THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRCGUak:1203495

18 October 2016

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: nicola.knackstredt@lawcouncil.asn.au

Dear Mr Smithers,

Senate Legal and Constitutional Affairs References Committee inquiry into the serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre and Manus Regional Processing Centre

I refer to the Law Council's memo dated 21 September 2016, seeking input for a submission to the Senate Legal and Constitutional Affairs References Committee ("Senate Committee") to the inquiry into the serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre and Manus Regional Processing Centre ("2016 inquiry").

The Law Society of NSW understands that for the 2016 inquiry, the Senate Committee will have access to all documents submitted to the Legal and Constitutional Affairs References inquiry into the conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea during the 44th Parliament. We also understand that the Senate Committee will have access to all submissions published by other committees inquiring into related issues. The Law Society has provided submissions to those previous inquiries to the Law Council and to the Senate Committee directly. As these previous submissions address a number of the terms of reference of the present 2016 inquiry, they will not be repeated.

We provide the following additional comments on the terms of reference of the 2016 inquiry.

The obligations of the Commonwealth Government and contractors relating to the treatment of asylum seekers, including the provision of support, capability and capacity building to local Nauruan authorities

Broadly, the Law Society reiterates its previous position that Australia retains responsibility for the health and safety of asylum seekers transferred to other countries for offshore processing and assessment under the *Convention Relating to the Status of Refugees* ("Refugee Convention").[1] It is well established that, under international law,

[1] Law Society of NSW, *Submission to Senate Inquiry into Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru*, (4 May 2015),

Australia does not avoid responsibility for refugees simply by transferring them to another country.[2] Further, if Australia is found to have "effective control" over the treatment of the asylum seekers it has transferred to another country it continues to be responsible for ensuring their treatment is consistent with international human rights obligations.[3]

We note the High Court of Australia handed down in February 2016 its decision on *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors* [2016] HCA 1. The Law Society considers that this decision has provided a position on the constitutionality of Australia's offshore immigration detention arrangements (and matters associated including the Commonwealth's contracts and effective control in respect of those arrangements). However, the decision does not affect Australia's position and obligations under international human rights law.

Consequently, the Law Society continues to hold the view that Australia may well be considered responsible, under international law, for the treatment of the asylum seekers transferred to Nauru and Papua New Guinea.

The Law Society also submits that the issue of "effective control" should be given greater consideration in light of the recent decision of the Supreme Court of Papua New Guinea regarding the legality of the detention of asylum seekers on Manus Island. On 26 April 2016 the Supreme Court of Papua New Guinea (PNG) held that the detention of asylum seekers on Manus Island was unconstitutional, in that the detention breached the right to personal liberty in the PNG constitution.[4] The Court ordered that the governments of PNG and Australia 'shall forthwith take all steps necessary to cease and prevent' their 'unconstitutional and illegal detention', and the 'continued breach' of their constitutional and human rights.

The Law Society agrees with comments made by Dr Stephen Tully in a summary of the decision, which noted that the judgment provides an impetus for Australia to instead work towards lasting, third country resettlement options, and it also brings into further consideration the claim that Australia may be breaching its duty of care to asylum seekers.[5]

The effect of Part 6 of the *Australian Border Force Act 2015*

Part 6 of the Australian Border Force Act 2015 ("ABF Act") contains secrecy and disclosure provisions that can apply to any information obtained by a person in the course of performing services for the Department of Immigration and Border Protection ("Department").

The Law Society agrees with the Law Council's submission dated 17 March 2016, that these provisions threaten the rule of law insofar as it may prevent a range of people, including any person who is engaged as a consultant or contractor, to perform services

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http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Submissions.

[2] G Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd ed, 2007), 408-4011.

[3] See the decision of the European Court of Human Rights in *Bankovic v Belgium and others* (dec.) [GC] [2001] ECHR 890 and *Al-Skeini v United Kingdom* [GC] [2011] ECHR 1093.

[4] Eric Tlozek and Stephanie Anderson, 'PNG's Supreme Court rules detention of asylum seekers on Manus Island is illegal', *ABC Online,* 27 April 2016, http://www.abc.net.au/news/2016-04-26/png-court-rules-asylum-seeker-detention-manus-island-illegal/7360078.

[5] Dr Stephen Tully, 'Manus Island Regional Processing Centre Illegal Under PNG Law', *Law Society of NSW Journal*, issue 23, June 2016, 84-85.

for the Department. The Law Society supports the Law Council's submission - that it is critical to ensure that consultants and contractors, including medical professionals, working for the Department in immigration detention facilities, are not restricted in their ability to make public interest disclosures in relation to the conditions in detention, and can do so without fear of retribution.

The Law Society agrees with the Law Council's recommendation that the ABF Act should include a public interest disclosure exception to the secrecy provisions, where the disclosure would, on balance, be in the public interest. We also support the recommendation that the ABF Act include an express requirement that, for an offence to be committed, an unauthorised disclosure caused, or was likely or intended to cause, harm to an identified essential public interest.

The role an independent children's advocate could play in ensuring the rights and interests of unaccompanied minors are protected

The Australian Human Rights Commission's (AHRC) 2014 report, *The Forgotten Children: National Inquiry into Children in Immigration Detention* ("the 2014 AHRC Report"), made a number of recommendations, including that an independent guardian be appointed for unaccompanied children seeking asylum in Australia.[6] This recommendation was also made by the Australian Human Rights Commission's 2004 Report: *A last resort? National Inquiry into Children in Immigration Detention*.[7]

The 2014 AHRC Report found that unaccompanied children require higher levels of emotional and social support because they do not have a parent in the detention environment.[8] The Report stated that detention is not a place where children are able to develop the necessary resiliencies that they will need for adult life and of great concern is the finding of causal links between detention, mental health deterioration and self-harm in unaccompanied children.[9]

Importantly, the AHRC noted that, as their legal guardian, the Minister for Immigration and Border Protection has failed to act in the best interests of unaccompanied children by not releasing unaccompanied children into community alternatives.[10] The 2014 AHRC Report submits that the Minister cannot be an effective guardian for unaccompanied children as he has conflicting roles as both the Minister responsible for immigration detention and as the legal guardian.

