TRADITIONAL RIGHTS & FREEDOMS

ENCROACHMENTS BY COMMONWEALTH LAWS

Interim Report

ALRC Report 127 - July 2015

Legal Aid NSW submission to the

Australian Law Reform Commission

October 2015

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 women's domestic violence court advocacy services.

Legal Aid NSW has significant expertise in the area of human rights, including traditional rights and freedoms, with a dedicated team of human rights specialists in its Civil Law Division. Grants of legal aid are available for matters concerning breaches of civil liberties, discrimination, migration, judicial review, bail hearings and matters of public interest.

Issues pertaining to traditional rights and freedoms regularly arise in the provision of Legal Aid NSW representation, advice and outreach services.

Background

Legal Aid NSW welcomes the Federal Government commitment to examine Commonwealth laws that encroach upon traditional rights, freedoms and privileges. This Inquiry offers a valuable opportunity to identify and review laws which have unduly and disproportionately eroded the rule of law and the protections traditionally afforded to vulnerable litigants.

This includes the opportunity for Government to:

- avoid retroactive laws
- curtail arbitrary or excessively broad discretionary power
- ensure laws which encroach upon traditional rights, freedoms or privileges are subject to judicial scrutiny
- achieve the necessary balance between individual rights and national security
- enhance protections where needs are identified, and
- improve compliance with Australia's international human rights obligations.

This submission will focus on two main areas in the Interim Report.

The first is the Burden of Proof: laws that reverse the burden of proof. The paper discusses:

- Bail
- Civil Laws – Discrimination
- Consistency with Fair Work Act 2009 (Cth)
- Protection for Respondents, and
- Increasing Access to Justice.

The second focus of this submission is Procedural Fairness. The paper discusses:

- National Security Laws, including Adverse Security Assessments and Renunciation of citizenship by conduct, and
- Migration Laws

For ease of reference, this submission uses the numbering system in the Interim Report.

The Legal Aid NSW submission is informed by our experience of providing information, community legal education, advice, minor assistance and representation to disadvantaged people across New South Wales. Our response is limited to those rights and freedoms named in the inquiry which relate most directly to our work.

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11. Burden of Proof: laws that reverse the burden of proof

Bail

Bail procedures are an important reflection of the presumption of innocence. The presumption against bail in some Commonwealth laws involve several risks.[1] The Interim Report notes that *"[p]rocedures relating to bail engage the presumption of innocence in its wider sense"* as they concern *"decision-making and the burden of persuasion."*[2]

Legal Aid NSW broadly agrees with the Commission's characterisation of bail. We note that pursuant to section 68 of the *Judiciary Act 1903* (Cth), state bail procedures apply to Commonwealth matters heard in NSW state courts. As such, observations below about NSW bail procedures could apply equally to the experience of clients charged under amended Commonwealth laws in the future.

It is sometimes said that the common law guards individual liberty. The bail system exists to ensure the careful consideration, usually by judicial officers, of individual circumstances and risks which militate against liberty. To refuse someone bail is to say that the risk to the community is sufficiently high to warrant impinging the individual's liberty. A reversal of the presumption in favour of bail fundamentally pre-empts the assessment of individual risk and removes the burden of persuasion which normally rests on the law enforcement officer. It draws the ambit of the criminal law away from individual, circumstantial assessment and moves it towards generality. The default test for curtailing liberty then becomes the relatively low threshold of "reasonable suspicion". This concerns conjecture about whether facts exist in relation to an offence, rather than "unacceptable risk", which involves a separate set of considerations.[3]

While legislation dealing with serious Commonwealth offences such as terrorism, consorting or drug importation curtail individual liberty in favour of protecting the community,[4] a reversal of the presumption in favour of bail effectively removes an important check and balance on the power and decision-making capacity of law enforcement officers.

Legal Aid NSW submits that when deciding to reverse the legal burden for bail for Commonwealth offences, due consideration should be given to the impact upon vulnerable members of the community such as young and indigenous people.

The disproportionate impact of policing and bail conditions on indigenous young people is well documented. Research by the Australian Institute of Criminology in 2008 confirmed that an Indigenous young person was more likely than a non-Indigenous offender to be arrested, charged, taken to court and given bail conditions. Further, non-Indigenous offenders were more likely to be released with a warning or caution (without arrest) or without bail conditions if they were arrested and charged.[5] In the experience of Legal Aid NSW Children's Civil Law Service, Indigenous young people continue to be subjected to differential policing in relation to bail.

