Senate Standing Committees on Legal and
Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

14 December 2012

Dear Committee Members

SUBMISSION TO THE COMMITTEE TO EXAMINE THE MIGRATION AND SECURITY LEGISLATION AMENDMENT (REVIEW OF SECURITY ASSESSMENT) BILL 2012

Sri Lanka Justice Forum welcomes the opportunity to offer input to the Inquiry into the Migration and Security Legislation Amendment Bill 2012 ("the Bill"). We commend the Bill's efforts to introduce fairness and transparency into the treatment of those refugees affected by adverse security assessments under Australian law.

Sri Lanka Justice Forum Brisbane is a network of community organisations and interested individuals who work for a just and durable peace in post-war Sri Lanka. Representatives of organisations such as the Catholic Justice and Peace Commission of Brisbane and Pax Christi Queensland also participate in its meetings and activities. Sri Lanka Justice Forum Brisbane was instrumental in forming an asylum seeker and refugee support network called the Brisbane Refugee and Asylum Seeker Support Network (BRASS). In addition, members of our group were involved in consultations conducted by the Expert Panel, which the Government established to make recommendations on Asylum Seeker policy.

We as a group are concerned that the overheated public discourse and politicisation of refugee and asylum seekers policy is extremely damaging. We believe it undermines the status of these refugees and harms their chances for successful settlement to lead a normal life. Additionally, there are over 50 individuals being held in indefinite detention on account of adverse security assessments ("ASA") and these assessments' ramifications under existing legislation. The Australian government can no longer continue to field opinions in this area, nor can they maintain the situation as it is. The March 2012 report handed down by the Joint Select Committee on Australia's Immigration Detention Network has recently exposed the dire situation currently faced by these detainees and has provided the necessary impetus for a resolution to this legal black hole. We believe this Bill is welcome progress towards a solution to the current limbo that leaves refugees in indefinite detention with no right to review.

The recent case of *Plaintiff M47/2012 v Director General of Security & Ors* [2012] HCA 46 highlights the need for the Bill and the importance it will have on refugee asylum seekers, particularly those of Tamil nationality. In the *M47* case the plaintiff, who is a national of Sri Lanka and a Tamil, commenced proceedings challenging the validity of the decision to refuse him a protection visa because he was found to be a security risk by the Australian Security Intelligence Organisation (ASIO). One of the arguments put forward by the plaintiff was that he was denied procedural fairness. A majority of the Court held that procedural fairness was not denied because the plaintiff was given the opportunity to address issues of concern to ASIO regarding his security assessment. However, a majority of the Court also held that the Migration Regulations could not validly prescribe the public interest criterion as a condition for the grant of a protection visa as doing so was inconsistent with the *Migration Act 1958* (Cth).

The outcome of the *M47* case provides a small victory for Tamil people in that it restricts the discretionary power of ASIO and the Minister to refuse to grant protection visas for security reasons. However the case provides little help to the current unfairness faced by refugees that undergo the current ASIO security assessment regime nor does it exclude indefinite detention.

In regards to procedural fairness, the Court held that the plaintiff was not denied this right because he had been alerted to specific allegations during his interview and was given the opportunity to respond. The Court found that there was no obligation on the interviewers to give the plaintiff the opportunity to respond if they were told by the interviewer that they do not believe them.[1] The implication of this finding is that no reason is given refugees in the position of the plaintiff as to why their statements are not believed by the interviewer. The finding of the Court also provides no guidance on whether procedural fairness is denied in cases where refugees are not interviewed at all and their security assessments are based on other sources of information. These two issues raise the need for the Bill to ensure procedural fairness to all Tamil refugees undergoing security assessments.

Another question that was put before the Court was whether the plaintiff's detention was authorised. The Court determined that the plaintiff's detention was authorised because he had not yet received a visa.[2] The question of whether indefinite detention was valid was avoided by the Courts and therefore still remains lawful until addressed by the Courts. This again raises the need for the Bill to ensure that refugees are not detained for long periods.

The decision of the majority in the *M47* case shows the need for the Bill to ensure all (especially Tamil) refugees receive procedural fairness and are not indefinitely detained. The Bill is also warranted to prevent fears that the Commonwealth will respond to the outcome of the case by enforcing harsher character test laws in place of the current and invalid public interest criterion used during security assessments.

