



## Refugee Council of Australia

19 January 2012

The Hon. Nicola Roxon MP  
Attorney-General

Dear Ms Roxon,

Congratulations on your recent appointment as Attorney-General of Australia.

We wish to raise with you the very urgent matter of the human rights of refugees issued with adverse security assessments by the Australian Security and Intelligence Organisation (ASIO).

There are currently over 50 people in immigration detention in Australia who have been found to be refugees but have received adverse security assessments from ASIO. These are people who the Minister for Immigration accepts are entitled to our protection under the Refugee Convention, but they face the prospect of remaining in detention for life because of adverse ASIO assessments. Many people issued with adverse security assessments have been detained for a number of years now and are suffering acute mental health problems. The number of people who have received adverse ASIO assessments – including families with young children – has increased dramatically in the past 24 months.

Refugees who are adversely assessed by ASIO have no right to know of or respond to any evidence or allegations taken into account against them. They have no right to legal representation if interviewed by ASIO. They have no entitlement to administrative review of these decisions because they are not citizens or permanent residents of Australia, and judicial review of such decisions is not useful, as courts will not order production of any material upon which the decisions are based.

The considerations which guide the process of adversely assessing a person are not found in the ASIO Act: they are found in regulations made under section 37 of the ASIO Act, but those regulations are not publicly available. Accordingly, adverse assessments are made by reference to secret evidence applied to secret criteria, and by this means, a person's life and mental health can be irrevocably destroyed.

In evidence given to the Joint Select Committee on Australia's Immigration Detention Network on 22 November 2011, Mr David Irvine, Director General of ASIO, stated (p.29) that review of adverse security decisions was a matter for government, and if government introduced a review framework, ASIO would work within it. He went on to outline some concerns he had with a potential review mechanism.<sup>1</sup>

Mr Irvine has been asked questions on this very issue several times now before Parliamentary Inquiries, Committees and Senate Estimates over the past 12 months. He would be aware of

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<sup>1</sup> See the transcript at <http://www.aph.gov.au/hansard/joint/committee/461.pdf>.

adverse assessment review models that exist in comparative jurisdictions such as New Zealand, Canada and the UK. His repeated intransigence to engage meaningfully with the legitimate and pressing issues concerning the review of adverse assessments is deeply frustrating, and highlights the immediate need for an in-depth, impartial reform process directed solely at this issue. As the head of ASIO, Mr Irvine is in a unique position to put before Parliament useful evidence of the various models of review.

We note that in *A v Secretary of State*,<sup>2</sup> the House of Lords struck down a law which provided for indefinite detention of refugees who were suspected of being terrorists and said, “The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.”<sup>3</sup>

It is worth noting that a person may be adversely assessed by ASIO on grounds far less serious than being a suspected terrorist. For example, we are aware of one case where a person who had been held on Nauru for five years was adversely assessed and was denied a visa; he had a mental breakdown and was then favourably assessed and given a visa. Clearly he could not have been suspected of anything too serious, or he would not have been reassessed. Presumably, if he had not had a mental breakdown, he would have suffered a fate which the House of Lords thought unacceptable even for suspected terrorists.

It is fundamental to our democratic system that a person should not face incarceration for the term of his/her natural life without being allowed to know why, and without the ability to challenge the factual basis and discretionary considerations which are said to support it. The concept of a right to a fair hearing is enshrined in Article 10 of the Universal Declaration of Human Rights and in Article 14 of the International Covenant on Civil and Political Rights – Australia is party to both Conventions. The Labor Government’s introduction of the *Human Rights (Parliamentary Scrutiny) Act 2011*, designed to examine Australia’s adherence to international human rights obligations, demonstrates its commitment to upholding human rights. The lack of any meaningful right of review of adverse ASIO assessments, however, breaches our international treaty obligations and seriously undermines the Government’s own efforts to enhance the protection and promotion of human rights in Australia.

We accept that the requirements of security will sometimes make it impossible to tell the affected person the details which result in an adverse assessment. However, it is difficult to see why that person’s lawyers or an independently appointed advocate should also be denied access to the material which is said to support such drastic powers.

In relation to the current procedures related to final security assessments, we urge you to:

- Ensure that refugees are advised of the reasons for their adverse security assessments in a meaningful way in order to have an opportunity to challenge them;
- Implement legislative change to ensure adverse ASIO security assessments can be meaningfully challenged;
- Implement a review of the grounds upon which ASIO are issuing people with adverse security assessments;
- Review the criteria for adverse assessments and ensure that those criteria are publicly available; and
- Promote alternatives to prolonged and indefinite detention.

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<sup>2</sup> [2004] UKHL 56. *A (FC) and others (FC) v. Secretary of State for the Home Department; X (FC) and another (FC) v. Secretary of State for the Home Department*, [2004] UKHL 56, United Kingdom: House of Lords (Judicial Committee), 16 December 2004, available at <http://www.unhcr.org/refworld/docid/42ef723c4.html>.

<sup>3</sup> per Lord Hoffman at para 97.

To pursue these opportunities, a number of options have been explored and proposed as part of several Parliamentary Inquiries and Committees.<sup>4</sup> These include the establishment of a Special Advocate to view assessment material and ensure adequate safeguards to the refugee, as well as other forms of right of review afforded to refugees given an adverse security finding. The precedent of releasing into the community people who have been given an adverse security assessment was also canvassed in these committees. Consideration of these precedents is a priority, as the vulnerable refugees left in indefinite detention are suffering dire health and psychological consequences from this prolonged incarceration.

We commend your fellow Labor MP Mr Daryl Melham's call for reform on this issue. As a member of the Parliamentary Joint Committee on Intelligence and Security, as well as the chair of the Joint Select Committee on Australia's Immigration Detention Network, Mr Melham speaks from a position of well-informed authority. His measured response and recognition of the urgency of this matter are both welcome.

This letter was developed in consultation and with support from some of Australia's most prominent legal advocates, all of whom are deeply troubled by the violation of human rights for these refugees. We would be happy to meet with you to discuss this issue in more detail and to pursue alternatives to the unsustainable outcomes of the current security procedures.

Yours faithfully,

A handwritten signature in black ink that reads "Paul Power". The signature is written in a cursive, flowing style.

Paul Power  
Chief Executive Officer

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<sup>4</sup> For instance, the Joint Select Committee on Australia's Immigration Detention Network and the Joint Committee on Intelligence and Security, both conducted in 2011.