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Joint Select Committee on Australia's Immigration Detention Network
By email: immigration.detention@aph.gov.au

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Dear Committee,

Re: Inquiry into Australia's Immigration Detention Network

I am writing to provide a supplementary submission in answer to a question on notice during my appearance in Sydney on 5 October 2011 (at p. 18 of Hansard: http://www.aph.gov.au/hansard/joint/commttee/j350.pdf) concerning legal approaches to the security assessment of refugees in other jurisdictions. This submission:

1. Makes simple recommendations for reform of the Australian approach, based on 'best practice' drawn from the laws in the United Kingdom, Canada and New Zealand; and

2. Provides a detailed summary of the legal approaches to security assessments in the United Kingdom, Canada, and New Zealand.

Constitutional Issue

Before turning to these matters, I also take this opportunity to alert the Committee to a possible constitutional defect in the ASIO security assessment regime. Chapter III of the Constitution requires the federal courts to exhibit certain essential characteristics of the 'judicial function' in exercising federal judicial power, as developed in the High Court's case law. Equality of arms and procedural fairness are fundamental judicial characteristics. It is arguable that a court is not acting as a court if it deprives one party of these protections.

Accordingly, where a person or their lawyers in judicial proceedings is unable to see anything in substance of the case against them (including, at a minimum, a redacted summary of the allegations, without disclosing sources), that person is deprived of equality of arms and constitutionally entrenched procedural fairness – and the court is not acting as a Chapter III court. The ASIO regime, by allowing procedural fairness to be reduced to 'nothingness' in court proceedings, arguably does not comply with this constitutional requirement.

Yours sincerely

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RECOMMENDATIONS FOR REFORM OF AUSTRALIAN LAW

In the making and review of ASIO security assessments concerning non-citizens, Australian law[1] should be amended to balance national security with the right to a fair hearing:

Sufficient reasons must be provided to an affected person

1. A summary of the allegations must always be provided to an affected person and their lawyers, where full disclosure of the evidence would cause undue prejudice to national security. The person must be given an adequate opportunity to respond.

2. The summary of allegations should be as specific and substantiated by evidence as possible, consistent with not causing undue prejudice to national security. Highly generalised allegations lacking adequate specificity are not permissible.

3. Where ASIO refuses to disclose an adequate summary of the allegations, ASIO may not rely upon the underlying classified information or evidence.

Genuine merits review must be available

4. At a minimum, an administrative tribunal (such as the Security Division of the Administrative Appeals Tribunal, as is the case with Australian citizens and permanent residents) must be empowered to independently review the merits of ASIO's security assessment. (The federal courts would maintain their role in judicially reviewing merits decisions for jurisdictional error.) The AAT must be given full access to all of the security sensitive information upon which ASIO seeks to rely.

5. In the alternative, a federal court (Federal Magistrates Court) should be empowered to determine *de novo* the merits of the security assessment. On this (more protective) model, ASIO would apply to a federal court for the issue of an adverse security assessment, in a hearing involving the affected person. Federal judges must be given full access to all of the security sensitive information upon which ASIO seeks to rely.

A special advocate must be appointed

6. Where ASIO seeks to rely upon any information not disclosed to the affected person or their lawyers in merits review before the AAT (or federal court), or in judicial review proceedings, a (security cleared) special advocate must be appointed.

7. The special advocate must be entitled to see all of the information upon which ASIO seeks to rely, and must keep such information in the strictest confidence (unless authorised by ASIO, the AAT or a federal court to disclose it to others).

8. The special advocate must be empowered to:

   (a) Make submissions on the adequacy of the summary provided to the person;

   (b) Test ASIO's claims that information may not be safely disclosed to the person; and

   (c) Make submissions on the substance of any evidence not disclosed to the person.

[1] Namely the *ASIO Act 1979* (Cth) and the *Migration Act 1954* (Cth).

THE UNITED KINGDOM APPROACH

In Britain, the exclusion from review of deportation cases involving national security was successfully challenged on human rights grounds, [2] resulting in a new and fairer process before the Special Immigration Appeals Commission (SIAC).[3]

Now the starting point is that information cannot be disclosed where it would be contrary to national security[4] and the affected person and their lawyer can be excluded from proceedings. In such circumstances, SIAC may appoint a 'special advocate'[5] with 'disclosure' and 'representative' functions.[6] The special advocate advises SIAC and is not the person's lawyer, although the role is designed to protect his or her interests.

The 'disclosure' function enables the special advocate to challenge the Secretary of State's objection that disclosing material to the affected person would prejudice security. The Secretary of State is *not* required to disclose material or a summary of it to the person where directed to do so by SIAC, but where disclosure is refused such information then cannot be relied upon in the proceeding.

The 'representative' function empowers the special advocate to view, examine and challenge confidential material which is not disclosed the affected person, including material which SIAC has not requested to be disclosed to the affected person and which the government accordingly seeks to rely upon.

The key drawbacks of the procedure include that the special advocate cannot disclose any confidential material to the affected person or receive instructions from them about how to deal with it, thus limiting the person's ability to test any adverse evidence. Further, special advocates have 'no access to independent expertise and evidence' and 'lack the resources of an ordinary legal team for the purpose of conducting a full defence in secret and they have no power to call witnesses'.[7]

The process nonetheless provides a considerably fairer hearing than in Australia, where there is no provision for a special advocate; the person's lawyers may be excluded from viewing confidential material (in both proceedings about whether to disclose material to the person, as well as in testing the substance of the evidence); and the affected person may be denied access to any evidence or summary of it.

Further, SIAC performs a more active role in decision-making about disclosure of the material or a summary of it, compared with Australia where the AAT and RRT lack jurisdiction, and the courts allow procedural fairness to be diminished to 'nothingness'.