Additionally, Attorney-General Nicola Roxon's 3 December media release on the commencement of an 'independent reviewer of adverse security assessments' is a welcome

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[1] *Plaintiff M47/2012 v Director General of Security & Ors* [2012] HCA 46, [253].
[2] *Plaintiff M47/2012 v Director General of Security & Ors* [2012] HCA 46, [177]

sign. The honourable Margaret Stone will fill the role of Independent Reviewer and will provide non-binding recommendations to ASIO after reviewing a security assessment. While external review of ASIO assessments in any sense is encouraging, we believe there are limitations to the scheme that will fall short of protecting the rights of refugees to procedural fairness. In summary, we consider the following factors to constitute such limitations:

- Decisions made by the Reviewer are non-binding and can continue to be rejected by ASIO at its will;
- Intervals of periodic review have been set at 12 months, which is still too long. Detaining refugees for this period of time is arbitrary;
- Unlike the Administrative Appeals Tribunal, the role of Reviewer has not been created under legislation and is therefore not entirely independent of the executive; and
- ASIO can continue to withhold information and reasons from the person affected by the adverse security assessment, thus maintaining the current lack of transparency in internal decision-making. This limitation to disclosure requirements prevents refugees from understanding the case against them and further facilitates their inability to effectively defend themselves.

Therefore, Sri Lanka Justice Forum supports the proposed amendments in the Bill. We acknowledge that the Bill seeks to amend the *Administrative Appeals Tribunal Act 1975*, the *Australian Security Intelligence Organisation Act 1979*, and the *Migration Act 1958* to provide for the review of security assessments for refugees who have received an ASA. We urge the Committee to adopt the following principles as a guide (for more specific details please see the Attachment 1):

1. Comply with the recommendation made by Joint Select Committee on Australia's Immigration Detention Network 2012
2. Show compassion to people in distress
3. Comply with the Universal Declaration of Human Rights (Article 14)
4. Comply with the UN Convention Rights of the Child (Article 37)
5. Comply with the Geneva Refugee Convention
6. Comply with the ACTU Policy (2012) on rights based approach to asylum seeker and refugee policy
7. Avoid long term detention of refugees denied a security clearance
8. Comply with the Human rights policies stated in the ALP National Platform 2011

In light of the above guidelines, we would like to offer the following commentary on the proposed amendments:

Administrative Appeals Tribunal Act 1975

The Bill seeks to amend the *Administrative Appeals Tribunal Act 1975* ("AAT Act") through the creation of the 'Special Advocate' role under section 13 of the Bill. The role is one that will represent the interests of the applicant in matters before the Tribunal where the applicant may not otherwise be present. It will also allow an authorised delegate to view evidence that is withheld from the applicant on account of that information being a national security risk. We agree with Senator Sarah-Hanson Young's reasoning that this will strike a balance in advancing human rights and maintaining Australia's national security.

Many of the amendments regarding the creation of the special advocate role will help the cause of refugees in getting a fair and just assessment of their situation. The Bill will provide some relief to the injustice faced by many refugees in indefinite detention, in particular the Tamil refugees who currently constitute the majority of this group of detainees. Importantly, the role of the special advocate balances the advancement of refugee rights with the preservation of sensitive information. In particular:

1. Sections 1-5 are standard amendments of the *AAT Act* and should be accepted as accommodating measures to s13 of this Bill.

2. Proposed section 39C(3) acknowledges that the special advocate's role is to protect the interests of the applicant when they have not been given the reasons for their adverse security assessment or when they cannot be present at the tribunal hearing. This is vital for procedural fairness and is an important provision.

3. Amendments to s39C(5)(a) and (b) would allow the special advocate to view the reasons for an applicant's ASA and make submissions on their behalf. This amendment would grant applicants access to an avenue of appeal that is not ordinarily available as the reasons for the ASA are often withheld.

4. We support s39C(7) and (8) in regards to the specific qualification of the special advocate. This will ensure that the delegated authority is of a high standard.

5. It is understood that s39C(11) allows for a special advocate to be terminated upon the request of the applicant or if the Tribunal President is satisfied that it is within the interests of justice to do so. This is particularly important for maintaining procedural fairness and should be adopted.

The following amendments under s39D discuss the disclosure of evidence. This represents the crux of this bill, as the law currently disables the applicant from hearing evidence in

certain situations - inevitably hindering their ability to effectively defend themselves and creating an unjust situation.

