to grant a visa if, *inter alia*, he or she is satisfied that 'the other criteria for it prescribed by this Act or the regulations have been satisfied', and it is not prevented by the 'special power to refuse or cancel'.[20]

Prescribed Regulations & the Public Interest Criterion

'Prescribed' is defined to mean 'prescribed by the regulations'.[21] The regulations may also prescribe criteria for a visa or visas of a specified class.[22] The *Migration Act* also relevantly provides the power to make regulations, 'not inconsistent with' the Migration Act.[23] French CJ explained that 'Section 504 does not in terms provide that the regulations may prescribe criteria for visas. Section 31(3) does that. Section 504 is nevertheless the source of the regulation-making power.'[24] Furthermore, 'Regulations made under s 504 must be "not inconsistent with" the *Migration Act*. Even without that expressed constraint delegated legislation cannot be repugnant to the Act which confers the power to make it'.[25]

According to French CJ:

> Schedule 1 to the Regulations prescribes criteria, in Item 1401, for Protection (Class XA) visas and specifies as a subclass an "866 (Protection)" visa. The designation of that subclass identifies the part of Sched 2 that applies in relation to the Protection (Class XA) visa[86]. That is the part headed "Subclass 866 Protection". That part of Sched 2 sets out, in Div 866.2, primary criteria to be satisfied at the time of the application for a protection visa[87] and other primary criteria to be satisfied at the time of the decision[88]. Secondary criteria are set out in Div 866.3. One of the primary criteria is in cl 866.225, which provides:
>
> > "The applicant:
> > (a) satisfies public interest criteria 4001, 4002 and 4003A; and
> > (b) if the applicant had turned 18 at the time of application - satisfies public interest criterion 4019."[26]

The legislation was discussed by Kiefel J:

> 429. Section 504(1) of the *Migration Act* provides that regulations may be made "not inconsistent with this Act, prescribing all matters which ... are necessary or convenient to be prescribed for carrying out or giving effect to this Act". Section 31(3) provides that the regulations may prescribe criteria for a visa of a specified class, including for the class provided for by s 36. Section 36(1) provides that there is a class of visas to be known as protection visas.
> 430. A primary criterion specified by s 36(2)(a) for a protection visa is that the applicant for the visa is "a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the [*Refugees Convention*]". Under the *Migration Regulations*, protection visas are subclass 866 visas. The criterion in s 36(2)(a) is restated in the Regulations. Clause 866.225 requires that an applicant satisfy particular public interest criteria.[27]

The Migration Regulations 1994 (Cth) provide relevant public interest criteria. These include Public Interest Criterion 4002:

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[19] *Migration Act 1958* (Cth) ss 36, 65.
[20] *Migration Act 1958* (Cth) s 65(1)(a)(ii)-(iii).
[21] *Migration Act 1958* (Cth) s 5.
[22] *Migration Act 1958* (Cth) s 31(3).
[23] *Migration Act 1958* (Cth) s 504(1).
[24] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [53].
[25] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [54]. Also [162] (Hayne J)

[26] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [58]. Citation in [87] is to Regulations, Sched 2, Subdiv 866.21 , citation in [88] is to Regulations, Sched 2, Subdiv 866.22. Also explained in *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [92] (Gummow J).
[27] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [429]-[430]. Citation omitted.

> 4002 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.[28]

When a decision is made to refuse to grant a protection visa, relying on Public Interest Criterion 4002, the decision may be reviewed by the Refugee Review Tribunal. However, Crennan J notes that:

> the only relevant matter for the RRT to consider on such a review is whether the applicant for review has or has not been "assessed by [ASIO] to be directly or indirectly a risk to security". As the RRT correctly observed in its reasons for affirming the delegate's decision to refuse to grant the plaintiff a protection visa, the RRT "does not have the power to go behind or examine the validity of the ASIO assessment" in the course of such a review.[29]

Other Relevant Powers

Under section 501, the 'special power' grants that the Minister may refuse to grant a visa to a person 'if the person does not satisfy the Minister that the person passes the character test.'[30] A person does not pass the character test if:

> (d) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:
>
> (i) engage in criminal conduct in Australia; or
> (ii) harass, molest, intimidate or stalk another person in Australia; or
> (iii) vilify a segment of the Australian community; or
> (iv) incite discord in the Australian community or in a segment of that community; or
> (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.[31]

When the Minister personally decides to refuse or cancel a visa, on grounds of the character test, reasonably suspecting 'that the person does not pass the character test' and being 'satisfied that the refusal or cancellation is in the national interest', the rules of natural justice do not apply.[32]

Sections 500-503 set out various powers of the minister to refuse or cancel visas, and relevant procedural rights, such as right of review.[33] For example, under section 502, the Minister also has a power to power to cancel or refuse to grant a visa relying on Article 1F, 32 or 33(2) of the Refugees Convention.[34] Such decisions are reviewable by the Administrative Appeals Tribunal.[35] However, the Minister may issue a certificate declaring the person an excluded person, which excludes review by the Administrative Appeals Tribunal.[36]

Why Refugees with Adverse Security Assessments are not removed

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[28] *Migration Regulations 1994* (Cth) Sch 4 reg 1.03.
[29] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [386].
[30] *Migration Act 1958* (Cth) s 501(1).
[31] *Migration Act 1958* (Cth) s 501(6)(d),
[32] *Migration Act 1958* (Cth) s 501(3)(5)
[33] *Migration Act 1958* (Cth) ss 500-3.
[34] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954). *Migration Act 1958* (Cth) s 502(1).
[35] *Migration Act 1958* (Cth) s 500(1)(c).
[36] *Migration Act 1958* (Cth) s 500(1), 502(1)

The *Convention Relating to the Status of Refugees* relevantly provides

> Article 32. - Expulsion
> 1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
> 2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
> 3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.
>
> Article 33. - Prohibition of expulsion or return ("refoulement")
> 1. No Contracting State shall expel or return (" refouler ") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.[37]

The Joint Select Committee noted:

> Being a signatory to the 1951 *Convention Relating to the Status of Refugees* (the Refugee Convention) and its 1967 *Protocol Relating to the Status of Refugees* (the Protocol), Australia does not refoule (return) 'people to countries where they have a well-founded fear of persecution for reasons of race, nationality, political opinion or membership of a particular social group.'[38]

The Joint Select Committee concluded:

> A consequence of this policy is that refugees who receive adverse security assessments can be left, effectively, in indefinite detention... Adverse security assessments mean people cannot be released into the community or sent to third countries, but their refugee status means they cannot be repatriated.[39]

The M47 Decision

On October 5, 2012, the High Court of Australia ruled on these provisions.[40] The case involved a Tamil man, found to be a refugee, who was a former member of the Liberation Tigers of Tamil Eelam (LTTE). He was given an adverse security assessment, and sought to challenge his detention. Among other claims to be discussed below, he claimed that he was denied procedural fairness. The court did not uphold this claim. Five justices held that because of the nature of a long interview he had with ASIO, there was no denial of procedural fairness. In his interview, he had legal representation, and he was informed of inconsistencies in his account of associating with the LTTE.[41]

French CJ, Hayne, Crennan and Kiefel JJ: inconsistency, PIC 4002 invalid

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[37] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) arts 32-3.
[38] Joint Select Committee, Parliament of Australia, *Australia's Immigration Detention Network* (2012) [6.98].
[39] Joint Select Committee, Parliament of Australia, *Australia's Immigration Detention Network* (2012) [6.98].
[40] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46.
[41] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [140]-[144], [244]-[253], [380], [415], [491]-[505].

