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Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Committee Secretary,

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

Thank you for the opportunity to make a submission to the inquiry into the private senator's bill. We are writing this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law, at the Faculty of Law, University of New South Wales. We are solely responsible for the views and content in this submission.

I Context

Security assessments made by the Australian Security Intelligence Organisation ('ASIO') are an important part of determining applications for protection visas to stay in Australia. However, the current system has serious problems. Refugees who are subject to an adverse security assessments ('ASA') are not released into Australia, cannot be refouled to their homes (where they have a well-founded fear of persecution) and are unlikely to be accepted by third, safe countries since they have been assessed as a threat.

Most of the 55 refugees currently meeting this description have been in immigration detention for well over a year, with no foreseeable resolution. The plaintiff in a recent High

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Court case (*Plaintiff M47 v Director General of Security* [2012] HCA 46 ('M47')) has been in immigration detention for almost three years.

In their decision in the *M47* case, a majority of the High Court of Australia declared invalid a regulation which made the grant of a protection visa directly contingent on the refugee not being the subject of an ASA. The majority held that for a regulation to automatically require the refusal of a protection visa effectively shifted the power of determining the application into the hands of an ASIO officer, whose decision was unreviewable. Thus the regulation was contrary to the scheme of the *Migration Act*, which provides for review of decisions by the Minister to cancel or refuse protection visas on national security grounds.

While the automatic effect of an ASA on an application for a protection visa has been invalidated, the *M47* decision did not invalidate the use of an effectively unreviewable ASA as a ground for a decision to refuse granting a protection visa. While some of the Court commented on problems with review of ASAs, the case did not turn on the ASA itself, and those comments are not binding. Those members of the Court who considered the issue held the plaintiff had been afforded procedural fairness. However, it should be noted the plaintiff in this case had (unusually) been afforded a second interview before a fresh assessment was made earlier in 2012. *M47* does not address many of the more fundamental problems of use of ASAs, but serves to highlight the consequences of the current regime, and bring it into public scrutiny.

II The Bill

We direct our remarks to the following aspects of the Bill.

A Use of Special Advocates

A significant element of the Bill is the establishment of Special Advocates in proceedings before the Security Appeals Division of the Administrative Appeals Tribunal. As acknowledged in the Second Reading speech, Special Advocates are utilised in Canada, New Zealand and the United Kingdom in similar matters. In this regard, it may be said that the Bill follows a path taken by jurisdictions that are perceived as generally comparable to Australia. However, the absence of a formal instrument of human rights protection in Australia is a significant distinction and one to bear in mind in this context given the impact of those statutes upon the use of secret evidence and Special Advocates, particularly in the United Kingdom and Canada.

We make two general points about Special Advocates before turning to more specific observations about provisions in the Bill. First, like many exceptional measures they have had a tendency to outgrow their original application and to be applied in other contexts. The United Kingdom experience offers dramatic evidence of this. Initially created to appear in proceedings before the Special Immigration Appeals Commission ('SIAC'), Special Advocates were later used in court proceedings reviewing the decision of the Home Secretary to issue control orders over persons suspected of being involved in terrorist activity. Those orders were applicable to citizens and non-citizens alike. In 2010, it was claimed that use of Special Advocates has since extended to 'no fewer than 22 different types of court hearing'.¹

¹ United Kingdom, *Parliamentary Debates*, House of Commons, 1 March 2010, vol 506, col 739 (Andrew Dismore).

The United Kingdom Parliament is currently debating the passage of legislation introduced by the Coalition government after a Green Paper consultation last year that would significantly expand the use of Special Advocates in any ‘closed material proceedings’. The Justice and Security Bill 2012 might, in several respects, be likened to Australia’s own *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) (‘the NSIA’), but concerns over the extended use of Special Advocates (not currently an element of the NSIA) have been central to major opposition to that Bill.

This takes us to our second point about Special Advocates, namely that their use remains contentious in the United Kingdom, particularly amongst the legal profession. Individual Special Advocates have resigned at various stages citing the scheme to be unworkably unfair,² and those who have persevered have complained about the prohibition on communication with the controlee and their legal representative once closed material has been disclosed, the lack of access to independent experts or evidence, and the inability to call witnesses.³ The views of the Special Advocates on the ‘inherent unfairness’ of closed material proceedings and the deficiencies of their own role to ameliorate this have been notable in mounting opposition to the Justice and Security Bill 2012.⁴

Turning to the specific provisions of the Bill before this Committee, we note that the Senator said in her Second Reading speech that ‘the Special Advocate provisions in this Bill have been modelled on New Zealand’s law’. That may mean some of the grounds for dissatisfaction with the United Kingdom system are inapplicable, but nevertheless it is that jurisdiction which has produced a wealth of parliamentary, judicial and other analysis of the use of Special Advocates, and against which we base our analysis of this Bill.