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[2] *Chahal v United Kingdom* [1996] 23 EHRR 413.
[3] Under the *Special Immigration Appeals Commission Act 1997* (UK).
[4] Or certain other public interests such as the international relations of the UK, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest.
[5] *Special Immigration Appeals Commission Act 1997* (UK), s. 6. The detailed procedures for special advocates are set out in the *Special Immigration Appeals Commission (Procedure) Rules 2003*, as amended.
[6] See generally Aileen Kavanagh, 'Special Advocates, Control Orders and the Right to a Fair Trial' (2010) 73 *Modern Law Review* 836, 838.
[7] Ibid.

THE CANADIAN APPROACH

A similar 'special advocate' procedure has been adopted in Canada,[8] as a result of constitutional rights challenges to the prior procedure.[9] Where an immigration officer believes a foreign national is inadmissible on security grounds[10] and a removal order is made,[11] there is no right of administrative appeal.[12] However, the Minister of Immigration must sign a certificate that the person is inadmissible and refer it to the Federal Court for review.[13]

The certificate must be accompanied by a 'summary of information and other evidence that enables the person who is named in the certificate to be reasonably informed of the case made by the Minister, but that does not include anything that, in the Minister's opinion, would be injurious to national security or endanger the safety of any person if disclosed'.[14] The judge then determines whether the certificate is reasonable, and quashes it if it is not.

In such proceedings, at the request of the Minister or on the judge's own motion, information or other evidence may be heard in the absence of the public and of the foreign national and their counsel, if in the judge's opinion 'its disclosure would be injurious to national security and or endanger the safety of any person'.[15]

The foreign national must be 'provided with a summary of information and other evidence that enables them to be reasonably informed of the case made by the Minister', again excluding material injurious to national security. The judge may still base a decision on evidence even if it is not provided to the foreign national, and accept any 'reliable and appropriate' information, even if inadmissible in a court.[16]

The judge must appoint a 'special advocate' to 'protect the interests' of the foreign national when information or other information is heard in the absence of the person and their counsel.[17] The special advocate can challenge the Minister's claim that disclosure would be injurious to national security, and the 'relevance, reliability and sufficiency' of that information and the weight given to it. The special advocate cannot communicate information disclosed to them to the person named in the certificate, without the authorization of a judge.

Special advocates have objected that they are 'seriously constrained in … [their]… ability to respond in a meaningful way to the government's secret evidence',[18] particularly because the restrictions on communication go beyond what is necessary to protect sensitive information. The special advocate procedure has, however, led to greater disclosure of information in some cases;[19] some inadmissibility decisions have been quashed as a result of evidence successfully contested by advocates;[20] and the Federal Court has held the procedure to be constitutional.[21]

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[8] *Immigration and Refugee Protection Act* (Canada), s. 85.
[9] See *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350.
[10] *Immigration and Refugee Protection Act* (2001), s. 34 (1).
[11] *Immigration and Refugee Protection Act* (2001), ss. 44-45.
[12] *Immigration and Refugee Protection Act* (2001), s. 64(1).
[13] *Immigration and Refugee Protection Act* (2001), s. 77(1).
[14] *Immigration and Refugee Protection Act* (2001), s. 77 (2).
[15] *Immigration and Refugee Protection Act* (2001), s. 83.
[16] *Immigration and Refugee Protection Act* (2001), s. 83(1).
[17] *Immigration and Refugee Protection Act* (2001), s. 85.
[18] Amnesty International (Canada) 2007, in *Bill C-3: An Act to amend IRPA* (2007), 22.
[19] *Charkaoui v Canada (Citizenship and Immigration)* (2008) SCC 39, 47; *Harkat (Re)* (2009) FC 203.
[20] *Almei (Re)* (2009) FC 1263.
[21] *Harket (Re)*, 2010 FC 1242.

THE NEW ZEALAND APPROACH

New Zealand introduced a new procedure for dealing with classified information in migration decisions under the Immigration Act 2009. While the earlier legislation[22] had not provided for the provision of open summaries of classified material to an affected person, or the appointment of special advocates, the courts had themselves recognised such processes[23] and the 2009 Act expressly incorporates procedures to that effect.

Where immigration officers rely on 'potentially prejudicial' classified information, a '**summary of the allegations'** arising from that information must be provided by the head of the agency holding the information to the affected person, who is then given an opportunity to comment on it.[24]

In making the decision, 'the classified information may be relied on only to the extent that the allegations arising from the information can be summarised without disclosing classified information that would be likely to prejudice' the security interests.[25] The sources of classified information need not, however, be disclosed.[26]

Immigration decisions involving classified information can be appealed to the Immigration and Protection Tribunal for merits review. The Tribunal must approve the summary of allegations provided by the relevant agency.[27] The Tribunal also determines whether the classified information is relevant, 'credible',[28] and satisfies the non-disclosure requirements. Classified material provided to the Minister by agencies must be 'balanced'.[29]

A special advocate is involved in the Tribunal proceedings as representative of an affected person. The special advocate may commence proceedings on behalf of the person, make oral submissions and cross-examine witnesses at closed hearings, and make written submissions to the Tribunal or the court.[30] The special advocate must be given access to classified information relied on in making the decision or provided to the Tribunal or court.[31]

The special advocate must preserve the confidentiality of classified information, and cannot communicate with the affected person (without the Tribunal's approval) after they have been given access to it.[32] The costs of the special advocate are borne by the government.[33]

As with similar procedures elsewhere, a key limitation is that the special advocate cannot communicate with or receive instructions from the affected person in respect of classified information which has not been disclosed to the person. There is also some uncertainty about the level of specificity which must be contained in the summary of allegations.