This recommendation is consistent with Australia's obligations under the *Convention on the Rights of the Child* ("CRC"), which requires State Parties to ensure that children lacking the support of their parents receive extra help to guarantee enjoyment of all their rights set out under the CRC and other international human rights or humanitarian instruments.[11]

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[6] Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014), 38, https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf.
[7] Australian Human Rights Commission, *A last resort? National Inquiry into Children in Immigration Detention*, (2004), https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/last-resort-national-inquiry-children-immigration.
[8] Above n6, 169.
[9] Ibid.
[10] Ibid.
[11] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 3 (entered into force 2 September 1990), article 20.

The 2014 AHRC Report outlined that Australia is under a clear obligation to provide special protection and assistance to ensure that the best interests of unaccompanied children seeking asylum are a primary consideration at all times.

The Law Society agrees with these findings and supports the AHRC's recommendation for an independent guardian to be appointed for unaccompanied children seeking asylum in Australia.

Additional measures that could be implemented to expedite third country resettlement of asylum seekers and refugees within the Centres

The Law Society takes this opportunity to reiterate its recent submission to the Federal Government on offshore processing of asylum seekers, which noted that the United Nations High Commission for Refugees ("UNHCR") has recognised that it is possible for burden sharing arrangements made between State parties to the Refugee Convention to be developed in a way that adheres to the Articles of the Refugee Convention and other internationally recognised human rights.[12]

The UNHCR considers that it is possible to transfer asylum seekers to another country while processing their applications for asylum in Australia in accordance with international obligations.[13] The legality and appropriateness of any such arrangements are to be assessed on a case-by-case basis. The UNHCR Guidance Note on bilateral and/or multilateral transfer agreements of asylum-seekers outlines the principles that are to guide the creation of any transfer arrangements for asylum seekers from Australia for the purposes of processing:

1. While asylum seekers do not have the right to choose their country of asylum, their intention to come to Australia is to be taken into account to the extent possible.

2. It is well established under international law that Australia does not avoid responsibility for refugees simply by transferring them to another country. If Australia is found to have "effective control" over the treatment of the asylum seekers it has transferred to another country, it continues to be responsible for ensuring their treatment is consistent with international human rights obligations.

3. While the fact that a particular country is a signatory to international human rights instruments is important, this is not enough for it to qualify as an appropriate processing destination. The obligation remains on Australia to review the actual practices of the country for compliance with those obligations.

4. In the process of creating arrangements, Australia should not be burden-shifting. Instead, the arrangements must be made with a view to enhance Australia's overall protection space.

5. These arrangements should be explicitly outlined in a legally binding instrument, enforceable in a court by asylum seekers.

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[12] United Nations High Commissioner for Refugees, 'Protection Policy Paper – Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing' (November 2010).
[13] United Nations High Commissioner for Refugees, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, accessed at http://www.refworld.org/docid/51af82794.html.

6. Transfer arrangements between Australia and any other country must guarantee that asylum seekers will be individually assessed through fair and efficient procedures, treated in accordance with international standards and ultimately be able to enjoy asylum.

7. Where the aforementioned guarantees cannot be met by any country Australia proposes to create arrangements with, transfer is not appropriate.

8. It is not enough for Australia to assume that an asylum seeker will be treated in conformity with these standards. There is an ongoing obligation on Australia to ensure the transfer conditions are being met.

The Law Society acknowledges Australia's commitment to uphold and promote the rule of law, and that this requires the Federal Government to give effect to the international obligations that Australia has ratified, including the right to seek asylum from persecution, protection from serious human rights violations and other serious harm.

The Law Society submits that, if offshore processing is to continue, the Federal Government should adhere to the UNHCR Guidance Note on bilateral and/or multilateral transfer agreements of asylum-seekers, to ensure that we continue to adhere to the full range of international human rights Conventions to which Australia is a party.

The Law Society also acknowledges the recent AHRC Report: *Pathways to Protection: A human rights-based response to the flight of asylum seekers by sea*, which recognises that the key driver of flight by sea to Australia is the lack of effective protection for refugees and people seeking asylum in the Asia-Pacific region.[14]

Consequently, the AHRC recommends alternative policy responses to the current problem of asylum seeker boat arrivals – that Australia should instead focus on improving access to effective protection, which would provide the most effective and sustainable means of preventing flight be sea.[15] As such, the AHRC has recommended that Australia should instead focus on expanding opportunities for safe entry to Australia; and enhancing foreign policy strategies on migration in the Asia-Pacific region.

The Law Society strongly supports the development of alternative strategies to offshore processing and the need to focus on expanding opportunities for safe entry to Australia for asylum seekers.

Thank you for the opportunity to provide comments to this inquiry. I would be grateful if questions can be directed at first instance to Anastasia Krivenkova, Principal Policy Lawyer, on 9926 0354 or anastasia.krivenkova@lawsociety.com.au.

Yours sincerely,

Gary Ulman
President

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[14] Australian Human Rights Commission, *Pathways to Protection: A human rights-based response to the flight of asylum seekers by sea*, (2016), 5, http://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/pathways-protection-human-rights-based-response.
[15] Ibid.