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Senator Trish Crossin
Chair, Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600

Dear Senator Crossin,

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

1. Australian Lawyers for Human Rights (ALHR) thanks the Senate Legal and Constitutional Affairs Committee for the opportunity to comment on the Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012.

2. ALHR was established in 1993. ALHR is a network of Australian law students and lawyers active in practising and promoting awareness of international human rights. ALHR has a national membership of almost 2500 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

3. In summary, ALHR supports the *Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012*. The Bill addresses a clear violation of the fundamental rights of refugees who are subject to ASIO adverse security assessments (ASAs). The Bill introduces a mechanism for the review of ASAs that is similar to that followed by the Special Immigration Appeals Commission Tribunal (SIAC) in the UK for non-citizens who face deportation on national security grounds. There are, however,

a few points where we recommend that some changes be made.

4. This submission briefly outlines the violations of the rights of refugees subject to ASAs in the law as it stands, and discusses how the Bill addresses these violations. Since the Bill was sent to the Committee for consideration, there have been two further developments. First, in the High Court decision of *Plaintiff M47/2012 v Director General of Security* [2012] HCA 46, the High Court held that an ASA could not, of itself, be a reason to refuse to grant or to cancel a protection visa. Second, the government has proposed an alternative form of review of ASAs. The submission explains how the High Court decision affects the Bill. The submission also compares the review procedure in the Bill with the government's proposal.

A. The impact of Adverse Assessments on refugees

5. Adverse Security Assessments are a particular concern for asylum seekers and refugees (affected persons) as they can lead to refusal to grant a protection visa or to the cancellation of a protection visa that has previously been granted. ASAs therefore have a direct effect on asylum seekers' and refugees' prospects for on-going protection from Australia, regardless of whether the applicant in question satisfies the definition of a refugee in Article 1(A) of the Refugee Convention.

6. Under current law, affected persons have no mechanism for having an ASA administratively reviewed. In practical terms, they also have little prospect of having it successfully reviewed by the courts since the Director-General of ASIO is not required to provide reasons for the assessment.

7. Prior to *Plaintiff M47*, under public interest criterion 4002, an ASA could be used on its own as the basis for refusing to grant a protection visa. Asylum seekers subject to an ASA also remained in immigration detention until one of three events occurred:

   (a) ASIO altered its security assessment;

   (b) the affected person was removed to a third country, or

   (c) the affected person was returned to their country of origin.

8. For different reasons, none of these events is likely to occur. As to 7(a), it is very rare, though not unprecedented, for ASIO to alter an ASA. The Australian Human Rights Commission recently found that 10 Sri Lankan refugees were arbitrarily detained in closed immigration detention for 5 months. The Commission held in this case that the department failed to consider whether these refugees could have been 'placed in less restrictive forms of detention'.[1] One example of ASIO altering an ASA was the case of Mohammed Faisal who, despite being recognised as a refugee, was refused a protection visa and detained on Nauru for five years as a result of receiving an ASA. Faisal's ASA was removed only after he had been transferred to a Brisbane psychiatric clinic suffering from mental health issues.[2]

9. As to 7(b), refugees can only be removed to a third country in compliance with Article

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[1] Sri Lankan Refugees v Commonwealth of Australia [2012] AusHRC 56, http://www.humanrights.gov.au/legal/humanrightsreports/AusHRC56.html

[2] See Amnesty International report, http://www.amnesty.org.au/refugees/comments/2250/.

32 of the Refugee Convention. Article 32 states that expulsion to a third country can only occur 'on grounds of national security or public order'. Even if a person is held to satisfy these grounds for removal, the government still has to find a third country willing to accept the affected person. The affected person's ASA makes it unlikely that a third country will voluntarily take them in.

10. As to7(c), the principle of non-refoulement in Article 33 means that the affected person cannot be returned to the country from which they fled persecution unless they have been 'convicted by a final judgment of a particularly serious crime' or they 'constitute a danger to the community'. Under the Migration Act, an ASA is not, by itself, a sufficient ground to return an affected person to the country from which they fled persecution.[3]

11. As a result, the term of detention of asylum seekers and recognised refugees subject to ASAs is long and indefinite and clearly breaches several basic human rights of affected persons.

12. It is our view that:

    (a) the denial of access to representatives at the ASIO interview;

    (b) the denial of access to the information on which ASIO bases its security assessments;

    (c) the denial of access to avenues of appeal; and

    (d) the consequent indefinite detention of refugees subject to an ASA,

    amount to breaches of the rights contained in Articles 9, 10 and 14 of the ICCPR and of the rights contained in Article 31 of the Refugee Convention.

13. Article 10 of the ICCPR provides for the right to be treated with humanity and with respect for the inherent dignity of the human person and, in our view, this is the proper starting point for this inquiry.

14. Article 14 of the ICCPR provides for the equality of all persons before the courts and tribunals. In our view, the current treatment of refugees subject to ASAs in relation to the denial of access to representatives and information on which ASIO bases its adverse assessments and denial of access to appeal fails the minimum guarantees set out in Articles 14(1), 14(3) and 14(5) of the ICCPR. It would accord with the ordinary principles of natural justice to allow a person a real and meaningful opportunity to answer the allegations against him or her.