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[22] Immigration Act 1987 (New Zealand).
[23] See, eg, *Zaoui v Attorney-General* [2004] 2 NZLR 339 and decisions from 2003-06.
[24] Immigration Act 2009, s. 38(1)-(2). Classified information is defined in s. 7 of the Act.
[25] Immigration Act 2009, s. 38(3).
[26] Immigration Act 2009, s. 38(4).
[27] Immigration Act 2009, s. 242.
[28] Immigration Act 2009, s. 243.
[29] Immigration Act 2009, s. 36.
[30] Immigration Act 2009, s. 263(2).
[31] Immigration Act 2009, s. 263(4).
[32] Immigration Act 2009, ss. 263(3) and 267.
[33] Immigration Act 2009, s. 263(7).

APPENDICES:

Special Advocate Procedures

1. **Extracts of United Kingdom laws** – page 7
2. **Extracts of Canadian laws** – page 10
3. **Extracts of New Zealand laws** – page 14

APPENDIX 1 : UNITED KINGDOM

(2) The United Kingdom Representative may give written notice to the Commission that he wishes to be treated as a party to proceedings, and where he gives such notice he shall be treated as a party from the date of the notice.

(3) Any restriction imposed by or under these Rules in relation to the appellant as to—

(a) the disclosure of material;

(b) attendance at hearings;

(c) notification of orders, directions or determinations; and

(d) communication from the special advocate,

shall also apply to the United Kingdom Representative where he is a party.

Representation of parties

33.—(1) The appellant may act in person or be represented by—

(a) a person having a qualification referred to in section 6(3) of the 1997 Act;

(b) a person appointed by any voluntary organisation for the time being in receipt of a grant under section 110 of the 2002 Act; or

(c) with the leave of the Commission, any other person,

provided that the person referred to in sub-paragraphs (a) to (c) is not prohibited from providing immigration services by section 84 of the Immigration and Asylum Act 1999**(a)**.

(2) The Secretary of State and the United Kingdom Representative may be represented by any person authorised by them to act on their behalf.

Appointment of special advocate

34.—(1) Subject to paragraph (2), the Secretary of State must, upon being served with a copy of a notice of appeal or application under these Rules, give notice of the proceedings to the relevant law officer.

(2) Paragraph (1) applies unless—

(a) the Secretary of State does not intend to—

(i) oppose the appeal or application; or

(ii) object to the disclosure of any material to the appellant; or

(b) a special advocate has already been appointed to represent the interests of the appellant in the proceedings.

(3) Where notice is given to the relevant law officer under paragraph (1), the relevant law officer may appoint a special advocate to represent the interests of the appellant in proceedings before the Commission.

(4) Where any proceedings before the Commission are pending but no special advocate has been appointed, the appellant or the Secretary of State may at any time request the relevant law officer to appoint a special advocate.

Functions of special advocate

35. The functions of a special advocate are to represent the interests of the appellant by—

(a) making submissions to the Commission at any hearings from which the appellant and his representatives are excluded;

(b) cross-examining witnesses at any such hearings; and

(c) making written submissions to the Commission.

Special advocate: communicating about proceedings

36.—(1) The special advocate may communicate with the appellant or his representative at any time before the Secretary of State serves material on him which he objects to being disclosed to the appellant.

(a) 1999 c.33.

(2) After the Secretary of State serves material on the special advocate as mentioned in paragraph (1), the special advocate must not communicate with any person about any matter connected with the proceedings, except in accordance with paragraph (3) or a direction of the Commission pursuant to a request under paragraph (4).

(3) The special advocate may, without directions from the Commission, communicate about the proceedings with—

(a) the Commission;

(b) the Secretary of State, or any person acting for him;

(c) the relevant law officer, or any person acting for him;

(d) any other person, except for the appellant or his representative, with whom it is necessary for administrative purposes for him to communicate about matters not connected with the substance of the proceedings.

(4) The special advocate may request directions from the Commission authorising him to communicate with the appellant or his representative or with any other person.

(5) Where the special advocate makes a request for directions under paragraph (4)—

(a) the Commission must notify the Secretary of State of the request; and

(b) the Secretary of State must, within a period specified by the Commission, file with the Commission and serve on the special advocate notice of any objection which he has to the proposed communication, or to the form in which it is proposed to be made.

(6) Paragraph (2) does not prohibit the appellant from communicating with the special advocate after the Secretary of State has served material on him as mentioned in paragraph (1), but—

(a) the appellant may only communicate with the special advocate through a legal representative in writing; and

(b) the special advocate must not reply to the communication other than in accordance with directions of the Commission, except that he may without such directions send a written acknowledgment of receipt to the appellant's legal representative.

Closed material

37.—(1) In this rule, "closed material" means material upon which the Secretary of State wishes to rely in any proceedings before the Commission, but which the Secretary of State objects to disclosing to the appellant or his representative.

(2) The Secretary of State may not rely upon closed material unless a special advocate has been appointed to represent the interests of the appellant.

(3) Where the Secretary of State wishes to rely upon closed material and a special advocate has been appointed, the Secretary of State must file with the Commission and serve on the special advocate—

(a) a copy of the closed material;

(b) a statement of his reasons for objecting to its disclosure; and

(c) if and to the extent that it is possible to do so without disclosing information contrary to the public interest, a statement of the material in a form which can be served on the appellant.

(4) The Secretary of State must, at the same time as filing it, serve on the appellant any statement filed under paragraph (3)(c).

(5) The Secretary of State may, with the leave of the Commission, at any time amend or supplement material filed under this rule.

Consideration of Secretary of State's objection

38.—(1) Where the Secretary of State makes an objection under rule 36(5)(b) or rule 37, the Commission must decide in accordance with this rule whether to uphold the objection.

(2) The Commission must fix a hearing for the Secretary of State and the special advocate to make oral representations, unless—

(a) the special advocate gives notice to the Commission that he does not challenge the objection;

(b) the Commission has previously considered an objection by the Secretary of State to the disclosure of the same or substantially the same material, and is satisfied that it would be just to uphold the objection without a hearing; or

(c) the Secretary of State and the special advocate consent to the Commission deciding the issue without an oral hearing.