As noted, the Migration Regulations must be consistent with the Migration Act.[42] The plaintiff submitted there was an inconsistency because 'the criterion imposed by PIC 4002 undermined or negated the scheme of the Migration Act to be found in ss 500-503.'[43] French CJ accepted that there was an inconsistency:

> That is primarily because the condition sufficient to support the assessment referred to in public interest criterion 4002 subsumes the disentitling national security criteria in Art 32 and Art 33(2). It is wider in scope than those criteria and sets no threshold level of threat necessary to enliven its application. The public interest criterion requires the Minister to act upon an assessment which leaves no scope for the Minister to apply the power conferred by the Act to refuse the grant of a visa relying upon those Articles. It has the result that the effective decision-making power with respect to the disentitling condition which reposes in the Minister under the Act is shifted by cl 866.225 of the Regulations into the hands of ASIO. Further, and inconsistently with the scheme for merits review provided in s 500, no merits review is available in respect of an adverse security assessment under the ASIO Act made for the purposes of public interest criterion 4002. Public interest criterion 4002 therefore negates important elements of the statutory scheme relating to decisions concerning protection visas and the application of criteria derived from Arts 32 and 33(2). It is inconsistent with that scheme. In my opinion cl 866.225 of the Regulations is invalid to the extent that it prescribes public interest criterion 4002.[44]

However, those refused a visa were still to be detained. Whilst there had been a jurisdictional error, and therefore no valid decision on the plaintiff's detention, his continued detention was lawful under s 196 of the Migration Act.[45]

Similarly, Hayne J said that 'the prescription of PIC 4002 as a criterion for the grant of a protection visa is not authorised by s 31(3) of the Act and is invalid.'[46] The prescription 'by cl 866.225(a) of Sched 2 to the Regulations of PIC 4002 as a criterion for the grant of a protection visa is not valid. Its making is inconsistent with the express provisions of the Act and s 31(3) does not authorise the specification of a criterion inconsistent with the Act.'[47] Like French CJ, Hayne J held that the plaintiff's continued detention was lawful, as no decision had been validly made. The Minister could validly refuse to grant the plaintiff a visa as a security risk, based on Art 32 or Art 33(2). The plaintiff would then be 'be entitled (unless s 502(1) were to apply) to seek review of that decision by the Administrative Appeals Tribunal.'[48] Hayne J contrasted the unacceptable process through PIC 4002, with an acceptable exercise of power under s 500(1)(c) of the *Migration Act*:

> Section 500(1)(c) provides for the review of a decision refusing to grant a protection visa under s 501 that is a decision relying on Art 32 or Art 33(2). Decisions of that kind are to be reviewed by the Administrative Appeals Tribunal, not by the Refugee Review Tribunal. By contrast, a decision to refuse to grant a protection visa relying on PIC 4002 is reviewed by the Refugee Review Tribunal. Not only is the identity of the reviewing body different, the issues that would arise in the two avenues for review are radically different. In the first case, the question would be whether grounds of the kind described in Art 32 or Art 33(2) were established. That would require consideration of the facts and circumstances that underpinned any conclusion about risks to Australia's security. No doubt it would permit reference to any view that was expressed by or on behalf of ASIO and it would ordinarily be expected that ASIO's views would be sought and be influential. But ASIO's expression of opinion would not, of itself, be conclusive of the enquiry. By contrast, in a review of a decision to refuse to grant a protection visa relying on PIC 4002, the only

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[42] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [54] (French CJ).

[43] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [394] (Crennan J).
[44] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [71] (French CJ).
[45] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [72] (French CJ).
[46] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [160].
[47] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [221].
[48] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [225].

> issue would be whether ASIO had made an adverse security assessment. There would be no issue about whether that assessment was well-founded.[49]

Similarly, Crennan J held that 'cl 866.225 of Sched 2 to the Migration Regulations is invalid to the extent that it prescribes PIC 4002 as a criterion for the grant of a protection visa, as it is beyond the power conferred by s 31(3) of the Migration Act.'[50] She held that as 'cl 866.225 is invalid to the extent that it prescribes PIC 4002 as a criterion for the grant of a protection visa', the 'plaintiff's application for a protection visa is yet to be considered', and so his continued detention remains lawful.[51]

Kiefel J's judgment was consistent with French CJ, Crennan and Hayne JJ's. She held that 'The Migration Act contemplates that the Minister, or the Minister's delegate, may consider whether a person poses a risk to the security of Australia in determining whether to grant or to refuse a protection visa.'[52] However,