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[1] Interim Report, pp.326-327.
[2] Interim Report, p.326.
[3] "Unacceptable risk" is defined in section 19 of the *Bail Act 2013* (NSW).
[4] Interim Report, p326.
[5] Lucy Snowball, 'Diversion of Indigenous juvenile offenders', (2008) 355 *Trends & Issues in Crime and Criminal Justice* 3.

Indigenous young people are 23 times more likely to be on remand per capita than their non-Indigenous counterparts.[6] Several factors contribute to this statistic, including the remand of juveniles in detention where there is no suitable alternative accommodation.[7] This is particularly significant given the NSW Government has noted that *"young people who come into the criminal justice system at a young age are more likely to offend for longer, more frequently and go on to receive a custodial sentence."*[8] Reversals of the legal burden for bail are therefore likely to lead to an increase in the number of Indigenous young people on remand and in custody, where that group is already over-represented in the custodial and prison populations.

Legal Aid NSW recommends that in accordance with both statutory and common law principles, arrest and detention of juveniles for Commonwealth offences should be used only as a last resort[9] and diversionary pathways should be preferred.

Legal Aid NSW can also provide the Commission with further details upon request about the operation of bail laws in NSW, including its involvement in the project which led to the commencement of the *Amom v State of NSW* class action on behalf of juveniles wrongfully arrested for breaches of bail conditions.[10]

Recommendations

1. In reviewing, enacting or applying legislation which reverses the legal burden of proof for bail, serious consideration should be given to the impact of these on vulnerable groups, including Indigenous and young people.
2. The arrest and detention of juveniles for Commonwealth offences should comply with the principle of last resort, and where appropriate, any reversal of the presumption in favour of bail should include statutory objects which consider the need to divert young people from the criminal justice system.

Civil Laws - Discrimination

The Interim Report addresses the reversal of the burden of proof in indirect discrimination matters, and notes concerns that this represents an unreasonable infringement on the principle of the burden of proof.[11]

The state of federal law in relation to the burden of proof impedes access to justice for discrimination complainants in multiple ways. Currently, there are only two ways of proving direct discrimination: either by direct evidence or by inference. As noted by the Full Federal Court in *Sharma v Legal Aid Queensland*[12] in relation to racial discrimination, it is unusual to find direct evidence of discrimination, and the outcome of a case will usually depend on what

[6] Amnesty International Australia, 2015, 'A brighter future', 31.
[7] Richards K & Renshaw L, 2013, 'Bail and remand for young people in Australia: A national research project', *Australian Institute of Criminology*, AIC Reports Research and Public Policy Series No.125, 65.
[8] http://www.youthontrack.justice.nsw.gov.au/Pages/yot/about_us/yot_cjs.aspx.
[9] In NSW, see *DPP v Carr* (2002) 127 A Crim R 151; *DPP v CAD* (2003) NSWSC 196. The principle of arrest as a last resort in NSW is contained generally in section 99, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), and more specifically in section 7(a), *Young Offenders Act 1997* (NSW). See also *Convention on the Rights of the Child*, 1989, 1577 UNTS 3 Article 37(b).
[10] *Amom v State of NSW* (proceeding number 2011/187125). At the time of writing, the settlement in *Amom* is still to be formally approved by the court, so there is no decision for the matter.
[11] Interim Report 332.
[12] *Sharma v Legal Aid Queensland* [2002] FCAFC 196 at [40].

inferences can be drawn from the primary facts as found. Since alleged perpetrators of discrimination rarely announce or record the reasons for a decision or conduct, direct evidence is rare. Thus, placing the evidentiary burden solely on complainants produces at least two barriers to success: the first is that the complainant must often divine the discriminator's intent or mindset – knowledge which is usually beyond their capacity of proof; the second is the production of competing forensic narratives which naturally favour respondents. As noted by Thornton, "*the mere articulation of a rational explanation can carry a probative weight which is difficult for the complainant to rebut*."[13] Because of this, the 'burden of proof' status quo may detract from the fundamental protections which the federal anti-discrimination laws were designed to deliver across key areas of life.

Legal Aid NSW conducts one of the largest anti-discrimination law practices in the NSW legal assistance sector. We have observed that alleged perpetrators frequently have near exclusive access to the documentation and evidence of the incidents the subject of the complaint. Furthermore, they often have sole knowledge of the reason a decision was taken.[14] As noted by Professor Neil Rees, *"to require the applicant to bear the burden of proof about the matter when there is undisputed evidence of an adverse outcome places the applicant in the almost impossible position of trying to prove the reasons for another person's conduct."*[15] Unlike other areas of law, a reversal of the burden of proof in discrimination matters would therefore ameliorate some of the practical barriers to litigating discrimination complaints.