For instance, on the crucial matter of the ability of the Special Advocate to communicate with the applicant after he or she has received the information relied upon in making the ASA, the Bill makes fairly detailed provision. Although the general position is that communication is not allowed except to acknowledge receipt of written communication from the applicant or his/her legal representative, authority to make some other communication may be sought from the presidential member of the Tribunal under s 39D(5).

However, the capacity of these provisions to enable communication between the Special Advocate and the applicant about the substance of the material used by ASIO to make the ASA against the latter is still significantly restricted. Under s 39D(6) the Attorney-General may certify that the proposed communication is contrary to the public interest because ‘(a) because it would prejudice security or the defence or international relations of Australia; or (b) because it would involve the disclosure of deliberations or decisions of the Cabinet or a Committee of the Cabinet or of the Executive Council; or (c) for any other reason stated in the certificate that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the content of the communication should not be disclosed’. Although a Special Advocate is to be afforded notice of the decision to issue a certificate and a reasonable opportunity to make submissions on this matter, it is a condition

² House of Commons Constitutional Affairs Committee Seventh Report of Session 2004-05, *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates* HC 323 (London: TSO) (CAC) 17.

³ Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, House of Lords Paper No 64, House of Commons Paper No 395, Session 2009-10 (2010) 18-25.

⁴ Joint Committee on Human Rights, *Legislative Scrutiny: Justice and Security Bill 2012*, House of Lords Paper No 59, House of Commons Paper No 370, Fourth Report of Session 2012-13 (2012).

of the presidential member's power to authorise the requested communication that the certificate is not issued for either reason in (6)(a) or (b) (see s 39D(5)(d) and (8)(a)). In short, by merely stating either of the reasons in s 39D(6)(a) or (b) the Attorney-General will ensure that the request of the Special Advocate is denied. In the context of the current Bill, it seems likely that the Attorney-General would regularly issue certificates on the ground of national security ((6)(a)). If this proves to be the case, then there will be few opportunities for the presidential member to use his or her discretion to authorise communication between the Special Advocate and the applicant. Thus the express emphasis given to this over security claims by s 39D(9) will be more apparent than actual in practice.

Even so, a statutory scheme for facilitating communication is still preferable to the United Kingdom practice. Even if it operates only modestly, it would seem likely to address the complaint made recently in oral evidence by a Special Advocate before the UK Joint Committee on Human Rights that called for 'a relaxation on the prohibition on communicating with the lawyer for the appellant, not on the closed material but on purely procedural matters that cannot involve any disclosure of any confidential material'.⁵ A request for permission to communicate on such matters may conceivably not be blocked by the issuing of a certificate from the Attorney-General.

By contrast to its efforts to clarify rights to communicate, an aspect of the Special Advocate experience that the Bill does not address is the need felt by those who have performed the role in the UK to access independent expertise and evidence. This is not simply a matter of formal rules, though we would support express inclusion in s 39C(5) of a power for Special Advocates to adduce their own evidence. The UK Joint Committee on Human Rights identified practical problems of access and resources that had totally impeded the capacity of Special Advocates in this regard, even after the relevant procedure rules were altered. The Joint Committee concluded:

*Notwithstanding the rule change which permits special advocates to adduce evidence, it remains the case that special advocates continue to have no access in practice to evidence or expertise which would enable them to challenge the expert assessments of the Security Service, assessments to which the court is therefore almost bound to defer in the absence of any evidence or expert opinion to the contrary.*⁶

This is a matter that should be considered more fully in the finalisation of this Bill if the aim is to expose to meaningful challenge the material relied upon to support the ASA.

B Remaining Obstacles for Non-Citizens in the Security Appeals Division

The Bill would also grant non-citizens the right to seek merits review of ASAs in the Security Appeals Division of the Administrative Appeals Tribunal ('AAT'). In Parliament, Senator Hanson-Young said that this was 'the most straightforward and reasonable way of protecting against indefinite detention and ensuring probity'.⁷ However, there are two key obstacles that non-citizens will face when applying for merits review in the Security Appeals Division.

a. Public Interest Certificates

⁶ Above n 3, 20.

⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 10 October 2012, 56.