(3) If the special advocate does not challenge the objection, he must give notice of that fact to the Commission and the Secretary of State within 14 days after the Secretary of State serves on him a notice under rule 36(5)(b) or material under rule 37(3).

(4) Where the Commission fixes a hearing under this rule, the Secretary of State and the special advocate must before the hearing file with the Commission a schedule identifying the issues which cannot be agreed between them, which must—

(a) list the items or issues in dispute;

(b) give brief reasons for their contentions on each; and

(c) set out any proposals for the Commission to resolve the issues in contention.

(5) A hearing under this rule shall take place in the absence of the appellant and his representative.

(6) The Commission may—

(a) uphold or overrule the Secretary of State's objection; and

(b) where the Secretary of State has made an objection under rule 37(3), direct him to serve on the appellant all or part of the material which he has filed with the Commission but not served on the appellant, either in the form in which it was filed or in a different form.

(7) Where the Commission overrules the Secretary of State's objection or directs him to serve any material on the appellant, the Secretary of State shall not be required to serve the material if he chooses not to rely upon it in the proceedings.

Directions

39.—(1) The Commission may give directions relating to the conduct of any proceedings.

(2) The power to give directions is to be exercised subject to—

(a) these Rules, including in particular the obligation in rule 4(1) to ensure that information is not disclosed contrary to the public interest; and

(b) any decision which the Commission makes under rule 38(6).

(3) Directions under this rule may be given orally or in writing.

(4) Subject to rule 48, the Commission must serve notice of any written directions on every party.

(5) Directions given under this rule may in particular—

(a) specify the length of time allowed for anything to be done;

(b) vary any time limit;

(c) require any party to file and serve—

(i) further details of his case, or any other information which appears to be necessary for the determination of the appeal or application;

(ii) witness statements;

(iii) written submissions;

(iv) a statement of any interpretation requirements; or

(v) any other document;

clude information that is believed on reasonable grounds to have been obtained as a result of the use of torture within the meaning of section 269.1 of the *Criminal Code*, or cruel, inhuman or degrading treatment or punishment within the meaning of the Convention Against Torture.

foi et utiles les renseignements dont il existe des motifs raisonnables de croire qu'ils ont été obtenus par suite du recours à la torture, au sens de l'article 269.1 du *Code criminel*, ou à d'autres peines ou traitements cruels, inhumains ou dégradants, au sens de la Convention contre la torture.

Appointment of special advocate

(1.2) If the permanent resident or foreign national requests that a particular person be appointed under paragraph (1)(*b*), the judge shall appoint that person unless the judge is satisfied that

(*a*) the appointment would result in the proceeding being unreasonably delayed;

(*b*) the appointment would place the person in a conflict of interest; or

(*c*) the person has knowledge of information or other evidence whose disclosure would be injurious to national security or endanger the safety of any person and, in the circumstances, there is a risk of inadvertent disclosure of that information or other evidence.

Choix de l'avocat spécial

(1.2) Si l'intéressé demande qu'une personne en particulier soit nommée au titre de l'alinéa (1)*b*), le juge nomme cette personne, à moins qu'il estime que l'une ou l'autre des situations ci-après s'applique :

a) la nomination de cette personne retarderait indûment l'instance;

b) la nomination de cette personne mettrait celle-ci en situation de conflit d'intérêts;

c) cette personne a connaissance de renseignements ou d'autres éléments de preuve dont la divulgation porterait atteinte à la sécurité nationale ou à la sécurité d'autrui et, dans les circonstances, ces renseignements ou autres éléments de preuve risquent d'être divulgués par inadvertance.

For greater certainty

(2) For greater certainty, the judge's power to appoint a person to act as a special advocate in a proceeding includes the power to terminate the appointment and to appoint another person.

2001, c. 27, s. 83; 2008, c. 3, s. 4.

Précision

(2) Il est entendu que le pouvoir du juge de nommer une personne qui agira à titre d'avocat spécial dans le cadre d'une instance comprend celui de mettre fin à ses fonctions et de nommer quelqu'un pour la remplacer.

2001, ch. 27, art. 83; 2008, ch. 3, art. 4.

Protection of information on appeal

84. Section 83 — other than the obligation to provide a summary — and sections 85.1 to 85.5 apply to an appeal under section 79 or 82.3, and to any further appeal, with any necessary modifications.

2001, c. 27, s. 84; 2008, c. 3, s. 4.

Protection des renseignements à l'appel

84. L'article 83 — sauf quant à l'obligation de fournir un résumé — et les articles 85.1 à 85.5 s'appliquent, avec les adaptations nécessaires, à l'appel interjeté au titre des articles 79 ou 82.3 et à tout appel subséquent.

2001, ch. 27, art. 84; 2008, ch. 3, art. 4.

Special Advocate

Avocat spécial

List of persons who may act as special advocates

85. (1) The Minister of Justice shall establish a list of persons who may act as special advocates and shall publish the list in a manner that the Minister of Justice considers appropriate to facilitate public access to it.

Liste de personnes pouvant agir à titre d'avocat spécial

85. (1) Le ministre de la Justice dresse une liste de personnes pouvant agir à titre d'avocat spécial et publie la liste de la façon qu'il estime indiquée pour la rendre accessible au public.

Statutory Instruments Act

(2) The *Statutory Instruments Act* does not apply to the list.

Loi sur les textes réglementaires

(2) La *Loi sur les textes réglementaires* ne s'applique pas à la liste.

Administrative support and resources

(3) The Minister of Justice shall ensure that special advocates are provided with adequate administrative support and resources.

2001, c. 27, s. 85; 2008, c. 3, s. 4.

Soutien administratif et ressources

(3) Le ministre de la Justice veille à ce que soient fournis à tout avocat spécial un soutien administratif et des ressources adéquats.

2001, ch. 27, art. 85; 2008, ch. 3, art. 4.