Legal Aid NSW acknowledges that federal laws already attempt to strike some degree of balance between complainants and respondents in relation to certain elements of discrimination as a cause of action. For example, sections 7C of the *Sex Discrimination Act* and 6(4) and 11(2) of the *Disability Discrimination Act* operate to shift the burden of proof onto respondents in relation to the "reasonableness" of a condition or requirement which has allegedly been imposed on a complainant.[16] While these shifts afford some protection to complainants, they fail to redress the overwhelming evidentiary disadvantage which complainants face in proving that discrimination occurred in the first instance.

Furthermore, cases such as *Hinchliffe v University of Sydney* [2004] FMCA 85 and *Walker v State of Victoria* [2012] FCAFC 38 have undone some of the statutory protection, at least in the area of education, by reading down the obligation to provide reasonable adjustments so long as sufficient consultation with the complainant takes place and by examining all the circumstances of the case. Notably, although the *Disability Standards in Education 2005* entered into force after *Hinchliffe*, the reasoning relied upon in that case continues to temper the judicial approach to "reasonable adjustments" in education. Such an approach serves to embolden the conduct of educational institutions when refusing requests for reasonable adjustments while simultaneously discouraging complainants from pursuing their claims beyond local dispute resolution mechanisms.

[13] M Thornton, 'Revisiting Race' in Racial Discrimination Act 1975: A Review, Human Rights and Equal Opportunity Commission, 1995, 81.
[14] Allen, D, 2009, 'Reducing the Burden of Proving Discrimination in Australia' *Sydney Law Review* Vol 31, 579, 583.
[15] Rees, N, 2013 'A great opportunity for modernising our ailing discrimination laws is lost', *Human Rights Law Centre*, <Available: http://hrlc.org.au/a-great-opportunity-for-modernising-our-ailing-discrimination-laws-is-lost/> .
[16] In NSW, see s104 of the *Anti-Discrimination Act*.

Prior to being withdrawn, the *Human Rights and Anti-Discrimination Bill 2012* (Cth) also contained provisions which would have shifted the onus of proof for complaints of unfavourable treatment.[17] In its submissions on that Bill, Legal Aid NSW expressed concerns that the current framework for burden of proof matters is unreasonably onerous on the complainant and requires reform, a position similarly expressed by the Law Council of Australia and the National Association of Community Legal Centres.[18] Legal Aid NSW particularly noted the impact of the burden of proof requirement on clients and their decisions to initiate claims of discrimination. The example below is illustrative.

Legal Aid NSW 'Discrimination Toolkit Workshops' for Aboriginal community workers in regional NSW

In the Legal Aid NSW Discrimination Toolkit Workshops, participants often report a discriminatory refusal of housing to Aboriginal people. Participants often say that they experience discriminatory treatment, but are unable prove it.

Facilitators spend a significant portion of workshop time explaining the importance of evidentiary requirements. Facilitators provide practical tips on how participants might be able to obtain proof of being refused housing. For example, where a person has been advised that a rental house has already been rented, and that person subsequently sees a 'for rent' sign relating to that house, the facilitator may discuss simple steps such as taking a photograph or a photocopy of the advertisement.

Workshop discussions often then turn to how, even with such evidence, the person would attempt to prove that the reason for the refusal was their race. In this example, unless the real estate agent has explicitly made a comment about race to the person seeking the rental house, it is exceptionally difficult for the complainant to prove that the reason was racial discrimination. Workshop facilitators often observe that participants consider the evidentiary requirements insurmountable and can consequently become despondent with the process.

The principle of a shifting burden of proof in discrimination matters would accord with established legal norms and is supported by overseas experience. Such an amendment has previously been successfully embraced in multiple international jurisdictions, including the United Kingdom. Specifically, in amending anti-discrimination laws to introduce a shifting burden of proof, the UK was guided by a directive of the European Council mandating such a shift for member states[19] and the consideration of this principle by the European Court of Justice in *C-127/92 Enderby v Frenchay Health Authority and Secretary of State for Health*.[20]

In considering the application of this principle in *Igen Ltd v Wong* [2005] ICR 931 the UK Court of Appeal set forth the following guidelines:

> "(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the grounds of sex, then the burden of proof moves to the respondent

[17] *Human Rights and Anti-Discrimination Bill 2012* (Cth) cl.124.