> PIC 4002, if applied, would deny the Minister that consideration and it would deny the review process specified in s 500(1). It has the effect of bringing the consideration by the Minister, or the Minister's delegate, to a premature end and rendering the decision to that effect non-reviewable. The process created by PIC 4002 requires a refusal of a protection visa based entirely upon an opinion formed by officers of ASIO. But it is nowhere contemplated by the Migration Act that officers of ASIO are to have a determinative role regarding applications for visas.[53]

Kiefel J also accepted the continuing detention of the plaintiff as lawful, until his application was lawfully decided upon in accordance with the *Migration Act*.[54]

Gummow and Bell JJ: no inconsistency, but overturn* Al-Kateb *and release detainee

Gummow J held that there was no relevant inconsistency,[55] but that 'if removal ceases to be a practical possibility, the detention must cease, at least for as long as that situation continues.'[56] Consequently, the 'continued detention of the plaintiff is not presently authorised', and presumably those in similar circumstances should also be freed, according to Gummow J.[57]

Bell J likewise held that there was no relevant inconsistency: 'Clause 866.225 of the Regulations, to the extent that it stipulates PIC 4002 as a criterion for the grant of a protection visa, is not ultra vires the power conferred by s 31(3) of the Act.'[58] Bell J held there was no denial of procedural fairness.[59] She agreed with Gummow J's answers, and further agreed with him that A*l-Kateb* should be overturned.[60] Gummow and Bell JJ both adopted Gleeson CJ's reasoning in *Al-Kateb*: 'if removal ceases to be a practical possibility, the detention must cease, at

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[49] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [205] (citation omitted). See also [387]-[393] for Crennan J's outline of the relevant powers and rights of review under ss 500-503 of the *Migration Act*.
[50] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [381]. See especially [396]-[399].
[51] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [404]
[52] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [456].
[53] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [458].
[54] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [460].
[55] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [123], [128].
[56] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [117], [120].
[57] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [117].
[58] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [490].
[59] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [505].
[60] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [533]-[535].

least for as long as that situation continues.'[61] However, appropriate terms and conditions of the release of the plaintiff may be determined by another justice.[62]

Heydon J: Dissent

Heydon J, in dissent, answered all of the questions adversely to the plaintiff.[63]

The Result of the M47 Decision: The New Scheme

As reviewed above in "Other Relevant Powers", there are other powers in the *Migration Act* which allow for the denial of a protection visa to a refugee, based on an adverse security assessment. Examples of these powers are to be found in ss 501 and 502. The impugned regulations provided that a refugee could be denied a protection visa because of an adverse security assessment from ASIO, and there would be virtually no issue that could be considered under a merits review. The legislative scheme for the other relevant powers provide that the Minister must make a relevant decision, and that the Minister's decision can be subjected to a merits review. This issue was explained by Crennan J:

> **396. A decision to refuse to grant a protection visa relying on PIC 4002 effectively reposes the power of determining the application for a protection visa in the hands of an officer of ASIO. The scheme under the Migration Act for refusing such an application relying on Arts 32 and 33(2) reposes the power of determining the application in the Minister personally or in the Minister's delegate.**
> **397. With some exceptions which are not presently relevant, an officer of ASIO is not required to state the grounds for issuing a security assessment for the purposes of the Migration Act. A decision by the Minister personally under s 502 of the Migration Act is subject to parliamentary scrutiny. A decision under s 501 of the Migration Act requires the Minister (or, in the case of a decision under s 501(1), a delegate of the Minister) to reach specific states of satisfaction as to whether the applicant for a visa "passes the character test", or whether the refusal of a visa is "in the national interest".**
> **398. A decision to refuse an application for a protection visa relying on PIC 4002 is subject to review under Pt 7 of the Migration Act. However, as explained above, neither the substance nor the making of the security assessment is relevantly subject to merits review. By comparison, a decision by the Minister, or the Minister's delegate, relying on Arts 32 and 33(2) (other than a decision to which a certificate under s 502 applies) is reviewable on the merits by the AAT.[64]**

It is not clear which powers under ss 500-503 would be relied on, now that PIC 4002 has been ruled invalid. However, it is clear that there are still valid legislative means to restrict entry to persons who are suspected of posing a risk to national security. There would be a merits review which would query the Minister (or a delegate of the Minister). However, it is not at all clear the extent to which there could be meaningful review of the decision, or the material on which the decision was made. For example, if the Minister routinely issued the prescribed certificates under s 502, that would exclude merits reviews. Furthermore, if merits reviews do not examine how ASIO reaches its determinations, but merely examine whether the Minister has correctly heeded the advice of ASIO, this review may become a hollow process.