15. The indefinite detention of refugees subject to ASAs violates the individual's right to liberty provided for by Article 9(1) of the ICCPR and the right against the arbitrary deprivation of liberty. Article 9 of the ICCPR also provides for the right of anyone deprived of their liberty to take proceedings before a court, "in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." (Article 9(4) of the ICCPR). It is our submission that the

[3] *Plaintiff M47/2012 v Director General of Security* [2012] HCA 46, [20].

current treatment of refugees subject to ASAs amounts to a breach of these provisions.

16. The UNHCR Guidelines provide that there should be a presumption against detention, and that "detention should only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose." Further, McHugh J., in *Re Woolley*[4], stated that "periodic judicial review of the need for detention, some kind of defined period of detention and the absence of less restrictive means of achieving the purpose served by detention of unlawful non-citizens" may serve to avoid breaches of the Refugee Convention, the ICCPR and international law.

17. The Refugee Convention explicitly prohibits the imposition of penalties based on the fact of unauthorised entry by an asylum seeker (Article 31(1) of the Refugee Convention). It also prohibits the undue restriction of movement other than those restrictions which are necessary (Article 31(2) of the Refugee Convention). Restrictions should be applied only until the applicant's status in the country is regularised or the applicant obtains admission into another country. We submit that the current treatment of refugees subject to an ASA violates Article 31 of the Refugee Convention by indefinitely detaining this group of people without the option of having the ASA administratively or judicially reviewed.

B. How the Bill changes the law

18. The Bill includes amendments to the *ASIO Act 1979*, the *AAT Act 1975* and the *Migration Act 1958* to add various forms of review of ASAs that currently do not exist under law for refugees in immigration detention. First, the Bill provides for review of the ASAs of 'eligible protection visa persons' in the Administrative Appeals Tribunal (AAT). This provision means that ASAs of refugees are subject to the same administrative scrutiny that applies to citizens and permanent residents. Unless the ASA is classified, this means that the affected person will have access to the basis for the decision, and will be able to present new material to the AAT and advance reasons why the ASA should be changed. Under the Bill, the AAT has jurisdiction to engage in a full merits review of the decision of the Director-General of ASIO to make an ASA.

19. The Bill recognises that there will be occasions when the ASA will be classified, in which case the reasons for the ASA will not be available to an affected person or their legal representatives. In this case, the Bill provides for the appointment of a 'Special Advocate' to make submissions on behalf of the affected person.

20. The refusal of access to a classified ASA, by the asylum seeker *and their lawyer*, is contrary to the principle of open and public justice which is a fundamental principle of the common law.[5] It is also contrary to both international human rights law and other examples of Australian legal practice.

21. ALHR accepts that, theoretically, there may be times where parts of an ASA may contain information which can legitimately be withheld from an asylum seeker because of broader concerns about national security or policing. However, given that Australia

[4] 225 CLR 1 at [114]
[5] See, eg, *Al Rawi and others v The Security Service and others* [2011] UKSC 34, [10].

needs to ensure a 'fair...competent, independent and impartial' process,[6] ALHR considers there would be problems if information is withheld from even the person's lawyer. We note Australia's legal system has been able to accommodate various situations where a party is not provided with all the information but their advisers or the proceedings still enable sufficient disclosure for a credible process to continue. This can occur either through:

(a) masking certain identities or information,[7] or

(b) withholding information from the applicant but allowing access by their lawyers (on conditions as to use and disclosure)[8] to ensure the applicant is able to obtain informed and independent advice.

Both of these alternatives should be considered before removing information from persons subject to an ASA and their lawyers and using Special Advocates.

22. The use of Special Advocates in the UK is instructive for Australia. The Joint Committee on Human Rights in the UK reported on the use of Special Advocates in that jurisdiction after 5 years of operation, and concluded that:

> This is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against the basic notions of fair play as the lay public would understand them.[9]

In light of these concerns, it is of fundamental importance that the use of Special Advocates only occurs in the context in which the right to a fair hearing is guaranteed. In the absence of overarching rights protections as found in the European Convention on Human Rights, or the UK Human Rights Act, the Bill should itself specify the framework of procedural rights within which the use of a Special Advocate is permitted.

23. In s 39C(3)(b), the Bill states that the special advocate is not to be taken to be 'a representative of the applicant for the purposes of the Act'. In our submission, this qualification on the role of the special advocate is unnecessary and inconsistent with the role of the Special Advocate. Although the Special Advocate is not in a lawyer/client relationship with the affected person, the whole point of the Special Advocate is to represent the affected person when that person has no means of participating in the proceedings. The distinction that the legislation is trying to draw is better drawn in the Special Immigration Appeals Commission Act 1997 (UK), which states that the Special Advocate is appointed to 'represent the interests of the appellant' (s 6(1)) but is not 'responsible to the person whose interests he (sic) is appointed to represent' (s 6(4)).