[18] Legal Aid NSW, Submission No 151 to Commonwealth Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Legislation* February 2012, Submission 151, pp.6-9.

[19] *European Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)*

[20] [1993] ECR 1-5535. That principle has since been the subject of further application and interpretation in the United Kingdom.

(10) It is then for the respondent to prove that he did not commit, or as the case maybe, is not to be treated as having committed, that act."[21]

The above two stage process requires a plaintiff to establish a *prima facie* case. Once that threshold has been satisfied, the burden of proof then shifts to the respondent who must demonstrate that they did not act unlawfully[22] by establishing a "non-discriminatory justification for their behaviour."[23] This process reduces the risk of vexatious complaints, preserves a respondent's right to explain their conduct, while simultaneously removing significant legal hurdles preventing complainants from accessing the legal system or indeed achieving success in discrimination litigation.

Recommendations

3. Legal Aid NSW recommends that not only is a reversal of burden reasonable, but it should be extended to matters of both direct and indirect discrimination for all the respective Commonwealth discrimination laws.

4. Commonwealth anti-discrimination legislation should be amended to introduce a shifting burden of proof in order to ameliorate the evidentiary burden on complainants in both direct and indirect discrimination matters. This should be reflected in a two-step process which first requires complainants to establish a *prima facie* case of discrimination before the burden of proof shifts to the respondent.

Consistency with Fair Work Act 2009 (Cth)

Beyond addressing the clear evidentiary challenge, a reversal in the burden of proof would also achieve consistency between anti-discrimination legislation and other Commonwealth legislation. Recognition of the difficulties faced by complainants has been incorporated into section 361 of the *Fair Work Act 2009* (Cth) ("FWA") which reverses the onus of proof where employers are alleged to have taken unlawful action. As noted by the explanatory memorandum to the Act, this has been incorporated as *"it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason."*[24] Legal Aid NSW welcomes this provision. It appropriately reflects the vulnerability of workers in challenging decisions by employers. However, this is inconsistent with other Commonwealth laws.

Legal Aid NSW considers that Commonwealth laws should afford the same protections as the FWA. In our experience, complainants alleging discrimination in other areas of public life face the same evidentiary hurdles as those to whom the FWA applies. Consistency could also ease the regulatory burden on employers, enabling businesses and organisations to streamline internal policies and procedures in line with a more uniform body of law.

[21] *Igen Ltd v Wong* [2005] ICR 931, [76]
[22] Allen, D, Ob cit 12, 598
[23] Ibid, 599
[24] Explanatory Memorandum, *Fair Work Act 2009* (Cth), [1461].

Protection for Respondents

In response to the reverse onus of proof under the FWA, employers' concerns were substantially allayed as a result of the decision of the High Court in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay*.[25] In discharging this reverse onus and in the absence of other evidence, it is sufficient for a respondent to rely on their subjective reasons for the decision at the time. If this approach were paralleled under the four federal anti-discrimination laws, potential respondents could be afforded similar protection. This would ensure the Commonwealth is able to uphold the jurisprudential principle of effectiveness in this area of law, while proportionately balancing the positions and vulnerabilities of the parties.

Other safeguards can also ensure respondents are not unduly subjected to vexatious and unsubstantiated claims. For example, introducing a principle of proportionality would allow courts to examine whether the reversal of a burden of proof was arbitrary or irrational having regard to the circumstances of the case. This is consistent with reversals of the burden of proof in criminal matters,[26] and allows for the unique aspects of each matter to be accounted for in determining how the burden of proof should apply. Similarly, requiring a complainant to meet a threshold establishing a *prima facie* case before shifting the burden of proof, as per the UK model of discrimination complaints,[27] would allow for the dismissal of vexatious matters without simultaneously eroding the prospects of success for genuine complainants.

The application of these safeguards in conjunction with the *Briginshaw* standard of evidence, consistently applied in discrimination matters, would ensure respondents were not being forced to defend unmeritorious or spurious claims.

Increasing Access to Justice

The current model of the burden of proof significantly limits a complainant's reasonable prospects of success if a complaint proceeds to litigation. This can substantially impair access to justice and often reduces a complainant's willingness to pursue the matter. Illustratively, in 2013-14, only four percent (4%) of discrimination complaints finalised by the Australian Human Rights Commission proceeded to court.[28] While Legal Aid NSW applauds the use of conciliation processes to resolve discrimination matters, this low rate of court proceedings is likely to also stem from complainants feeling undue pressure to settle matters due to the high risks of engaging in court processes for plaintiffs.

