



An Open Letter to the Attorney General, the Hon Nicola Roxon

The Hon Nicola Roxon MP
Attorney General

Dear Minister

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 the Australian Security and Intelligence Organisation (ASIO). These are people who the Minister for Immigration accepts are entitled to our protection, but they face the prospect of remaining in detention for life because of the ASIO assessments. The number of people who have received adverse ASIO assessments has increased dramatically in recent years.

Refugees who are adversely assessed by ASIO are not allowed to know the evidence or the reasoning which underpin the assessment. They have no right to know of or respond to any evidence or allegations taken into account against them. They have no practical way of getting an administrative review of these decisions, and judicial review of the decision is practically unavailable as courts will not order production of any material upon which the decisions are based.

A person issued with an adverse security assessment by ASIO will be refused a visa and therefore face being detained indefinitely in immigration detention in Australia. Many people issued with adverse security assessments have been detained for a number of years in Australian detention facilities and are suffering acute mental health problems. Recently, lawyers for a 17 year old child issued court proceedings to have him removed from detention because his mental condition had deteriorated so far that he had made repeated suicide attempts. On the same day, ASIO assessed the child as a security risk. He remains in detention.

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, but those regulations are not publicly available. They are not found in the *Australian Security Intelligence Organisation Regulations 1980*. ASIO regards them as secret. Accordingly, adverse assessments are made by reference to secret criteria applied to secret evidence and by this means a person's life and mental health can be destroyed.

NSW Council for Civil Liberties Inc

Postal address: PO BOX A1386 SYDNEY SOUTH NSW 1235
Office address: suite 203, 105 Pitt Street SYDNEY NSW 2000
Phone: 02 8090 2952 Fax: 02 8580 4633
Email: office@nswccl.org.au Website: www.nswccl.org.au

Victorian Council for Civil Liberties Inc

Postal address: GPO Box 3161 Melbourne, Victoria 3001
Phone 03 9670 6422
Email info@libertyvictoria.org.au Website:
<http://www.libertyvictoria.org/>



In evidence given to the Joint Parliamentary Committee on Immigration Detention on 22 November 2011 Mr David Irvine, Director General of ASIO, gave evidence that indicated he was strongly opposed to allowing people affected by an adverse assessment a right of review. This evidence raises serious questions about Mr Irvine's suitability as head of our national security agency given that he appears to hold opinions which are not consistent with those of a pluralist democracy. In evidence given to the committee, Mr Irvine raised abstract security concerns should people given an adverse assessment be entitled to a review of the assessment. We believe that independent and rigorous review of the actions of administrators is not a threat to a democracy as he seems to believe – it makes it stronger.

We note that in *A v Secretary of State*¹ 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."² A person can be adversely assessed if ASIO thinks such an assessment is 'consistent with the requirements of security'. 'Security' is very broadly defined in the ASIO Act and is concerned not only with Australia's security but also that of other countries. It is worth noting that a person may be adversely assessed by ASIO on grounds far less serious than being a suspected terrorist. 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 then had a mental breakdown and was later favourably assessed and given a visa. Clearly he could not have been suspected of anything serious or he would not have been reassessed. Presumably, if he had not had a mental breakdown, he may 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 indefinite detention without being allowed to know why, and without the ability to challenge the factual basis and discretionary considerations which are said to support it. 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. It is difficult to see why that person's lawyers should also be denied access to the material which is said to support such drastic powers. It is alarming that Mr Irvine appears to see this as a problem.

We urge you to:

- 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.

¹ [2004] UKHL 56

² per Lord Hoffman at para 97



New South Wales
Council for
Civil Liberties



This letter was prepared with the assistance of Bruce Haig and Julian Burnside AO QC.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Stephen Blanks'.

for

Stephen Blanks

Secretary

NSW Council for Civil Liberties

A handwritten signature in black ink, appearing to read 'Spencer Zifcak'.

for

Professor Spencer Zifcak

President Liberty Victoria

18th January 2012