First, non-citizens applying for merits review of an adverse security assessment will find it extremely difficult, if not impossible, to challenge a public interest certificate that withholds information from the applicant or excludes the applicant from the proceedings.

Currently, the Attorney-General has the power to issue public interest certificates both prior to and during the review process in the Security Appeals Division. These certificates allow the Attorney-General to withhold notice of the existence of an assessment,⁸ remove the statement of grounds contained in the making of the assessment,⁹ or remove the applicant from the proceedings.¹⁰ Under the current Bill, the Attorney-General would no longer be able to withhold notice of the existence of an assessment,¹¹ but the powers to withhold additional information from applicants and exclude applicants from the tribunal proceedings would remain. As discussed above, the Attorney-General can also issue a certificate to prevent communication between the special advocate and the applicant on public interest grounds.¹² The presidential member is denied any discretion to allow the communication where the Attorney-General has certified that the communication would prejudice security or defence, or disclose cabinet deliberations.¹³

Challenging public interest certificates issued by the Attorney-General has proved extremely difficult for citizens applying for merits review in the Security Appeals Division. This is for two reasons. First, there is little if any prospect of citizens appealing to the Federal Court on the ground that the Security Appeals Division erred in law by relying on a public interest certificate. In *Hussain*, the Federal Court dismissed an appeal on that ground by holding that the Security Appeals Division must accept the validity of a public interest certificate without question.¹⁴ Secondly, there is little prospect of citizens seeking judicial review of a public interest certificate directly, because the statutory power to issue those certificates does not list any factors that the Attorney-General must consider when making her decision. In *Traljesic*, the applicant sought judicial review of a public interest certificate on the ground that the Attorney-General took into account an irrelevant consideration, but the Federal Court held that ‘[t]he minister has an unconfined discretion to have regard to what he, as a high officer of the executive, considers is in the public interest’.¹⁵

The Bill would improve this situation by requiring the Directory-General of Security to provide Special Advocates with a range of information that can currently be withheld from the applicant altogether.¹⁶ Special Advocates must also be given a reasonable opportunity to respond to a public interest certificate prohibiting contact with an applicant.¹⁷ In theory this means that Special Advocates will have a greater chance of successfully challenging the Attorney-General’s decision to withhold information from the applicant or exclude the applicant from the proceedings. In practice, however, the limits in seeking judicial review of these certificates indicate that the Attorney-General has, in essence, an unconfined statutory discretion to decide what is in the public interest. In the absence of changes to the Attorney-General’s power to issue public interest certificates, it is unlikely that the Bill will grant

⁸ *ASIO Act 1979* s 38(2)(a).

⁹ *ASIO Act 1979* s 38(2)(b).

¹⁰ *AAT Act 1975* s 39A(8)-(9).

¹¹ Item 19.

¹² Item 13, s 39D(6).

¹³ Item 13, s 39D(6)(a)-(b).

¹⁴ *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241, at [127], [129].

¹⁵ *Traljesic v Attorney-General* (Cth) (2006) 150 FCR 199, at [26].

¹⁶ Item 13, s 39D.

¹⁷ Item 13, s 39D(7)(b).

citizens or non-citizens any greater access to the information on which their security assessments are based.

b. Procedural Fairness

The second obstacle that non-citizens would face in the Security Appeals Division is that their right to procedural fairness is accorded a very limited value in the national security context. Although Senator Hanson-Young has argued that ‘no good policy rationale for continuing to deny non-citizens the right to procedural fairness that is enjoyed by Australian citizens’,¹⁸ the degree of protection for non-citizens has been judicially recognised as especially vulnerable.

Currently, security assessments of non-citizens are subject to a requirement of procedural fairness, which requires that individuals know the case to be met and are given an opportunity to respond to all significant evidence led against them. In *Leghaei*, the Federal Court followed *Kioa v West* in reasoning that the ASIO Act would require express words to remove this right from non-citizens.¹⁹ The problem is not, therefore, that the government may ignore the requirements of procedural fairness when issuing security assessments against non-citizens. The problem is that national security considerations severely diminish these requirements. In *Leghaei*, a prominent Sydney Shiite cleric alleged a denial of procedural fairness because the ASIO officers making the assessment failed to detail any particular grounds as to why he should be considered a security risk. The Federal Court dismissed the appeal, holding that national security considerations effectively reduced this requirement to ‘nothingness’.²⁰ In *Sagar v O’Sullivan* the Federal Court again followed this approach, holding that the right to procedural fairness for non-citizens challenging security assessments was effectively reduced to a ‘bare minimum’.²¹

The decision of the High Court in *M47* provided the catalyst for the current Bill, but that judgment gave no more content to the right of procedural fairness for non-citizens challenging security assessments issued by ASIO. The High Court acknowledged that the requirements of procedural fairness applied to the making of security assessments against non-citizens, but it held that these requirements were satisfied according to the facts of the case.²² The judgment did not challenge the Federal Court’s idea in *Leghaei* and *Sagar v O’Sullivan* that national security considerations could effectively reduce the requirement of procedural fairness for non-citizens to ‘nothingness’ or a ‘bare minimum’.