Additionally, complainants seeking legal aid may find themselves unable to meet strict merit tests, as they do not have access to the requisite evidence to prove their allegation.[29] Alternatively, even where a complainant does have access to legal representation, it is likely they will be advised not to engage in court proceedings, even where it is highly likely an act of discrimination has occurred. This is compounded by the relatively low levels of damages typically awarded in discrimination matters.[30] This can further deter complainants from bringing

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[25] [2012] HCA 32.
[26] Ong, KC, 2013, 'Statutory Reversals of Proof: Justifying Reversals and the Impact of Human Rights', *University of Tasmania Law Review* 32(2).
[27] Allen, D, 2009, 'Reducing the Burden of Proving Discrimination in Australia' *Sydney Law Review* Vol 31, 579, 596.
[28] AHRC, 2014, 'Annual Report – 2013-14', 132
[29] Legal Aid NSW, op cit, 6-9.
[30] Allen, D 2010, 'Remedying Discrimination: The Limits of the Law and the Need for a Systemic Approach' 29(2) *University of Tasmania Law Review*.

proceedings in a discrimination matter, as costs frequently exceed damages. Conversely, the lower prospects of success for complainants provide incentive for respondents to continue a matter through to court proceedings, thus reducing any motivation to reach appropriate settlements.

A reverse burden of proof could improve prospects of success for meritorious claims and increase opportunity for legal representation, allowing for more appropriate settlements to be reached, and ensuring victims of discrimination could achieve access to justice.

Recommendation

5. The reversal of the burden of proof be extended across Commonwealth anti-discrimination legislation in order to further protect victims of discrimination and align the protections available across all areas of public life.

Closing Remarks

The burden of proof represents a crucial safeguard in ensuring the protection of basic freedoms and the principle of fairness. A shift away from traditional understandings of the burden of proof may be considered necessary in limited circumstances including in the public interest and to protect national security. However, provisions reversing the presumption in favour of bail for Commonwealth offences, should be enacted sparingly, and with due consideration given to their impact on vulnerable groups such as indigenous or young people, especially where these two groups intersect. Additionally, consideration should be given to the introduction of a reversal of the burden of proof in anti-discrimination matters in order to remedy the knowledge differential between complainants and respondents and some of the evidentiary impediments to bringing a successful discrimination complaint.

15. Procedural Fairness

National Security Laws

Current national security laws pose significant risks to the protection of basic rights and freedoms of both citizens and non-citizens.

Adverse Security Assessments

The lack of transparency surrounding the process of Australian Security Intelligence Organisation (ASIO) adverse security assessments (ASA) poses a serious threat to principles of procedural fairness. Legal Aid NSW agrees that the failure to provide adequate reasoning or justification for the decision to issue an ASA threatens traditional requirements of procedural fairness and leaves individuals vulnerable to serious violations of human rights.[31] Legal Aid NSW has significant experience with ASAs in migration matters. We represented eight individuals subject to a review of their ASA in 2013 by the Independent Reviewer of Adverse Security Assessments, the Hon Margaret Stone. Ahilan's case study below highlights concerning aspects of the ASIO process.

[31] Interim Report, p431.

Procedural fairness ordinarily requires a decision-maker to provide a person with the reasons for a decision and the material used to come to it. National security cases differ. In *Leghaei v Director-General of Security* (2007) 241 ALR 141[32] the Full Federal Court concluded that ASIO did owe the applicant procedural fairness and that this obligation, contrary to ASIO's submissions, was not excluded by the terms of the ASIO Act. Notwithstanding that finding, the Court concluded that in cases where national security is invoked, the content of the procedural fairness requirement can be reduced in particular terms to 'nothingness' (at [51] and [52]).[33]

In an analogous context, the Full Federal Court in *NAVK v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 160, in considering the content of procedural fairness where "confidential" information is held by a decision-maker, concluded that the "fact that confidential material is involved in the decision-making process .... does not negate the application of the rules of natural justice; rather it narrows the field of their operation" (per Lockhart J in *Ansett Transport Industries Ltd v Secretary, Department of Aviation* (1987) 73 ALR 205 at 218.