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[61] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [117] (Gummow J)
[62] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [149] (Gummow J) [534] (Bell J)
[63] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [364].
[64] *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 [396]-[398]

Appointment of an Independent Reviewer

Attorney-General Nicola Roxon announced that an 'Independent Reviewer of Adverse Security Assessments' began working on 3 December 2012. The Independent Reviewer (IR) is Margaret Stone, a former judge of the Federal Court of Australia.[65] Roxon also released a document 'Independent Review function – Terms of Reference'.[66] It set out that the IR would conduct a periodic review every 12 months of ASAs. Those who are given ASAs may apply within 60 days for the IR to review their ASA. Those who apply after 60 days may, at her discretion, also have their ASA reviewed. The IR may 'Examine all of the ASIO material that was relied upon by ASIO in making the ASA, including unclassified written reasons provided by ASIO for the eligible person, as well as other relevant material, which may include submissions or representations made by the eligible person.'

The IR's functions include advising "the subject of the security assessment in writing of the outcome of the review. This will include providing a document in unclassified form, to the extent possible without prejudicing national security as advised by the Director-General, the Reviewer's opinion, reasons and any recommendations made and the outcome of the Director-General's consideration of the opinion and recommendations".

When a review is finished, the IR is to "form and record in writing an opinion as to whether the assessment is an appropriate outcome based on the material ASIO relied upon (including any new material referred to ASIO) and provide such opinion to the Director-General, including recommendations as appropriate.' The IR then informs the Attorney General, the Minister for Immigration and Citizenship and the Inspector-General of Intelligence and Security (IGIS) of this opinion.

Ultimately, the IR must 'provide an opinion to the Director-General of Security ('Director-General') on whether the assessment is an appropriate outcome based on the material ASIO relied upon and make recommendations accordingly, for the Director-General's consideration.' Ultimately, power over the detainee's fate will lie in the hands of the Director-General of ASIO.

Part 2: Proposed Changes

Review of Security Assessments: Statement of the Purpose

In response to the findings of the Joint Select Committee report of refugees, with the intention of addressing the issues identified concerning the indefinite detention of refugees with adverse security assessment, Senator Hanson-Young introduced the private member's bill; the Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012 (No 1), 2012 (Cth). This bill remains before the senate as at the time of writing.

The bill seeks to amend:

- *Administrative Appeals Tribunal Act 1975* (Cth)
- *Migration Act 1958* (Cth)
- *Australian Security Intelligence Organisation Act 1979* (Cth)

[65] Nicola Roxon, 'Commencement of Independent Reviewer of Adverse Security Assessments' (Press Release, 3 December 2012).
[66] http://www.attorneygeneral.gov.au/Media-releases/Documents/IndependentReviewFunction-TermsofReference.pdf

The bill seeks to address the following issues:

The general problem of refugees are being detained indefinitely due to an adverse security assessment is a result of distinct problems with the existing law;

(a) Adverse Security Assessments are rarely reviewed once issues by ASIO, irrespective of chances to circumstances;[67]

(b) Affected refugees are not attributed procedural fairness, as the reasons for the adverse security assessment are not provided to them or their legal representative;[68]

(c) There is no statutory right to seek merit review (at the Administrative Appeals Tribunal (AAT)) of the adverse security assessment for an affected refugee.[69]

(d) Judicial review in the Federal or High Court is possible, but without reasons for the decision it is generally impossible to identify whether there has been an error of law;[70]

(e) The law currently allows national security considerations as deemed by the ASIO Director- General to trump any procedural fairness at common law.[71]

The Bill adopts the following measures:

The bill addresses issues concerning the rights of affected refugees while still protecting national security and the national interest, by proposing the following measures:[72]

i) Merit review rights at the Administrative Appeals Tribunal are created for affected refugees;[73]

ii) Implementation of procedural fairness, by requiring that affected refugees be provided with a copy of the adverse assessment or qualified finding, unless certified public interest or national security exceptions apply;[74]

iii) Where the Attorney-General deems that there is a public interest reason to withhold part of or all of the security assessment, the affected person will still receive notification that a security assessment has been made so that merit review remains a possibility;

iv) Protects national security and public interest where the assessment is certified as sensitive, allowing access to the contents of the assessment only to those with the correct security clearance;[75]

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[67] Commonwealth, *Parliamentary Debates*, Senate, 10 October 2012, 7853 (Sarah Hanson-Young)
[68] Ibid.
[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] Explanatory Memorandum, Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012 (No 1), 2012 (Cth)
[73] Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012 (No 1), 2012 (Cth) sch 1 items 2, 17 & 18
[74] Ibid. sch 1item 19
[75] Ibid. sch 1item 6

v) Creates the role of special advocate to represent refugees.[76] Special advocates will be security cleared, pre approved and experienced, selected by the president from an existing pool when required;[77]

vi) Requires the Director-General of ASIO to complete a review of adverse security assessments for affected refugees every six months;[78]

vii) Requires ASIO to notify a refugee of an adverse assessment within 14 days;[79]

viii) Where a refugee is on indefinite detention due to adverse security assessment, the Minister must consider a method of granting residence in the community. This amendment requires the Immigration Minister to consider ways in which the security concerns identified by ASIO might be addressed so that the person can live in the Australian community;[80]

ix) when an adverse security assessment is overturned by an internal review at ASIO or through merits review at the AAT, the Immigration Minister must revisit the decision about the refusal or cancellation of a protection visa.[81]

Part 3: Liberty Victoria's response to the Bill

Liberty Victoria has long been concerned with the mandatory indefinite detention of asylum seekers, which becomes even more heinous when the detainee has been found to be a genuine refugee. The confirmation that 'indefinite detention' can mean 'detention forever' came in the case of *Al-Kateb v Godwin* in 2004, and since that time, the issue has been crying out for reform.

The RSA bill seeks to close the 'legal black hole'[82] that has left 60 people in indefinite detention. The bill substantially remedies problems of the Minister's personal exercise of power and procedural fairness raised by the court in M47.

The introduction of the bill was followed by Nicola Roxon's announcement on 16 October 2012 of an independent review process for the asylum seekers that are in the 'legal black hole'. This announcement is in line with the RSA bill, and not only shows the government's willingness to accept modest changes to the ASIO Act, but also the positive reaction of the human rights community towards these changes.[83] The fact that the Human Rights Commissioner approves of the review processes may give some comfort that the bill, should it become law, might be welcomed by the community.

The bill seeks to close the legal black hole in two main ways: by introducing measures likely to aid refugees in obtaining review of ASAs, and by introducing measures likely to aid in refugees' rights to acquire information regarding their ASA. Liberty Victoria is strongly supportive of these goals. There are limitations, however, on the

[76] Ibid. sch 1item 1
[77] Ibid. sch 1item 2-15
[78] Ibid. sch 1item 21
[79] Ibid. sch 1item 19
[80] Ibid. sch 1item 23
[81] Ibid. sch 1item 25
[82] http://www.news.com.au/breaking-news/national/greens-want-reasons-for-asylum-rejections/story-e6frfku9-1226492882986
[83] http://www.theaustralian.com.au/news/breaking-news/rights-advocate-hails-asio-review/story-fn3dxiwe-1226497009519

effectiveness of both these measures as contained in the Bill.

Measures likely to aid in refugees' rights to acquire information

The attempt to bring refugees' rights on par with that of an Australian citizen by giving access to information is hindered by s39D(6)(a) of the AAT Act, which gives the Attorney General a non-reviewable power to deny a Special Advocate permission to communicate with the applicant (or their representative) on whose behalf they are advocating, if the Attorney General has certified that the communication would be adverse to national security. Liberty Victoria submits that such a wide non-reviewable power is not in the public interest. That being said, the establishment of a position of the Special Advocate in Schedule 1 substantially aids problems of procedural fairness and justice in the current regime.