Special advocate's role

85.1 (1) A special advocate's role is to protect the interests of the permanent resident or foreign national in a proceeding under any of sections 78 and 82 to 82.2 when information or other evidence is heard in the absence of the public and of the permanent resident or foreign national and their counsel.

Responsibilities

(2) A special advocate may challenge

(*a*) the Minister's claim that the disclosure of information or other evidence would be injurious to national security or endanger the safety of any person; and

(*b*) the relevance, reliability and sufficiency of information or other evidence that is provided by the Minister and is not disclosed to the permanent resident or foreign national and their counsel, and the weight to be given to it.

For greater certainty

(3) For greater certainty, the special advocate is not a party to the proceeding and the relationship between the special advocate and the permanent resident or foreign national is not that of solicitor and client.

Protection of communications with special advocate

(4) However, a communication between the permanent resident or foreign national or their counsel and the special advocate that would be subject to solicitor-client privilege if the relationship were one of solicitor and client is deemed to be subject to solicitor-client privilege. For greater certainty, in respect of that communication, the special advocate is not a compellable witness in any proceeding.

2008, c. 3, s. 4.

Powers

85.2 A special advocate may

(*a*) make oral and written submissions with respect to the information and other evidence that is provided by the Minister and is not disclosed to the permanent resident or foreign national and their counsel;

(*b*) participate in, and cross-examine witnesses who testify during, any part of the proceeding that is held in the absence of the public and of the permanent resident or foreign national and their counsel; and

(*c*) exercise, with the judge's authorization, any other powers that are necessary to protect the interests of the permanent resident or foreign national.

2008, c. 3, s. 4.

Rôle de l'avocat spécial

85.1 (1) L'avocat spécial a pour rôle de défendre les intérêts du résident permanent ou de l'étranger lors de toute audience tenue à huis clos et en l'absence de celui-ci et de son conseil dans le cadre de toute instance visée à l'un des articles 78 et 82 à 82.2.

Responsabilités

(2) Il peut contester :

a) les affirmations du ministre voulant que la divulgation de renseignements ou autres éléments de preuve porterait atteinte à la sécurité nationale ou à la sécurité d'autrui;

b) la pertinence, la fiabilité et la suffisance des renseignements ou autres éléments de preuve fournis par le ministre, mais communiqués ni à l'intéressé ni à son conseil, et l'importance qui devrait leur être accordée.

Précision

(3) Il est entendu que l'avocat spécial n'est pas partie à l'instance et que les rapports entre lui et l'intéressé ne sont pas ceux qui existent entre un avocat et son client.

Protection des communications avec l'avocat spécial

(4) Toutefois, toute communication entre l'intéressé ou son conseil et l'avocat spécial qui serait protégée par le secret professionnel liant l'avocat à son client si ceux-ci avaient de tels rapports est réputée être ainsi protégée, et il est entendu que l'avocat spécial ne peut être contraint à témoigner à l'égard d'une telle communication dans quelque instance que ce soit.

2008, ch. 3, art. 4.

Pouvoirs

85.2 L'avocat spécial peut :

a) présenter au juge ses observations, oralement ou par écrit, à l'égard des renseignements et autres éléments de preuve fournis par le ministre, mais communiqués ni à l'intéressé ni à son conseil;

b) participer à toute audience tenue à huis clos et en l'absence de l'intéressé et de son conseil, et contre-interroger les témoins;

c) exercer, avec l'autorisation du juge, tout autre pouvoir nécessaire à la défense des intérêts du résident permanent ou de l'étranger.

2008, ch. 3, art. 4.

Immunity

85.3 A special advocate is not personally liable for anything they do or omit to do in good faith under this Division.

2008, c. 3, s. 4.

Immunité

85.3 L'avocat spécial est dégagé de toute responsabilité personnelle en ce qui concerne les faits — actes ou omissions — accomplis de bonne foi dans le cadre de la présente section.

2008, ch. 3, art. 4.

Obligation to provide information

85.4 (1) The Minister shall, within a period set by the judge, provide the special advocate with a copy of all information and other evidence that is provided to the judge but that is not disclosed to the permanent resident or foreign national and their counsel.

Obligation de communication

85.4 (1) Il incombe au ministre de fournir à l'avocat spécial, dans le délai fixé par le juge, copie de tous les renseignements et autres éléments de preuve qui ont été fournis au juge, mais qui n'ont été communiqués ni à l'intéressé ni à son conseil.

Restrictions on communications — special advocate

(2) After that information or other evidence is received by the special advocate, the special advocate may, during the remainder of the proceeding, communicate with another person about the proceeding only with the judge's authorization and subject to any conditions that the judge considers appropriate.

Restrictions aux communications — avocat spécial

(2) Entre le moment où il reçoit les renseignements et autres éléments de preuve et la fin de l'instance, l'avocat spécial ne peut communiquer avec qui que ce soit au sujet de l'instance si ce n'est avec l'autorisation du juge et aux conditions que celui-ci estime indiquées.

Restrictions on communications — other persons

(3) If the special advocate is authorized to communicate with a person, the judge may prohibit that person from communicating with anyone else about the proceeding during the remainder of the proceeding or may impose conditions with respect to such a communication during that period.

2008, c. 3, s. 4.

Restrictions aux communications — autres personnes

(3) Dans le cas où l'avocat spécial est autorisé à communiquer avec une personne, le juge peut interdire à cette dernière de communiquer avec qui que ce soit d'autre au sujet de l'instance, et ce jusqu'à la fin de celle-ci, ou assujettir à des conditions toute communication de cette personne à ce sujet, jusqu'à la fin de l'instance.

2008, ch. 3, art. 4.

Disclosure and communication prohibited

85.5 With the exception of communications authorized by a judge, no person shall

(*a*) disclose information or other evidence that is disclosed to them under section 85.4 and that is treated as confidential by the judge presiding at the proceeding; or

(*b*) communicate with another person about the content of any part of a proceeding under any of sections 78 and 82 to 82.2 that is heard in the absence of the public and of the permanent resident or foreign national and their counsel.