As to the content of procedural fairness in national security cases, ASIO, like other decision-making agencies, must be flexible and adapt the content to the particular circumstances.[34] It is critical that "practical injustice" is avoided.[35] Factors relevant to the determination of the content of procedural fairness include the statutory context, the circumstances in which the relevant power is exercised, and the consequences of the exercise of that power.[36] In the experience of Legal Aid NSW, an individual's eligibility to apply for a visa is effectively prevented by the ASA. In the case of an asylum seeker who has been assessed as engaging Australia's protection obligations, the result of an ASA is indefinite immigration detention.

The High Court in *M47/2012 v Director General of Security* [2012] HCA 46 (*Plaintiff M47*) found that the applicant in that case had been given sufficient information during the ASIO interview such as to discharge the procedural fairness obligation. The information was said to have been given with sufficient particularity to allow that applicant to know enough about the allegations to confront and answer them. As noted by Gummow J[37] the applicant was found to have received a fair hearing because he was given the *substance* of the allegations against him during a lengthy ASIO interview. That interview was conducted in the presence of the applicant's lawyer and was recorded by ASIO. There were a number of breaks during the interview where the applicant had the opportunity to consult his lawyer. Following the interview, presumably, the lawyer would have had the opportunity to make submissions, addressing any matters arising from the content of the interview.

The experience of the applicant in M47/2012 does not reflect that of our clients. Many of our clients were interviewed by ASIO without the presence of a lawyer, and without knowing, even generally, the allegations made against them. The stated reason for the non-disclosure of any material was that to do so would impugn national security.

[32] see also *Church of Scientology v Woodward* (1982) 154 CLR 25.
[33] See also McHugh J in *Johns v Australian Securities Commission* (1993) 178 CLR 409 at 472.
[34] *VEAL v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [25].
[35] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR at [37].
[36] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.
[37] Ibid at [142].

However, this should be contrasted with the position when the Independent Reviewer of Adverse Security Assessments was appointed in 2013. At that time all clients were provided with an unclassified summary of the reasons for the ASA. These reasons were based on an assessment made under section 17(1(c) and section 37 of the ASIO Act.

Critically, nothing changed for the client whose case study is set out below. Ahilan remained in detention until his adverse security assessment was successfully challenged. The unclassified summary showed that the concerns of ASIO related to matters existing prior to 2010, before his arrival in Australia. This material was withheld at the time of the initial adverse assessment in 2011on the basis that to release it would prejudice Australian's national security. In fact this could not have been the case, because the unclassified summary was subsequently released to the client. There had been no change to the law or to the process of security assessments, nor the facts of the case.

Even in matters of national security, it is fundamental that affected persons be given an opportunity to challenge adverse contentions in a meaningful way, where to do so will not infringe the principles of public interest immunity. This obligation is not displaced simply because ASIO is the relevant decision-making body and the material being scrutinised is of a sensitive nature. Merely because ASIO collected the relevant information, does not mean that the information is *ipso facto* of security concern and cannot be revealed.

Compounding the limitations on procedural fairness are the constraints imposed upon the Independent Reviewer of Adverse Security Assessments who can make recommendations but not binding orders. The UN Human Rights Committee found the appointment of an independent reviewer entirely inadequate to discharge Australia's obligations, as "the reviewer's findings are not binding [and]… there remains no minimum content of disclosure in all cases, which limits a refugee's ability to effectively respond."[38]

Case Study – Client with Adverse Security Assessment

Ahilan* is a Sri Lankan Tamil. He arrived in Australia in 2010 as an Irregular Maritime Arrival (IMA). He was detained in immigration detention centres on Christmas Island, in Darwin and then Villawood before being released in 2015. Ahilan spent over five years in detention, during which he made two serious suicide attempts. Soon after his arrival Ahilan made an application for a Protection visa and was assessed as engaging Australia's protection obligations.

However, in 2011 he received an adverse security assessment and ASIO recommended that his application for a visa be refused because he was a risk to national security. ASIO did not indicate the basis for that assessment. During the ASIO interview, a lawyer was not present, Ahilan was not provided with any details of the allegations against him, and he was not informed of any of the concerns ASIO had regarding his history.

ASIO did not advise Ahilan that ASIO undertook yearly reviews of its assessments and that Ahilan could submit further information to ASIO which would be considered on review. Prior to receiving the adverse security assessment Ahilan had been interviewed by both Immigration and ASIO but had not been told of the general allegations against him.