6. Proposed section 39D(1) of the Act will allow the advocate to obtain the reasons for the adverse security assessment and other information. This is vital in allowing a representative to effectively represent the applicant and to prepare a valid appeal.

7. The insertion of s39D(3) will grant the applicant access to the reasons why they have received an ASA and allows them to discuss the proceedings with the special advocate. This will assist applicants in understanding the reasons behind the decision against them, while maintaining the confidentiality of the documents involved. This strikes a balance between upholding refugee rights and the protection of national security and is vital amendment that we wholly support.

8. We fundamentally agree with the overall notion of the amendments under s39D, however we suggest that proposed sections 39D(6)-(9) be redrafted so that the president of the Tribunal is granted the power to dismiss a certificate issued by the Attorney-General, which deems proposed communication between the special advocate and the applicant "contrary to public interest", if this is found to be outweighed by the interests of justice.

We would also like to point out that the special advocate role has already been implemented in jurisdictions such as the UK, Canada and New Zealand[3]. While there have been mixed results, there is no doubt that the special advocate performs its function to retain national security, showing this is at least a step in the right direction for human rights.

We argue that the main flaw of the role is the limitation to the special advocate's right to communication with the applicant. This particular area needs further consideration in order to ensure a sufficient communication channel between the applicant and the special advocate.

Australian Security Intelligence Organisation Act 1979

9. The proposed amendments to s36 of the *Australian Security Intelligence Organisation Act 1979* ("ASIO Act") extends the application of Part IV of the Act to certain eligible persons who, under this same Part, are not permitted to seek review of their security assessments.

[3] John Ip, 'Human Rights at the Frontier: an International Human Rights Law Perspective on New Zealand's Immigration Legislation: The Adoption of the Special Advocate Procedure in New Zealand's Immigration Bill' (2009) New Zealand Law Review 207.

10. We commend the proposed amendments stipulated in ss17 and 18 of the Bill. The insertion of these provisions will allow those persons who are eligible for a protection visa under the Migration Act, but who fail on character grounds, to access review of their security assessment. Without this right to merits review, legitimate refugees are being held in detention indefinitely as the result of the impasse between our non-refoulement obligations and the restriction against allowing these persons to live in the community. This is a clear violation of our obligations under international law and we believe the proposed amendments will provide some alleviation to this situation.

11. Sections 17 and 18 of the Bill also amend the application of s38 of the ASIO Act so that a person, to whom Part IV of the Act applies, must be notified of the security assessment and their right to review within 14 days after a decision on that assessment is made.

12. The proposed amendment under section 19 of the Bill will prevent the Attorney-General from withholding notice of the assessment – and with that, notice of the person's right to review – regardless of whether the Attorney-General chooses to withhold part or all of the assessment itself due to security reasons. This will ensure that eligible persons are given a fair opportunity to seek a timely review of their assessment.

13. The amendments stipulated in section 21 of the Bill, concerning internal review within ASIO and six month review periods, increases transparency and communication between the Department of Immigration and ASIO. It also ensures that adverse security assessments continue to be assessed at regular intervals and in light of the most current information. This will safeguard against adverse assessments being furnished on account of obsolete security threats and incorrect information.

Migration Act 1958

14. The writers commend the overall notion of sections 23 and 24 of the Bill. Proposed amendments to ss197AB(4)(a) and (b) and 197AD(4)(a) and (b) of the *Migration Act 1958 (Cth)* ("Migration Act"), will compel the Minister of Immigration to consider the viability of community processing on a case by case basis. We reiterate the importance of allowing a detainee to live within the Australian community, where possible, to avoid prolonged detention after determining refugee status. In doing so, we believe this will assist in deterring refugees from engaging in episodes of protest such as hunger strikes and preventing self-harm and suicide attempts that so often arise as a direct result of unreasonable, indefinite detention.

15. Despite our above point, we are concerned that the ambiguity of the phrase in the aforementioned amendments, 'threat to security (within the meaning of that Act)', that is, within the ASIO Act, will leave too much room for competing interpretation and, ipso facto, inconsistent decision-making. There is no set definition for 'threat to security' under s4 of the ASIO Act nor is there any direction as to how this term can be recognised in practice. Rather, we are directed to the definition of 'security', which offers the following list of threats:
    (i) Espionage;
    (ii) Sabotage;
    (iii) Politically motivated violence;
    (iv) Promotion of communal violence;
    (v) Attacks on Australia's defence system; and
    (vi) Acts of foreign interference.