2008, c. 3, s. 4.

Divulgations et communications interdites

85.5 Sauf à l'égard des communications autorisées par tout juge, il est interdit à quiconque :

a) de divulguer des renseignements et autres éléments de preuve qui lui sont communiqués au titre de l'article 85.4 et dont la confidentialité est garantie par le juge présidant l'instance;

b) de communiquer avec toute personne relativement au contenu de tout ou partie d'une audience tenue à huis clos et en l'absence de l'intéressé et de son conseil dans le cadre d'une instance visée à l'un des articles 78 et 82 à 82.2.

2008, ch. 3, art. 4.

Rules

85.6 (1) The Chief Justice of the Federal Court of Appeal and the Chief Justice of the Federal Court may each establish a committee to make rules governing the practice and procedure in relation to the participation of special advocates in proceedings before the court over which they preside. The rules are binding de-

Règles

85.6 (1) Les juges en chef de la Cour d'appel fédérale et de la Cour fédérale peuvent chacun établir un comité chargé de prendre des règles régissant la pratique et la procédure relatives à la participation de l'avocat spécial aux instances devant leurs cours respectives; ces

spite any rule of practice that would otherwise apply.

Composition of committees

(2) Any committee established shall be composed of the Chief Justice of the Federal Court of Appeal or the Chief Justice of the Federal Court, as the case may be, the Attorney General of Canada or one or more representatives of the Attorney General of Canada, and one or more members of the bar of any province who have experience in a field of law relevant to those types of proceedings. The Chief Justices may also designate additional members of their respective committees.

Chief Justices shall preside

(3) The Chief Justice of the Federal Court of Appeal and the Chief Justice of the Federal Court — or a member designated by them — shall preside over their respective committees.

2008, c. 3, s. 4.

règles l'emportent sur les règles et usages qui seraient par ailleurs applicables.

Composition des comités

(2) Le cas échéant, chaque comité est composé du juge en chef de la cour en question, du procureur général du Canada ou un ou plusieurs de ses représentants, et d'un ou de plusieurs avocats membres du barreau d'une province ayant de l'expérience dans au moins un domaine de spécialisation du droit qui se rapporte aux instances visées. Le juge en chef peut y nommer tout autre membre de son comité.

Présidence

(3) Les juges en chef de la Cour fédérale d'appel et de la Cour fédérale président leurs comités respectifs ou choisissent un membre pour le faire.

2008, ch. 3, art. 4.

Other Proceedings

Application for non-disclosure

86. The Minister may, during an admissibility hearing, a detention review or an appeal before the Immigration Appeal Division, apply for the non-disclosure of information or other evidence. Sections 83 and 85.1 to 85.5 apply to the proceeding with any necessary modifications, including that a reference to "judge" be read as a reference to the applicable Division of the Board.

2001, c. 27, s. 86; 2008, c. 3, s. 4.

Application for non-disclosure — judicial review

87. The Minister may, during a judicial review, apply for the non-disclosure of information or other evidence. Section 83 — other than the obligations to appoint a special advocate and to provide a summary — applies to the proceeding with any necessary modifications.

2001, c. 27, s. 87; 2008, c. 3, s. 4.

Special advocate

87.1 If the judge during the judicial review, or a court on appeal from the judge's decision, is of the opinion that considerations of fairness and natural justice require that a special advocate be appointed to protect the interests of the permanent resident or foreign national, the judge or court shall appoint a special advocate from the list referred to in subsection 85(1). Sections 85.1 to 85.5 apply to the proceeding with any necessary modifications.

2008, c. 3, s. 4.

Autres instances

Demande d'interdiction de divulgation

86. Le ministre peut, dans le cadre de l'appel devant la Section d'appel de l'immigration, du contrôle de la détention ou de l'enquête, demander l'interdiction de la divulgation de renseignements et autres éléments de preuve. Les articles 83 et 85.1 à 85.5 s'appliquent à l'instance, avec les adaptations nécessaires, la mention de juge valant mention de la section compétente de la Commission.

2001, ch. 27, art. 86; 2008, ch. 3, art. 4.

Interdiction de divulgation — contrôle judiciaire

87. Le ministre peut, dans le cadre d'un contrôle judiciaire, demander l'interdiction de la divulgation de renseignements et autres éléments de preuve. L'article 83 s'applique à l'instance, avec les adaptations nécessaires, sauf quant à l'obligation de nommer un avocat spécial et de fournir un résumé.

2001, ch. 27, art. 87; 2008, ch. 3, art. 4.

Avocat spécial

87.1 Si le juge, dans le cadre du contrôle judiciaire, ou le tribunal qui entend l'appel de la décision du juge est d'avis que les considérations d'équité et de justice naturelle requièrent la nomination d'un avocat spécial en vue de la défense des intérêts du résident permanent ou de l'étranger, il nomme, parmi les personnes figurant sur la liste dressée au titre du paragraphe 85(1), celle qui agira à ce titre dans le cadre de l'instance. Les articles 85.1 à 85.5 s'appliquent alors à celle-ci avec les adaptations nécessaires.

2008, ch. 3, art. 4.

(b) the form or content of a summary prepared and provided under section 38 (including any updated summary):

(c) the form or content of information provided under section 39:

(d) the form or content of a presentation made by the chief executive of a relevant agency under section 241:

(e) the form or content of a summary developed, provided, and approved under section 242 or 256 (including any updated summary), including the decision whether to modify, and the nature of any modifications to, the summary:

(f) a decision to withdraw, update, or add to classified information.

(3) No appeal under section 245 may be brought in relation to any proceedings involving classified information that are before the Tribunal unless the Tribunal has issued final determinations on all matters subject to the proceedings.

(4) No review proceedings may be brought in relation to any appeal or matter before the Tribunal to which subsection (3) or sections 240 to 244 apply unless the Tribunal has issued final determinations on all matters subject to the appeal or matter.