This contrasts with the UK approach, in which article 6 of the *European Convention on Human Rights* requires in the national security context that individuals be provided with a ‘gist’ or ‘core irreducible minimum’ of information led against their interests.²³ In the absence of similar human rights protection in Australia, and in the absence of substantive procedural protections under the common law, the current Bill does not guarantee that non-

¹⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 10 October 2012, 56.

¹⁹ *Leghaei v Director-General of Security* [2005] FCA 1576, at [77] (*‘Leghaei’*).

²⁰ *Leghaei* [2005] FCA 1576, at [88]. This was later upheld on appeal: *Leghaei v Director-General of Security* [2007] FCAFC 37, at [54].

²¹ *Sagar v O’Sullivan* [2011] FCA 182, at [92].

²² *M47* [2012] HCA 46, at [73], [139]-[144], [244]-[253], [378]-[380], [413]-[415], [491]-[505].

²³ See *Secretary of State for the Home Department v AF* [2009] UKHL 28; *AT v Secretary of State for the Home Department* [2012] EWCA Civ 42; *Secretary of State for the Home Department v BC* [2009] EWHC 2927 (Admin).

citizens are provided with essential information about the case to be met. Nor will it ensure that they are given an opportunity to respond to significant evidence led against them.

As has been noted by overseas courts, the use of Special Advocates cannot cure that core deficiency due to the restrictions upon them communicating with the applicant. The very limited opportunities that the Bill provides in this regard, as discussed in the preceding section, does not overcome this concern. While the approach adopted by the Bill generally is an improvement on the current situation that non-citizens face when seeking to challenge security assessments issued by ASIO, it is going too far to assert that it means that non-citizens will not be effectively ‘left in the dark’ about the case against them.²⁴ Nothing in the Bill is on par with the insistence in other jurisdictions that the applicant be directly informed of the essence of the case against them.

III Establishment of the Independent Reviewer by the Government

On 16 October, after the release of this Bill, the Government announced the appointment of former Federal Court judge the Hon Margaret Stone as an Independent Reviewer for Adverse Security Assessments. The Independent Reviewer will notify refugees if they are eligible for review, and if they apply for review within 60 days of that notice, the Independent Reviewer has a discretion whether to conduct a review or not.

The Independent Reviewer will review the information ASIO itself has used in making its assessment to determine whether the ASA was an appropriate outcome, before providing a recommendation to the Director-General of Security. This recommendation is not binding on ASIO. The Independent Reviewer is also to report her findings to the Attorney-General, Minister for Immigration and Citizenship and the Inspector-General of Intelligence and Security. To the applicant refugee, the Independent Reviewer will pass on ASIO’s declassified summary of reasons for the ASA, and herself provide a declassified explanation of her recommendations, reasons, and the outcome of the Director-General’s consideration of any of her recommendations.

The Independent Reviewer will conduct a regular 12 month periodic review of ASAs regarding refugees eligible for review, including gaining advice from ASIO whether there is any new information, and having ASIO reconsider an ASA where there is new information, and reporting that outcome. After the initial round of applications for review has been cleared, the Government expects the reviewer to complete each application for review within three months.

The creation of the Independent Reviewer office is not necessarily incompatible with the review mechanisms which this Bill seeks to introduce, but the likelihood of complementary operation is far from clear. It is, for example, difficult to conceive how both internal review and the expanded oversight role of the Administrative Appeals Tribunal provided for by the Bill would interact with the task given to the Independent Reviewer as a matter of practice. Additionally, and more substantially, we note the criticisms of the Independent Reviewer office made by Professor Ben Saul (Submission 3). However, we appreciate that the mechanisms favoured by this Bill may have been, at least for the short-term, superseded by this development.

²⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 10 October 2012, 56 (Senator Hanson-Young, citing Lord Diplock in *Mahon v Air New Zealand Ltd* [1984] ACA 808).

Yours sincerely,

Rafe Andrews, Keiran Hardy and Andrew Lynch