[38] *F.K.A.G. et al. v Australia* (UN Doc CCPR/C/108/D/2094/2011) and *M.M.M. et al. v Australia* (UN Doc CCPR/C/108/D/2136/2012) 20 August 2013, [5.9].

In 2013 the Federal Government announced the introduction of an Independent Reviewer of Adverse Security Assessments. The Hon Margaret Stone was appointed to undertake a review of Ahilan's adverse security assessment. As part of that review Ahilan was provided with an unclassified document with general details of the allegations against him. He was not provided with information about the material on which the allegations were based, nor the source of that material, and was unable to test the credibility of that information or those sources. The provision of this unclassified summary of reasons allowed Legal Aid NSW to make submissions on the client's behalf, cogently addressing the stated concerns. As a result of our work, Ahilan's adverse security assessment was overturned. Had these unclassified reasons been provided at the time of the initial adverse assessment in 2011, Ahilan may have been granted a permanent protection visa and would not have spent an additional four years in detention.

**Client's name has been changed.*

Legal Aid NSW understands that on 21 August 2015 the Honourable Margaret Stone vacated the office of the Independent Reviewer of Adverse Security Assessments, a role that had been extended to December 2016.[39] Legal Aid NSW is currently unaware if and when the role will be filled again and we are concerned about the absence of a clear process of review. We also note that ASIO still have a statutory obligation to carry out yearly reviews of their decisions, and that these are not made public nor do affected persons know if these take place.

Legal Aid NSW recommends that a transparent process of review should be permanently implemented and publicly announced. This should require ASIO to provide unclassified reasons for an ASA, advise the person the subject of the review that the review is being undertaken and invite them to make submissions.

Additionally, the continued detention of those who have had an ASA against them may in many circumstances represent a violation of fundamental rights and freedoms. Continued detention occurs primarily where an ASA is made, but an individual is either unwilling or unable to return to their country of origin, especially by reason of refugee status or statelessness. In 2013, the UN Human Rights Committee found that ongoing detention following adverse ASIO security assessments amounted to violations of Articles 7, 9(1), 9(2), 9(4) of the ICCPR.[40] Ahilan in our case study above was a party to that communique.

Recommendations

6. All ASIO security assessment interviews should be conducted in the presence of a lawyer, and assessment subjects should be made aware of the details of the allegations made against them and provided with the opportunity to refute them.
7. Any decision not to disclose information or material to the subject of a security assessment should be reviewable by either the courts or a permanently appointed Independent Reviewer with the power to make binding determinations.

[39] As noted on the Attorney General's website, Media Release 11 December 2014: http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/FourthQuarter/11December2014-ContinuationoftheOfficeoftheIndependentReviewerofAdverseSecurityAssessments.aspx
[40] Ibid.

Renunciation of citizenship by conduct

The Interim Report does not deal in detail with the *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* and the impact of this Bill on traditional freedoms if it were to be enacted. This Bill concerns the revocation of Australian citizenship of dual nationals who engage in specific conduct, predominantly involving the engagement in, or promotion of, terrorist activities. Under the Bill, the revocation of citizenship occurs as an immediate consequence of action, rather than a decision of the Minister.[41]

This Bill raises a number of concerns regarding a lack of procedural fairness:

i) The Bill does not specify the process by which it is determined whether an individual has engaged in the prohibited conduct.

ii) The Bill specifically notes that the rules of natural justice do not apply to the powers of the Minister to issue a notice of revocation.[42]

iii) The Bill does not include provisions to incorporate the revocation of citizenship into section 52 of the *Australian Citizenship Act 1958* allowing for review of decisions. Additionally there is no indication that an individual would have any appeal rights upon being notified of the revocation of citizenship.

iv) While the Minister does have the power to rescind a notice of revocation or exempt a person from revocation, he or she is under no obligation to consider this option. Further, a person subject to a revocation notice has no right to be heard by the Minister.

The interaction between this Bill and a number of traditional principles of rights and freedoms was discussed by the Parliamentary Joint Committee on Human Rights, which made significant comment on the limitations posed by the Bill to matters relevant to this inquiry.

With regard to substantive rights, the Interim Report addresses the right to freedom of movement,[43] finding that it is unjustifiably restricted by the proposed Bill. The restriction in freedom of movement stems from the consequential removal of travel documents such as passports on revocation of citizenship, as well as the travel restrictions placed on those within Australia on ex-citizen visas. The finding of unjustifiability resulted from the broad potential scope and applicability of the Bill, which lacks a clear or reasonable connection to the protection of national security.