Measures likely to aid in refugees' rights to access Merits Review

While the review processes proposed are a step towards creating a fair judicial system for refugees, the secrecy behind these reviews can again leave too much power in the hands of a small unreviewable sect. Administrative reviews undertaken pursuant to proposed amendments to ss 39D(6) (8) (11) and (12) of the AAT Act would be kept secret by all parties as a result of the duty of strict confidentiality imposed by those sections. Although some of the information should be kept secret in the national interest, such absolute secrecy is contrary to the public interest and the doctrines of legal certainty and *stare decisis*.[84]

Shortcomings of the Bill

The passage of the Bill would see a significant improvement in the rights of affected refugees, including bestowing the rights to merit review and for the minister to consider community placement). However, it would not completely resolve the problem of the legal "black hole". Should ASIO succeed in proving that the adverse assessment was valid, the refugee may still remain in detention 'indefinitely'.

At present, a review of an ASA proceeds without the subject of the review, or their counsel, having any useful information about the reason for the ASA. This produces gross unfairness, and reduces the right of review to a meaningless formality.[85] In Hussain v Minister for Foreign Affairs[86] the applicant for review of an ASA, and his counsel, were denied access to most documents and were not permitted to be present in the hearing room when the government led its evidence and made its submissions. The Full Court of the Federal Court characterised the operation of the present review provisions as "unfair". The use of Special Advocates will significantly reduce the unfairness which results from the regular use of certificates which result in the applicant having no real knowledge of the case he or she has to make.

While the Bill provides for Special Advocates, it limits the appointment of Special Advocates who already have a security clearance.[87] It would be preferable if a person was capable of appointment as a Special Advocate if they have a security clearance, or receive one before relevant material is provided to them. By this means, a person seeking review would be able to choose a legal representative (subject to that person receiving a security clearance). It is undesirable that the Special Advocate selected should come from a list effectively controlled by government.[88] As presently framed, the proposed section 39C appears to proceed on the assumption that most

[84] Humanitarian Research Partner's Submission
[85] See for example Sagar v O'Sulllivan [2011] FCA 182, and Hussain v Minister for Foreign Affairs [2008] FCAFC 128
[86] [2008] FCAFC 128 at [176] and [183]
[87] see proposed section 39C(7)(c)
[88] see proposed section 39C(8)(b)

lawyers are untrustworthy and are not capable of maintaining information in confidence. Such an assumption is offensive and unjustifiable.

If the Bill passes, there remains a more fundamental point. As is the case with convicted criminals who serve a penal sentence and are released into the community, there are mechanisms for monitoring behaviour to protect the community. To imprison a refugee indefinitely on the premise that they may commit a crime or cause harm in the future, is profoundly offensive to the rule of law. The grounds on which a person may be adversely assessed are wide and nebulous. They include that a person may represent a risk to the security of another country. Ironically, that country is likely to be the country from which they have sought protection. The House of Lords has held that it is an unjustifiable infringement of human rights to detain a refugee who is suspected of being a terrorist risk. In A v Secretary of State for the Home Department [89] Lord Hoffman said "The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these"[90]

Liberty Victoria acknowledges that the Bill does not address every aspect of the issue, however we support its passage. Liberty Victoria strongly supports the introduction of any measure to improve transparency and provide a measure of natural justice to the security assessment process. We also eagerly await further challenge to the mandatory indefinite detention provisions of the Migration Act.

Ultimately, Liberty Victoria calls for the abolition of mandatory indefinite detention of asylum seekers. It is expensive in both human and financial terms, and is a stain on the character of the nation.

Liberty Victoria thanks the Committee for the opportunity to contribute to the inquiry. Should the Committee wish to discuss the matter further, contact should be made with on

Sincerely yours,

LIBERTY VICTORIA

[89] [2004] UKHL 56
[90] at [97]