24. In s 39C(11)(b), the Bill states that, if affected persons request that the appointment of a

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[6] ICCPR art 14(1) requires 'In the determination of ...[a person's] rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'. These rights apply to all persons in Australia including asylum-seekers: ICCPR art 2(1) and Human Rights Committee, *General Comment 31*, UN doc A/59/40 (2004) 175 at [10].

[7] eg. see discussion in *R v. Kwok* [2005] NSWCCA 245, [16]-[17] per Hodgson JA (Howie & Rothman JJ agreeing).

[8] eg. in native title proceedings: *Clarrie Smith v Western Australia* [2000] FCA 526, order 2 and [17] per Madgwick J.

[9] Joint Committee on Human Rights, HL Paper 157, HC 394, (published on 30 July 2007), [210] as reported in *Al Rawi and others v The Security Service and others* [2011] UKSC 34, [37].

special advocate be terminated, they are not entitled to the appointment of a second special advocate. In our submission this limitation is unnecessarily restrictive. It would seem reasonable for the applicant to have at least one opportunity to object to the appointment of a Special Advocate without undermining the integrity of the review process. Allowing an opportunity to object (which is unlikely to be exercised in any case) increases the perception that the Special Advocate is appointed to act in the affected person's interests.

25. The Bill requires the Director-General of ASIO to conduct internal reviews of ASAs. Reviews must be conducted within 6 months (proposed amendment to ASIO Act s 50(2)). The Director-General can affirm the assessment, vary it or set it aside and make a new assessment in its place (proposed s 50(5)). However, the Bill does not require the conduct of further reviews after this time. It is of critical importance that ASAs are regularly reviewed, as the basis of an assessment may change over time, and because the consequences of being subject to an ASA have such a detrimental impact on an affected person's rights.

26. The Bill proposes adding a new s 197AB (4) to the Migration Act 1958, to require the Minister to review a decision not to grant, or to cancel, a protection visa on security grounds in cases in which an ASA has been altered by a decision of the AAT under s 43 of the AAT Act 1975 or by a review of the Director-General under s 50(6) of the ASIO Act. This is a necessary consequential requirement on the Minister to ensure that an ASA that has been varied or removed does not continue to block an affected person's application for a protection visa.

27. Finally, the Bill adds a provision to the Migration Act that requires that the Minister consider whether, in making a residence determination under s197AB of the Act, any security concerns surrounding a person who has received an ASA can be addressed. This provision is an important addition to the Act as it provides an avenue for affected persons to be removed from immigration detention. Although the person is still in a form of residential detention, this is far preferable to indefinite detention in an Immigration Detention Centre. The importance of this avenue out of immigration detention was highlighted by the decision in Plaintiff M47 which confirmed that the indefinite detention of a refugee who has received an ASA is legal under the Migration Act.[10]

C. A comparison between the Bill and the Government's proposed Independent Review process for ASAs.

28. Under the Government's Independent Review Function announced on 16 October, a former Federal Court Judge has been appointed to review ASAs of refugees in immigration detention. The Independent Reviewer will review the materials used by the Director-General of ASIO in making the assessment and there is provision for affected persons to make submissions to the Independent Reviewer. The Reviewer writes an opinion for the Director-General, including recommendations for varying an ASA where appropriate. The Director-General is obliged to consider, but not to follow the recommendations of the Independent Reviewer. In addition to the initial review of

[10] Plaintiff M47/2012 v Director General of Security *[2012] HCA 46, [20].*

ASAs, the Independent Reviewer conducts annual reviews of all ASAs.

29. Although the Independent Reviewer provides a new layer of scrutiny to the making of ASAs, it is a much more limited form of review than that provided by the AAT in the Bill. A recommendation of the Independent Reviewer cannot vary or set aside the original assessment. The Independent Review is an 'in-house' review. As such, there is a risk that the Independent Review process will be used simply to add credibility to ASIO's assessment process while adding little of substance to the currently flawed mechanism of assessment in terms of improved processes or protection of rights. Although the use of a Federal Court judge as the Independent Reviewer lends a level of independence to the process, the Review process itself does not have the benefit of the procedural safeguards of judicial or tribunal proceedings, including submissions from both sides in an adversarial hearing, and the application of rules of evidence and the protection of the normal procedural rights of parties.

30. Although the Independent Reviewer can receive submissions from the affected person, the Independent Reviewer does not represent the affected person's interests as does the affected person's own legal representatives or a Special Advocate in the case of classified ASAs.

31. On the other hand, the role of the Independent Reviewer in reviewing ASAs is superior to periodic reviews of ASAs by the Director-General as required in the Bill.

    (a) The review is conducted by a person with at least some independence from ASIO;

    (b) The reviews are conducted annually, whereas under the Bill there is only a single review within 6 months.

32. In our submission, the Bill should be altered to replace the review role of the Director-General of ASIO with the Government's Independent Reviewer function.

33. If you would like to discuss any aspect of this submission, please feel free to contact me.

Best regards,

Stephen Keim SC
President, Australian Lawyers for Human Rights