



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: JD:HumanRights:VK:719363

9 May 2013

The Hon. Mark Dreyfus QC, MP
Attorney-General
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600

By Email: mark.dreyfus.mp@aph.gov.au

Dear Attorney-General,

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

I write to you on behalf of the Human Rights Committee of the Law Society of NSW ("Committee"), which has the responsibility to consider and monitor Australia's obligations under international law in respect of human rights; to consider reform proposals and draft legislation with respect to issues of human rights; and to advise the Law Society on any proposed changes.

The Committee notes that the *Australian Security Intelligence Organisation Act 1979* (Cth) ("ASIO Act") currently denies persons who are not Australian citizens, holders of permanent visas, special category visas and special purpose visas the right to be provided with a statement of the grounds for the assessment made against them and denies a right of merits review to the Administrative Appeals Tribunal ("AAT")¹. In the Committee's view, this denial of basic procedural fairness is neither necessary in order to protect national security, nor proportionate to such an objective.

In the case of refugees against whom ASIO has made an adverse security assessment ("affected persons"), this has resulted in a situation of indefinite detention. The Committee's view is that while indefinite detention has not been found impermissible under Australian law, it may fall foul of Australia's obligations under Article 9 of the *International Covenant on Civil and Political Rights* in the sense that it will often become arbitrary².

For these reasons, the Committee writes to you to express its support for Recommendations 1 and 2 of the report of the Senate Legal and Constitutional Affairs Committee on its inquiry into the Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012 (the "Report").

¹ See sections 36, 37 and 54 of the ASIO Act.

² Arbitrariness has been defined as incorporating 'elements of injustice, unpredictability, unreasonableness, capriciousness and disproportionality, as well as the Anglo-American principles of due process of law'. See Manfred Lowak, *UN Covenant of Civil and Political Rights CCPR Commentary*, 2005, page 172.

The Committee respectfully urges the Government to implement both recommendations, extracted from the Report below:

Recommendation 1

3.43 The committee recommends that the Australian Government enshrine in stand-alone legislation the role, responsibilities and functions of the Independent Reviewer of Adverse Security Assessments. Such legislation should specifically acknowledge and maintain the independence of that position.

Recommendation 2

3.44 The committee recommends that the Australian Government amend the *Australian Security Intelligence Organisation Act 1979* to provide refugees who have received an adverse security assessment from the Australian Security Intelligence Organisation with a right to merits review of that assessment in the Security Appeals Division of the Administrative Appeals Tribunal. In developing this legislation, the committee recommends that the Australian Government give consideration to the concerns raised in evidence to this inquiry as to how best to balance the applicant's right to a fair hearing with maintaining national security.

In addition to implementing recommendations 1 and 2 of the Report, the Committee respectfully urges the Government to introduce regular internal reviews of the situation of affected persons, as an adverse security assessment can change in time and in light of new information. Further, the Committee submits that affected persons should be released into the community in appropriate cases and if necessary, with appropriate monitoring arrangements in place. In regard to this point, the Committee notes that the ASIO Act already provides an array of functions for monitoring those deemed to be a risk to national security, such as the use of tracking devices³ and the confiscation of passports⁴.

In the Committee's view, these measures would greatly reduce the risk of indefinite arbitrary detention and breaches of Australia's international obligations.

The Committee also submits that the Government should amend the ASIO Act to provide for the requirement that an affected person, prior to an assessment being made, and where appropriate, be given clear particulars (either orally or in writing) of any information that would be the reason, or part of the reason, for making an adverse security assessment against them. It is the view of the Committee that an affected person should be given a real and meaningful opportunity to respond to information on which their assessment will turn. This would accord with the ordinary principles of natural justice and in particular the *audi alteram partem* rule.

There are circumstances, of course, where the disclosure of particular information may not be appropriate as it may compromise national security⁵. The Courts, while acknowledging that the ASIO Act does not exclude requirements of procedural fairness, have considered that a decision against disclosure in the interest of national security may "reduce the content of procedural fairness, in practical terms, 'to nothingness'"⁶. More recently, the High Court has commented in *obiter*, that procedural fairness may well apply in the case of adverse security assessments, though the content of procedural

³ Section 26B of the ASIO Act.

⁴ Section 24 of the ASIO Act, Division 3--Special powers relating to terrorism offences.

⁵ As envisaged by the ASIO Act.

⁶ See *Leghaei v Director-General of Security* [2007] FCAFC 37 at [30] and *Leghaei v Director-General of Security* [2005] FCA 1576.

fairness will depend upon the precise context and the nature of rights and interests affected.⁷ In many cases, it will be open to the Director-General, in giving genuine consideration to issues of disclosure and national security, to reveal the general nature of information or the substance of the allegations and what conclusions may be drawn from them in a manner that leads to no prejudice to national security but puts an affected person on notice as to the case against them.

The Committee, mindful that some information in its entirety cannot for reasons of national security be disclosed, continues to support the creation of the new role of Special Advocate before the AAT, as proposed by the Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012 (the "Bill"). The Committee notes that the Bill intends for the Special Advocate to have access to all evidence and material relevant in making the security assessment, in order for the Special Advocate to make submissions and provide assistance to the AAT in forming an independent assessment. While the ability of the Special Advocate to conduct its role is somewhat diminished by restrictions imposed on seeking instructions after gaining access to the relevant material,⁸ the Committee nevertheless welcomes the role as of great assistance to the person affected and to the AAT.

The Committee is also concerned that ASIO may have made some of the negative security assessments without conducting interviews. The Committee is concerned with knowledge that in some matters legal representatives have been denied the opportunity to attend interviews to provide support and representation; having been advised that an interview may not proceed should the representative insist on being present. It is the view of the Committee that all affected people should be invited to an interview to give evidence and present arguments in defence of allegations made against them and be given the opportunity to have a legal representative present. This is a basic right in circumstances where procedural fairness may, in practical terms, have already been reduced to 'nothingness'.

The Committee thanks you for your attention to its submissions. If your office has any questions please contact Vicky Kuek, policy lawyer for the Committee, on (02) 9926 0354 or victoria.kuek@lawsociety.com.au.

Yours sincerely,



John Dobson
President

⁷ See French CJ, in *Plaintiff M4&-2012 v Director General of Security* [2012] HCA 46 (5 October 2012), at 73; Heydon J, at 244 – 253.

⁸ For a more detailed analysis of the inherent limitations of the role of the Special Advocate as envisaged by the Bill the Committee refers to the views expressed by the Law Council of Australia in its submission to the inquiry on the Bill at [73] – [82].