The Interim Report also considered a number of procedural matters and the impact of the Bill on procedural fairness. Firstly, while the Bill does give courts a power to hear a review of the decision, the significant practical challenges facing those seeking a review will limit the extent to which this power can be effectively utilised. These challenges include the lack of applicability of the *Administrative Decisions (Judicial Review) Act 1977* and the lack of opportunity for an individual to contest the allegations giving rise to the repudiation of citizenship. The Interim Report concluded that in relation to this issue, the Bill unreasonably

[41] *Australian Citizenship Amendment (Allegiance to Australia) Bill* cl 3.
[42] Ibid cl 3, inserting s.33AA(10).
[43] Article 12, International Covenant on Civil and Political Rights, 1966, 999 UNTS 171

restricts the principle of a fair hearing.[44] Secondly, the Bill "limits criminal process rights"[45] in breach of Article 14 of the ICCPR, through the restriction of the presumption of innocence, and a lack of process protections in the Bill.

Recommendation

7. The *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* should be amended to afford individuals an opportunity to contest allegations which give rise to a revocation of citizenship.

Migration Laws

As highlighted by the Interim Report, several areas of migration law pose potentially substantial infringements to basic rights and freedoms, through both explicit legislative exclusions[46] and the practical application of immigration policy.

The *Migration and Maritime Power Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* introduced fast-track processing, with any reviewable decisions being referred to the Immigration Assessment Authority ("IAA").[47] As noted by Legal Aid NSW in its submission to the Senate and Constitutional Affairs Committee regarding this Bill,[48] the use of the IAA, rather than the Refugee Review Tribunal (as it was then known) may be inappropriate and detracts from procedural fairness:

> "Section 473FA states that the IAA is to pursue the objective of providing a mechanism of limited review that is *efficient and quick.* This is significantly different to the statutory objective of the Refugee Review Tribunal and Migration Review Tribunal, which is to provide a mechanism of review that is *fair, just, economical, informal and quick* (see sections 353 and 420 of the *Migration Act* 1958)."[49]

The provision of this avenue of review does not adequately fulfil the principle of procedural fairness if it does not also operate according to principles of fairness and justice.

Additionally, section 5(1) of the *Migration Act* creates the category of 'excluded fast track review applicants' for whom no avenue of review is available. This contradicts the principles of procedural fairness and judicial review. This category includes applicants who are found to have 'bogus documents.'[50] In oral submissions at the public hearing into the *Migration and Maritime Power Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* Inquiry, Amnesty International Australia (AIA), represented by Graham Thom, noted AIA has had experience in cases where documents had been declared bogus at first instance, but on a review of the decision, were verified through the involvement of international bodies and

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[44] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Twenty-fifth report of the 44th Parliament*, (2015) 7.
[45] Ibid [1.146].
[46] See, for example, *Migration Act 1958*, s133A which states that natural justice does not apply to visa cancellation decisions made by the Minister under s109. Other examples set out at 421-422 of the Interim Report.
[47] *Migration Act 1958*, s473CA.
[48] Legal Aid NSW, Submission No 112 Submission Senate Legal and Constitutional Affairs References Committee, *Migration and Maritime Power Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (2014).
[49] Ibid, 8.
[50] *Migration Act* s.5(1).

researchers.[51] Under current legislation, such reviews would not be permissible. This restriction on the reviewability of decisions concerning refugee status has significant implications for principles of procedural fairness and may also be in breach of Australia's international non-refoulement obligations.

Recommendation

8. All immigration decisions made under the auspices of "fast-track" processes should be subject to review by the Migration & Refugee Division of the Administrative Appeals Tribunal.

Closing Remarks

Procedural fairness underpins much of the criminal and civil justice systems in Australia, yet recent trends in national security and migration law have reflected a shift away from traditional safeguards and protections. Denying individuals sufficient information to refute allegations, or limiting opportunities for review, threatens basic rights at a domestic and international level. It is incumbent upon policy makers to ensure that if restrictions on procedural fairness are imposed, these must have a justifiable basis in public policy, serve legitimate ends and be proportionate to those ends having regard to the principle of legality. Any presumption that procedural fairness does not apply to specific offences or circumstances permits a wide discretionary authority on the part of government to by-pass *proof* and reflects a shift away from the principles of the rule of law which are the bedrock of Australia's judicial system.

[51] Evidence to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, Parliament House, Canberra, 14 November 2014, 14:04 (Dr Graham Thom, Refugee Coordinator, Amnesty International Australia).