Special advocates

263 Role of special advocates

(1) The role of a special advocate is to represent a person who is the subject of—

(a) a decision made involving classified information; or

(b) proceedings involving classified information.

(2) In particular, a special advocate may—

(a) lodge or commence proceedings on behalf of the person:

(b) make oral submissions and cross-examine witnesses at any closed hearing:

(c) make written submissions to the Tribunal or the court, as the case may be.

(3) At all times a special advocate must—

(a) ensure that the confidentiality of the classified information remains protected; and

(b) act in accordance with his or her duties as an officer of the High Court.

(4) The Minister or a refugee and protection officer (as appropriate) must provide a special advocate with access to the classified information—

(a) relied on in making the decision being appealed against; or

(b) provided to the Tribunal for the purpose of determining the matter; or

(c) provided to the Tribunal or the court in the appeal or in the review proceedings; or

(d) provided to the court in warrant of commitment proceedings.

(5) Before providing access to the classified information, the Minister or the refugee and protection officer must consult the chief executive of the relevant agency.

(6) A special advocate must keep confidential and must not disclose classified information, except as expressly provided under this Act.

(7) The chief executive of the Department must meet the actual and reasonable costs of a special advocate on a basis agreed between the special advocate and the designated agency.

264 Recognition of special advocates

(1) A special advocate is a lawyer (as defined in section 6 of the Lawyers and Conveyancers Act 2006) who has been recognised as a special advocate by an agency designated for the purpose by the Prime Minister.

(2) The designated agency may recognise a lawyer as a special advocate if—

(a) the lawyer holds an appropriate security clearance given by the chief executive of the Ministry of Justice; and

(b) the designated agency is satisfied that the lawyer has appropriate knowledge and experience to be recognised as a special advocate.

(3) Recognition under this section continues for 5 years, but the designated agency may recognise a lawyer as a special advocate for further 5-year periods.

(4) The designated agency may withdraw a special advocate's recognition if the special advocate—
  (a) ceases to hold an appropriate security clearance; or
  (b) is suspended from practice as a barrister, a solicitor, or both, under the Lawyers and Conveyancers Act 2006; or
  (c) is struck off the roll of barristers and solicitors of the High Court.

(5) The designated agency must, in addition to recording the persons recognised by it as special advocates, maintain a list of special advocates who may represent persons in proceedings under Part 9, to cover the situation where—
  (a) a person has not yet appointed a special advocate to represent him or her in any appeal, matter, or review proceedings involving classified information; and
  (b) classified information may be relied on in determining an application made under that Part.

265 Appointment of special advocate in individual case

(1) The Minister or a refugee and protection officer (as appropriate) must notify the designated agency if it is likely that a decision under this Act (other than a decision on appeal to, or in relation to a matter before, the Tribunal)—
  (a) will be made relying on classified information; and
  (b) may be subject to appeal.

(2) The designated agency must provide the names of no fewer than 3 possible special advocates to a person who is the subject of a decision under this Act (other than a decision on appeal to, or in relation to a matter before, the Tribunal)—
  (a) if the decision relies on classified information and a person subject to the decision appeals it; and
  (b) not later than 3 days after the person lodges the appeal.

(3) The designated agency must not provide the name of a special advocate unless the special advocate is reasonably available, having regard to the time frames in this Part.

(4) The chief executive or the Minister (as appropriate) must notify the designated agency if—

(a) classified information is first raised or proposed to be raised in the course of an appeal to, or a matter before, the Tribunal; or

(b) a person appeals against a decision of the Tribunal and the Tribunal relied on classified information in making the decision; or

(c) a person brings review proceedings in relation to any decision made under this Act and the decision maker relied on classified information in making the decision.

(5) The designated agency must provide the names of no fewer than 3 possible special advocates to the appellant, applicant, or affected person, as the case may be, no later than 3 days after receiving a notification under subsection (4).

(6) An appellant, applicant, or affected person, as the case may be, must determine whether to appoint a special advocate, and which special advocate to appoint, and notify the designated agency accordingly, not later than 7 days after being notified of the names of possible special advocates.

(7) If the appellant, applicant, or affected person does not appoint a special advocate, the Department must make arrangements with the designated agency for a special advocate to be available on behalf of the person.

(8) Subsection (6) does not apply if the appellant or applicant is the Minister, the chief executive, or a refugee and protection officer.

266 Appointment of special advocate for purposes of Part 9 proceedings

(1) This section applies to a person if the person—

(a) has not appointed a special advocate to represent him or her in any appeal, matter, or review proceedings involving classified information; and

(b) is the subject of an application under Part 9 in which classified information may be relied on in determining the application.

(2) If the person has been arrested and detained under Part 9, the Department must contact the designated agency as soon as practicable after the person is arrested and detained and make

arrangements for a special advocate to whom section 264(5) applies to be available, on behalf of the person, for the warrant of commitment hearing.

(3) If the person has been detained under a warrant of commitment, or released on conditions under section 320, the Department must contact the designated agency as soon as practicable after it becomes apparent that this section applies to the person and make arrangements for a special advocate to whom section 264(5) applies to be available, on behalf of the person, for the hearing of the application.

(4) If an application on a matter to which subsection (2) or (3) applies is made directly to the High Court, or is transferred to the High Court, the special advocate concerned must be provided with access to the classified information provided to the High Court before the application is heard (and he or she may not unreasonably refuse to be provided with access to the classified information).

(5) The designated agency must not provide the name of a special advocate unless the special advocate is reasonably available, having regard to the time frames in Part 9.

267 Communication between special advocate and person to whom classified information relates

(1) In this section (other than subsection (4)), **person A** means—

(a) a person who has appointed a special advocate under section 265(6); or

(b) a person to whom a special advocate has been made available under section 265(7) or 266.