16. This is particularly concerning to the Tamil community, as ASIO has clearly considered – and continues to consider – a few Sri Lankan Tamils lived in North East Sri Lanka (pre 2009) to be a threat to Australia's national security. Justice Coghlan stated, in *R v Vinayagamoorthy & Ors*[4], the LTTE (Liberation Tigers of Tamil Eelam, the rebel group) "has never actually been declared a terrorist organisation in Australia" and yet it continues to be treated as one through the issuance of Adverse Security Assessments to its members. It is widely known that the majority of detainees currently held in indefinite detention after being issued an ASA are Tamil and yet it is impossible to know what information ASIO has relied on to come to this decision. ASIO is clearly relying on intelligence that suggests the LTTE is a national security threat but we are not granted access to the information that indicates this. As such, the aforementioned phrase leaves the power and decision-making in the hands of ASIO 'behind closed doors'. While the Minister is expected to have regard to the threat to security a person poses, he is not afforded any practical direction as to how or why an applicant represents a threat to security within ASIO's "definition". We therefore recommend clarification of this term 'threat to security' in order to increase transparency and uniformity in decision-making.

17. We commend the amendment in section 25 of the Bill, which requires the Minister to review the original decision pertaining to a residence determination or protection visa for a refugee in the event a security assessment is altered. This additional avenue of review is important in rectifying the current lack of transparency and accountability within ASIO and therefore encourages an alternative decision maker to monitor the changes to the assessment and have the power to restore balance

[4] *R v Vinayagamoorthy & Ors* [2010] VSC 148 (31 March 2010), para 9.

between the human rights and personal interests of the person affected by the ASA and ASIO's interests in protecting our national security.

While we recognise the utmost importance of nation's security, the applicable approach under current legislation damages the prospect of balanced decision-making and distorts public perceptions about the most vulnerable members of our community. As the Senator has pointed out, the current system is excessively restrictive and unfair. It fails to balance the competing interests of national security and human rights and leads to unaccountability and lack of transparency in ASIO decision-making. It discriminates against a group of people on the basis of their background – predominantly the Sri Lankan Tamils – and prevents Australia from acknowledging and upholding their obligations and responsibilities under international law.

Hence, we support Senator Hanson-Young's Bill, which we agree will introduce a suite of reforms that will bring fairness into the law without jeopardising the safety of the Australian community and security.

As part of this Bill we recommend the consideration of the above stated eight principles and the specific recommendations outlined in Attachment 1.

Yours sincerely

Sri Lanka Justice Forum

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Attachment 1:

Specific Policy adopted by peak bodies relevant to Adverse Security Assessment (ASA)

1. Australian Medical Association 2012

Proposal made by Australian Medical Association President Dr Steve Hambleton during his 22 August 2012 speech to the AMA Parliamentary Dinner, namely:

"the urgent establishment of a truly independent expert medical Panel to oversee the quality of health services available to all immigration detainees in all locations – onshore and offshore, the Panel to report directly to the Parliament, the Prime Minister, and Ministers."

2. ALP National Platform 2011

Labor will require the National Security Legislation Monitor to advise on establishing a mechanism for independent review of the adverse security assessments that ensures procedural fairness while recognising that processes may be required to protect intelligence sources and methodology.

A commitment to amending the ASIO Act to include people found to be refugees as people who can apply under existing provisions for review to the Administrative Appeals Tribunal.

A commitment to explore options other than indefinite detention to deal with refugees with adverse security assessments.

3. ACTU Congress 2012

A Rights Based Approach to Asylum Seeker and Refugee Policy

Congress notes that current procedures surrounding ASIO security assessments are not transparent and can lead to indefinite detention, despite individuals having been granted refugee status. Congress calls for such assessments to be made reviewable.

4. The Joint Select Committee on Australia's Immigration Detention Network 2012

Recommendation 27

6.151 The Committee recommends that the Australian Government and the Australian Security Intelligence Organisation establish and implement periodic, internal reviews of adverse Australian Security Intelligence Organisation refugee security assessments commencing as soon as possible.

Recommendation 28

6.152 The Committee recommends that the Australian Security Intelligence Organisation Act be amended to allow the Security Appeals Division of the Administrative Appeals Tribunal to review the Australian Security Intelligence Organisation security assessments of refugees and asylum seekers.