Submission No 54

# Inquiry into potential reforms of National Security Legislation

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INQUIRY INTO POTENTIAL REFORMS OF NATIONAL SECURITY LEGISLATION

SUBMISSION

J.W.K. Burnside AO QC

I make this submission on a limited point only, but that fact should not be understood as meaning that I am satisfied with the rest of the security legislation. However I am in hospital as I write this, and circumstances to not allow me to undertake a thorough review of the legislation.

My principal concern centres on the consequences of an adverse security assessment by ASIO. Although ASIO is part of the executive arm of government, a decision to adversely assess is, for all practical purposes, impossible to challenge.

Citizens have a right to seek a merits review of an adverse assessment in the Administrative Appeals Tribunal. Non-citizens do not have that right, but can seek administrative review by reason of section 75(v) of the Constitution. It should be noted that administrative review is much more limited than merits review, but in either case the theoretical right of review is illusory. This is so because ASIO refuses to allow the subject of the assessment to know the basis for the assessment.

Two cases illustrate the problem.

**Citizen**

*Hussain v Minister for Foreign Affairs* [2008] FCAFC 128. Mr Hussain's passport was cancelled because of an adverse security assessment by ASIO. Mr Hussain sought a review in the AAT of the decision to adversely assess.

Sections 36, 39A and 39B of the AAT Act all provide, in part, that the Attorney-General can certify in writing that the disclosure of information concerning a specified matter or the disclosure of any matter contained in a document in proceedings before the Tribunal would be contrary to the public interest by reason that such disclosure would prejudice the security of Australia.

In accordance with usual practice, DFAT and ASIO were ordered to provide all relevant documents. They withheld some documents, and produced redacted versions of other documents. This approach was supported by a certificate of the Attorney-General under s.39A.

Section 39A also provides:

> (6) Subject to subsection (9), the applicant and a person representing the applicant may be present when the Tribunal is hearing submissions made or evidence adduced by the Director-General of Security or the Commonwealth agency to which the assessment was given.
>
> (8) The (Attorney-General) may ... certify that evidence proposed to be adduced or submissions proposed to be made by or on behalf of the Director-General of Security ... are of such a nature that the disclosure of the evidence or submissions would be contrary to the public interest because it would prejudice security or the defence of Australia.
>
> (9) If such a certificate is given:
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> (a) the applicant must not be present when the evidence is adduced or the submissions are made, and

(b) a person representing the applicant must not be present when the evidence is adduced or the submissions are made unless the responsible Minister consents.

In *Hussain*, the Attorney-General's certificate had the effect that neither Hussain nor his lawyers were allowed to know either the factual or the legal basis for the adverse assessment, and neither he nor his lawyers were allowed to be present when ASIO gave its evidence and made its submissions.

The AAT gave its reasons in two parts: open reasons and secret reasons. Hussain and his lawyers were only allowed to see the open reasons. They made the point that, on the material available to Hussain, the adverse assessment was not justified. However the AAT upheld the adverse assessment on the basis of the secret reasons. Neither Hussain nor his lawyers have any idea what he is supposed to have done that would justify an adverse assessment.

**Non-citizen**

Muhammad Faisal and Muhammed Sagar are from Iraq in 2001. They sought asylum in Australia, and were caught up in the Pacific Solution. They were detained in Nauru. They were assessed as refugees. They were refused protection visas because (after four years' detention in Nauru) ASIO had adversely assessed them. It refused to give any reasons for the assessments. In a Federal Court application for review of the decision to adversely assess, they claimed that there were no facts which would justify an adverse assessment. Both gave evidence that they had never done or said anything which could bring them within the reach of the security provisions. That evidence was not challenged, and ASIO did not put forward any evidence of any fact it had relied on to support adverse assessments. At trial, ASIO argued, among other things, that

> "...there is no evidence before the Court as to the basis upon which the adverse security assessments were actually made ... . As a result, these proceedings must be dismissed because:
>
> > 2.1. in the absence of evidence as to the basis upon which each adverse security assessments was made, the Applicant's cannot prove that any error was made;..."

The court accepted ASIO's submission.

It is important to note that an adverse assessment does *not* mean that the subject of the assessment is a terrorist. The ASIO Act does not prescribe the criteria for making an adverse assessment. The matters to be taken into account in making a security assessment are the subject of regulations, but the regulations are secret.

When he was told of his adverse assessment, and faced with the prospect of spending the rest of his life on Nauru, Muhammad Faisal had a nervous breakdown. He was evacuated to Brisbane. While he was in a mental hospital in Brisbane, ASIO revised its view and gave him a favourable security assessment, with the result that he was given a visa and remains in Australia.

**Other consequences**

An adverse assessment can have much graver consequences than cancellation of a passport or refusal of a visa. At present there are about 50 people in immigration detention who have been found to be genuine refugees entitled to protection. Their visas have been cancelled (or refused) because of adverse security assessments.

Because they are refugees, they cannot be returned to their country of origin. Because they do not have a visa and will not be given one, they must remain in detention. Because of the High Court ruling in *Al-Kateb v Godwin* 219 CLR 562, they may be held in detention for life.

The effect of the security legislation is that a person may be locked up for life in circumstances where they have not committed any offence, and they are not told the basis of ASIO's concerns about them.

On any view of things, it is an unjustifiable departure from the principle of legality that a person's liberty can be taken away without offence, without charge, and without explanation.

**Submission**

The outcome was good for Faisal, but it raises important questions about the secret process which had led to an adverse assessment in the first place. It is hard to accept that a nervous breakdown can properly make the difference between a positive security assessment and an adverse assessment. But if that was not the decisive factor in Faisal's case, what was?

I fully recognise the need for an effective security agency. I recognise that intelligence concerning a person cannot always be disclosed to that person, because to do so might tend to reveal the agency's sources or methods. However it cannot be that in every case national security would be compromised by allowing the subject of an assessment know what facts are relied on to justify an adverse security assessment.

Furthermore, it offends the most basic principles of fairness that a person's rights can be decided in circumstances where they, and their legal team, are denied any information about basis for the assessment.

Naturally there must be occasions when the subject should not be told the facts relied on by ASIO. Even so, it is difficult to imagine any reason why Faisal should have been denied the facts, given that he was re-assessed as not a risk to security. (Incidentally, ASIO also refused to disclose the reason he had been re-assessed).

My submission is that lawyers for the subject of an adverse assessment should be given full information about the basis of the assessment, on condition that they do not disclose it to their client. While this is not an idea solution, it is better than not being able to run a case at all. It is virtually impossible to run a sensible case when you do not know who has said what against your client. The rest of our legal system Is designed to see that a litigant knows te case they have to answer.

Providing the relevant material to the lawyers does not hold any real risks. Lawyers are accustomed to receiving sensitive material and keeping it confidential. If a particular lawyer is regarded by ASIO as unreliable, then ASIO should be permitted to apply to a court for permission to refuse to provide information to that lawyer. It is wrong for ASIO to assume that lawyers are not to be trusted with confidential information; and it is offensive if ASIO assumes that all or most lawyers will breach an undertaking to keep material confidential, but that appears to be the assumption ASIO adopts.

The committee should consider amending the ASIO Act to introduce a presumption that the subject of an adverse assessment (and their lawyers) will be told the facts and the reasoning which are relied on to justify the assessment. If, in a particular case, ASIO believes there is a genuine risk to the security of Australia if the subject were to be told the basis of the assessment, then there should be a presumption that the person's lawyers should receive the material.

In matters which are capable of bearing on basic rights, the Parliament should ensure, as far as possible, that the ordinary rules of fair hearings apply.

Julian Burnside