(2) In subsection (4), **person A** means—

(a) a person who has appointed a special advocate under section 265(6); or

(b) a person to whom a special advocate has been made available under section 265(7).

(3) A special advocate may communicate with person A or person A's representative on an unlimited basis until the special advocate has been provided with access to the classified information concerned, but once he or she has been provided with access to the classified information, he or she may not com-

municate with any person about any matter connected with the proceedings involving the classified information except in accordance with this section.

(4) The Minister or a refugee and protection officer (as appropriate) must provide the special advocate with access to the classified information on any date that is 29 days or more after the date on which person A was provided with the names of possible special advocates under section 265(2) or (5) or, as the case may be, had a special advocate made available to him or her under section 265(7).

(5) A special advocate may not unreasonably refuse to be provided with access to the classified information after the date after which access may be provided under subsection (4).

(6) A special advocate may, without the approval of the Tribunal or the court, communicate about the proceedings with—

(a) the Judge or Judges of the Tribunal or the court:

(b) the Minister, or the Minister's security-cleared representative:

(c) the refugee and protection officer concerned, or the refugee and protection officer's security-cleared representative:

(d) the chief executive of the relevant agency, or that chief executive's security-cleared representative:

(e) the chief executive of the Department, if the proceedings relate to an application to which section 325 applies:

(f) any other person, except for person A or his or her representative, with whom it is necessary for administrative purposes for the special advocate to communicate about matters not connected with the substance of the proceedings.

(7) A special advocate who wishes to communicate with person A or his or her representative after having been given access to the classified information may submit a written communication to the Tribunal or the court (as appropriate) for approval and for forwarding to person A or his or her representative.

(8) The Tribunal or court must either—

(a) forward the communication, with or without amendment, to person A or his or her representative if the com-

munication would not be likely to prejudice the interests referred to in section 7(3); or

(b) decline to forward the communication, and notify the special advocate of that decision.

(9) The Tribunal or court may consult the chief executive of the relevant agency before determining—

(a) whether to forward a communication, with or without amendment, to person A or his or her representative; or

(b) if it proposes to forward the communication, the nature of any amendments necessary; or

(c) whether to decline to forward the communication.

(10) The Tribunal or court may—

(a) amend a communication only if the communication would be likely to prejudice the interests referred to in section 7(3), and only to the extent necessary to ensure the communication would not be likely to prejudice those interests:

(b) decline to forward a communication only if the communication would be likely to prejudice the interests referred to in section 7(3), and it is not practicable to amend the communication to prevent such prejudice.

(11) Person A may, of his or her own volition, communicate with the special advocate on any matter in accordance with subsection (12).

(12) The communication—

(a) must be made in writing; and

(b) may be made through person A's representative.

(13) The special advocate must not reply to such a communication except—

(a) in accordance with the manner set out in subsection (7); or

(b) in order to provide a bare acknowledgement of receipt of the communication to person A or his or her representative.

268 Protection of special advocates from liability

(1) To the extent that a special advocate is acting in accordance with the requirements of this Act, he or she is not guilty of—

(a) misconduct within the meaning of section 9 of the Lawyers and Conveyancers Act 2006; or

(b) unsatisfactory conduct within the meaning of section 12 of that Act.

(2) To avoid doubt, the provisions of this Act apply despite the requirements of any practice rules made and approved under the Lawyers and Conveyancers Act 2006.

(3) No person is personally liable for any act done or omitted to be done in good faith, in his or her capacity as a special advocate, in accordance with the requirements or provisions of this Act or of any regulations made under this Act.

269 Tribunal or court may appoint counsel assisting the court

(1) The Tribunal or a court may appoint counsel assisting the court for the purposes of any proceedings before it involving classified information.

(2) Counsel assisting the court may be a special advocate but, if not, must be a person who holds an appropriate security clearance given by the chief executive of the Ministry of Justice.

(3) Subsection (1) applies regardless of whether the person concerned has appointed a special advocate or a special advocate has been made available for the person.

(4) The Tribunal or the court may provide counsel assisting the court with access to the classified information concerned as it thinks fit.

(5) Counsel assisting the court must keep confidential and must not disclose classified information, except as expressly provided under this Act.

(6) Counsel assisting the court may be removed from office by the Tribunal or a court for inability to perform the role of counsel assisting the court, neglect of duty, bankruptcy, or misconduct proved to the satisfaction of the Tribunal or the court.

270 Tribunal or court may appoint special adviser

(1) The Tribunal or a court may appoint a cultural, medical, intelligence, military, or other special adviser for the purposes of giving advice in any proceedings before it involving classified information.

(2) The special adviser must hold an appropriate security clearance given by the chief executive of the Ministry of Justice.

(3) The Tribunal or the court may provide the special adviser with access to the classified information concerned as it thinks fit.

(4) A special adviser must keep confidential and must not disclose classified information, except as expressly provided under this Act.

(5) Subsection (1) applies regardless of whether—
- (a) the person concerned has appointed a special advocate or a special advocate has been made available for the person; and
- (b) the Tribunal or the court has appointed counsel assisting the court for the purposes of the proceedings.

(6) A special adviser may be removed from office by the Tribunal or a court for inability to perform the role of special adviser, neglect of duty, bankruptcy, or misconduct proved to the satisfaction of the Tribunal or the court.

271 Payment to counsel assisting the court or special adviser

(1) The Tribunal or the court concerned may make the order it thinks just for payment to—
- (a) counsel assisting the court appointed for any proceedings under section 269; and
- (b) a special adviser appointed for any proceedings under section 270.

(2) The Registrar of the Tribunal or the court must send a copy of the order to the chief executive of the department of State referred to in clause 5 of Schedule 2, who must then make the payment out of money appropriated by Parliament for that purpose.

Part 8
Compliance and information

272 Purpose of Part

The purpose of this Part is—
- (a) to confer on immigration officers the power to obtain information in order to allow the Department to—
  - (i) detect immigration fraud or misrepresentation: