



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HumanRightsREvk:840786

2 May 2014

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary,

Inquiry into the incident at the Manus Island Detention Centre during 16 to 18 February 2014

I am writing on behalf of the Human Rights Committee of the Law Society of NSW ('Committee') which is responsible for considering and monitoring Australia's obligations under international law in respect of human rights; considering reform proposals and draft legislation with respect to issues of human rights; and advising the Law Society accordingly.

The Committee is writing in relation to terms of reference (k) and (l) in relation to the Government's existing agreement with Papua New Guinea to transfer refugees to Papua New Guinea for processing and permanent resettlement¹ ("PNG Arrangement") and the Manus Island detention centre.

The Committee is not opposed to the development of durable regional processing arrangements; however, such arrangements must comply with Australia's human rights obligations. The conditions that led to the incident at Manus Island during 16 to 18 February 2014 ("February Manus Island incident"), and the subsequent injury of many asylum seekers and death of one highlights the seriousness and urgency of Australia's lack of human rights compliance.

While the Committee is concerned about the carriage of asylum seekers in unseaworthy or overcrowded boats, it does not support the turning back of such vessels or other action inappropriate to the condition of the boats, or to the rights of their occupants.

The policy goal of stopping deaths at sea is consistent with the right to life. However,

¹ See original agreement at *The Drum* available online at <http://www.abc.net.au/news/2013-07-22/png-australia-asylum-seekers-agreement/4835234> [accessed 12 October 2013].

seeking asylum is also a human right.² The Committee notes that the *Vienna Declaration and Programme of Action*³ provides that all human rights are interrelated, interdependent and indivisible and should therefore be applied equally. The right to life should be protected and promoted equally to the rights set out in various human rights instruments including the *Refugee Convention*⁴, the *International Covenant on Civil and Political Rights*⁵ ("ICCPR") and the *Convention on the Rights of the Child*⁶ ("CRC").

As a consequence of its international obligations, in the Committee's view Australia is required to take actions to save the lives of asylum seekers at sea that involve the diminution of their other human rights as little as possible, and certainly not at the risk of injury and death while in mandatory offshore detention.

With respect, it is not apparent how the PNG Arrangement is consistent with those requirements of the human rights of asylum seekers, taking into account the situation on Manus Island, the relatively low level of economic development in PNG and the security concerns detailed below. The February Manus Island incident makes it clear that the safety of asylum seekers held at the Manus Island detention centre cannot be guaranteed.

The Committee notes that many of the specific human rights concerns it raises in this submission are consistent with the views put forward by the Australian Human Rights Commission in its report *Human rights issues raised by the third country processing regime* of March 2013⁷.

1. Legal responsibility for transferees and regional processing arrangements

As a preliminary issue, the Committee notes that the 8 September 2012 Memorandum of Understanding between Australia and PNG does not specify which country has responsibility for the processing of the claims of transferred asylum seekers. It also does not provide details as to how the respective governments understand the apportionment of legal responsibilities.

Under international law, it is well established that Australia cannot avoid responsibility for refugees under international law simply by transferring refugees who arrive within Australia's jurisdiction to other countries.⁸ Both the Australian Human Rights

² Article 14 of the *Universal Declaration of Human Rights* (UDHR) provides that "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

³ UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, available at: <http://www.refworld.org/docid/3ae6b39ec.html> [accessed 22 November 2013].

⁴ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html> [accessed 22 November 2013].

⁵ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 22 November 2013].

⁶ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html> [accessed 22 November 2013].

⁷ At <https://www.humanrights.gov.au/publications/human-rights-issues-raised-third-country-processing-regime>.

⁸ G Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd ed, 2007), pp 408-411.

Commission⁹ and the United Nations High Commission on Refugees (“UNHCR”)¹⁰ have strongly indicated that Australia may continue to have legal responsibility for refugees transferred to both Nauru and Manus Island.

Australia’s human rights obligations may well extend to its actions outside Australian territory.¹¹ In 2004 the International Court of Justice (“ICJ”) considered the extraterritorial application of the ICCPR, the *International Covenant on Economic, Social and Cultural Rights*¹² (“ICESCR”) and the CRC in its advisory opinion dealing with the building of a wall by Israel in the Occupied Palestinian Territory, and found that these international covenants are applicable to acts done by a State in the exercise of its jurisdiction *outside* its own territory.¹³

If Australia has “effective control” over the treatment of asylum seekers it has transferred to another country, then it is obliged to continue to treat them consistently with the human rights obligations it has agreed to be bound by.¹⁴ The Committee understands that the question of whether Australia has “effective control” over arrangements in Nauru or on Manus Island is yet to be determined. Even if a State does not have effective control over a situation in another State’s territory, it may remain liable for the consequences of its action of transferring them. The UN Human Rights Committee has stated that a State Party will be responsible for extra-territorial violations of the ICCPR if its actions expose a person to a “real risk” that his or her rights will be violated, and this risk could reasonably have been anticipated by the State.¹⁵ A State may be responsible if it is “a link in the causal chain that would make possible violations in another jurisdiction”.¹⁶

International law does not prohibit third country processing of asylum seekers’ claims, provided certain conditions are met. The UN High Commissioner for Refugees (“UNHCR”) has commented that “cooperative approaches” and regional agreements may be put in place; and that genuine responsibility-sharing, such as that envisaged by

⁹ Australian Human Rights Commission, “Examination of the Migration (Regional Processing) package of legislation: Australian Human Rights Commission” Submission to the Parliamentary joint committee on Human Rights dated January 2013.

¹⁰ See letter from the High Commissioner Antonio Guterres to the Hon Chris Bowen MP dated 5 September 2012 in regard to Nauru, and dated 9 October 2012 in regard to Papua New Guinea, available at

<http://unhcr.org.au/unhcr/images/120905%20response%20to%20minister%20bowen.pdf> [accessed 13 October 2013].

¹¹ See the decision of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 (dealing in particular with rights under the ICCPR and the CRC).

¹² UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> [accessed 22 November 2013].

¹³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* [2004] ICJ Rep 136.

¹⁴ See the decisions of the European Court of Human Rights in *Banković v Belgium and others* (dec.) [GC] [2001] ECHR 890 and *Al-Skeini v United Kingdom* [GC] [2011] ECHR 1093.

¹⁵ *Mohammad Munaf v. Romania*, CCPR/C/96/D/1539/2006, UN Human Rights Committee (HRC), 21 August 2009, available at: <http://www.refworld.org/docid/4acf500d2.html> [accessed 25 November 2013], para 14.2.

¹⁶ *Roger Judge v. Canada*, CCPR/C/78/D/829/1998, UN Human Rights Committee (HRC), 13 August 2003, available at: <http://www.refworld.org/docid/404887ef3.html> [accessed 25 November 2013].

The Bali Process¹⁷, is to be encouraged if directed at more fairly distributing responsibilities and enhancing available protection space. However, in transferring asylum seekers to third countries, Australia must ensure that adequate safeguards are in place in those countries. The Committee is concerned that such safeguards do not exist in PNG.

The UNHCR has expressed its concerns in letters from the High Commissioner to the then Minister for Immigration.¹⁸ The Committee shares these concerns. The Committee is of the view that, consistent with the High Court's reasoning in *Plaintiff M70/2011 and M106/2011 v MIAC & Commonwealth*¹⁹, and despite subsequent changes to the *Migration Act 1958*²⁰ certain human rights safeguards must be present in the receiving countries in order for Australia to legally transfer asylum seekers to those countries consistently with its international obligations.

The Committee is concerned that PNG has limited expertise in refugee protection. The Committee notes that recognised refugees may spend years in poor conditions in Manus Island before being resettled and local integration is unlikely. The February Manus Island incident demonstrates that these concerns are, unfortunately, founded.

Diplomatic assurances from PNG, such as those referred to in the *Instrument of Designation of the Independent State of Papua New Guinea as a Regional Processing Country under Subsection 198AB(1) of the Migration Act 1958*²¹, have been shown to be inadequate safeguards for individuals transferred to PNG by Australia.

2. Discriminatory impact

The Committee is concerned that the transfer of asylum seekers who arrive in Australia by boat may contravene Article 26 of the ICCPR.

The UN Human Rights Committee has held that the right to equality and non-discrimination in Article 26 extends to non-citizens, (including asylum seekers).²² However, the UN Human Rights Committee has held that different treatment will not violate the prohibition against discrimination "if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."²³

There is no doubt that preventing the loss of the lives of asylum seekers at sea is a legitimate purpose under the ICCPR, particularly in light of Article 6 of the ICCPR which protects the right to life.

¹⁷ The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, see <http://www.baliprocess.net/regional-support-office> [accessed 20 October 2013].

¹⁸ Letters from Antonio Guterres to the Hon Chris Bowen dated 5 September and 9 October 2012, the United Nations High Commissioner for Refugees.

¹⁹ [2011] HCA 1.

²⁰ Changes to s 198AB make the public interest the only relevant criteria for the Minister to designate a country as suitable for the transfer of offshore entry persons.

²¹ October 2012, available at <http://www.comlaw.gov.au/Details/F2012L02003> [accessed 25 November 2013].

²² Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant*, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (1986), paras 2, 5, 7, 9 and 10. Available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm> [accessed 25 November 2013].

²³ Human Rights Committee, *General Comment No. 18*.

However, in the Committee's view, to the extent that the aim of the Australian Government's differential treatment of maritime asylum seekers is said to be prevention of loss of life, the measures adopted by the Australian Government are unlikely to be a "reasonable" response to this problem for the purposes of Article 26 given the highly arbitrary differential impact on different classes of asylum seekers.

3. Specific treaty obligations

3.1. Requirements of the Refugee Convention

The Committee respectfully submits that the Government's policy of treating asylum seekers who arrive by boat differently from asylum seekers who arrive by other means is a contravention of the Refugee Convention at a fundamental level.

Article 31(1) of the Refugee Convention provides that refugees shall not be penalised solely by reason of their unlawful entry to a country. This clause has been interpreted by the UNHCR as not being limited to refugees coming directly from territories where their life is threatened, but also including those who have been unable to obtain effective protection in transit countries.²⁴ This is significant since the majority of countries in the Asia Pacific region from which irregular maritime arrivals travel to Australia, such as Indonesia and Malaysia - are not parties to the Refugee Convention and offer very poor protection environments, with no durable solutions such as local integration.

This policy places asylum seekers who have arrived in Australia by boat at a significant and excessive disadvantage relative to those who arrive by plane. Furthermore, this differential treatment is unwarranted based on the evidence. Most protection visa applications lodged onshore are by international students, accounting for 47% of total applications in 2011-12. In comparison, 71.1% of irregular maritime arrivals were found to be owed protection obligations by Australia at first instance by a departmental delegate in 2011-12, compared with only 25.3% non-irregular maritime arrivals.²⁵ Similarly, on review, the overturn rate (that is, the percentage of recommendations made by independent reviewers to consider as refugees compared to the total number of review recommendations during the period) for irregular maritime arrivals was 82.4%, compared with a 44% grant rate for non-irregular maritime arrivals.²⁶ It is apparent that most asylum seekers who arrive in Australia by boat are, when assessed, eventually found to be genuine refugees.²⁷ Given this, the Committee's view is that this differential treatment is unnecessary, arbitrary and discriminatory.

²⁴ Summary Conclusions: Article 31 of the 1951 Convention, *Expert Roundtable organized by the United Nations High Commissioner for Refugees and the Graduate Institute of International Studies*, Geneva, Switzerland, 8-9 November 2001, available at <http://www.unhcr.org/419c783f4.pdf>. [accessed 25 November 2013].

²⁵ *Asylum Trends Australia*, 2011-12 Annual Publication, the Department of Immigration and Citizenship available at: <http://www.immi.gov.au/media/publications/statistics/asylum/files/asylum-trends-aus-annual-2011-12.pdf> [accessed 26 November 2013] at p 29.

²⁶ *Asylum Trends Australia*, 2011-12 Annual Publication, the Department of Immigration and Citizenship available at: <http://www.immi.gov.au/media/publications/statistics/asylum/files/asylum-trends-aus-annual-2011-12.pdf> [accessed 26 November 2013] at p 30.

²⁷ The Committee notes that this data reflects the situation prior to the institution of the "no-advantage" policy. Clearly, where applications are not being processed, it is not in fact possible to ascertain how many of the applicants are owed protection.

The *non-refoulement* obligation in Article 33 not to return individuals to countries where they fear persecution also extends to transfer to secondary countries where they may face persecution; or countries that may refole them. Homosexuals, single women, children and other particularly vulnerable social groups may have legitimate fears of being sent to PNG, taking into account the domestic legal arrangements of PNG. If transfer must continue to occur, the Committee strongly submits that there must be a proper process for screening these claims in Australia before transfer takes place. The Committee notes in this regard that PNG is itself a refugee-producing nation. Manus Island has a high risk of malaria²⁸, making it an unsuitable location for children and other vulnerable asylum seekers.

3.2. Requirements of the ICCPR

The Committee has previously made submissions that mandatory detention, except for identity and health checks, is likely to be considered arbitrary, and likely to offend Article 9 of the ICCPR. A copy of this submission is attached for information. It holds this view regardless of whether mandatory detention takes place in Australia or offshore, such as on PNG.

The Committee notes that there is a longer term risk for Australia of detention being considered arbitrary under the ICCPR if detainees are not able to be released into the community in PNG after the refugee status determination process. The Committee's view is that suggestions that asylum seekers can be sent to 'third countries' after their applications are processed are improbable. The Committee notes that Australia risks contravening the ICCPR rights of asylum seekers to be free from cruel, degrading treatment or punishment, depending on detention centre conditions, the duration of detention and other associated factors.

The largest ever complaint made against Australia to the UN Human Rights Committee was lodged in August 2011 and February 2012 by 46 detained refugees who received adverse security assessments from ASIO. For all 46, the UN Human Rights Committee found that the detention was illegal, and that there was inhuman or degrading treatment in detention, because of the arbitrary nature of the refugees' detention. In regard to the arbitrary nature of the detention (Article 9(1) ICCPR), the UN Human Rights Committee found that:

9.4 Whatever justification there may have been for an initial detention, for instance for purposes of ascertaining identity and other issues, the State party has not, in the Committee's opinion, demonstrated on an individual basis that their continuous indefinite detention is justified. The State party has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's need to respond to the security risk that the adult authors are said to represent. Furthermore, the authors have been kept in detention in circumstances where they are not informed of the specific risk attributed to each of them and of the efforts undertaken by the Australian authorities to find solutions which would allow them to obtain their liberty. They are also

²⁸ Eoin Blackwell, 'Malaria on Manus Island "endemic": report', *Sydney Morning Herald*, 18 August 2011, available online at <http://news.smh.com.au/breaking-news-world/malaria-on-manus-endemic-report-20110818-1izo0.html> [accessed 18 November 2013]; Global Human Rights Clinic, "Urgent Appeal regarding the Commonwealth Government of Australia's proposed offshore processing of asylum seekers in Manus Island", 25 September 2012 at paragraph 1.2, citing World Health Organisation, *World Malaria Report 2011*, WHO: Geneva, 2012, at p 152, available online at http://www.humanitarianresearchpartners.org/uploads/9/9/1/0/9910899/manus_island_urgent_appeal_public.pdf [accessed 18 November 2013].

deprived of legal safeguards allowing them to challenge their indefinite detention.²⁹

The Committee holds similar concerns for those transferred to PNG and reiterate that asylum seekers should not be transferred under the existing PNG Arrangement. The Committee notes that it appears that the detention conditions on Manus Island are not consistent with the requirements of the ICCPR due to the real risk of arbitrary detention and inhuman conditions in detention.

The Committee notes that asylum seekers have a right to family unity under Article 23 of the ICCPR. However, the Minister for Immigration has stated that even children with family members in Australia can be transferred to PNG. This appears to breach parts of the CRC. Such breaches of the CRC are detailed in section 3.3 below.

The Committee notes that restrictions of some rights under the ICCPR are permitted, but States must demonstrate that such measures are necessary and proportionate to the pursuit of legitimate aims.³⁰ Article 4 of the ICCPR allows states to derogate from rights in a time of public emergency – though there are restrictions on this. Notably, Australia is not facing a time of public emergency.

3.3. Requirements of the Convention on the Rights of the Child

The Committee notes that under Article 3, the best interests of the child is the paramount consideration. The Committee's strong view is that it is not appropriate to transfer vulnerable people, including children (and those with disabilities, or acute mental or physical health needs) to PNG, as the facilities on PNG are unlikely to be able to meet those health and other needs.

The Committee strongly submits that children should not be separated from their parents against their will without judicial review that determines that such separation is necessary for the best interests of the child (Article 9(1)). If children are separated from their parents, they should be able to maintain personal relations and direct contact with both parents on a regular basis unless it is contrary to their best interests (Article 9(2)).

The Committee notes that State parties are obliged to cooperate with the UN and any other competent intergovernmental organisation or NGO cooperating with the UN to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with the child's family (Article 22(2)).

The Committee sets out for ease of reference the requirements of Article 37:

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

²⁹ UN Human Rights Committee (HRC), *Communication No. 2094/2011*, 20 August 2013, CCPR/C/108/D/2094/2011, available at:

<http://www.refworld.org/docid/52270fe44.html> [accessed 13 October 2013].

³⁰ UN HRC General Comment 31(2004), and General Comment 29 on states on national emergency.

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Given the above, the Committee is of the strong view that children should not be transferred to PNG, and certainly not without judicial review.

3.4. Requirements of other human rights instruments

The Committee notes that PNG is not party to the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*³¹, which sets out standards on how people in detention must be treated. It is also not a party to the *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*³² (having recently strengthened its death penalty provisions), or the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*.³³

4. Factual issues of concern in relation to PNG

In addition to the concerns expressed about the lack of guarantee of safety for asylum seekers in detention on Manus Island, if refugees are indeed resettled on PNG, the Committee is deeply concerned that they will be faced with social unrest. The Committee notes that there is a lack of effective protection from tribal or gender-based violence. The Committee notes that at the date of this letter, the website of the Department of Foreign Affairs and Trade advises Australian travellers to exercise a "High Degree of Caution" in PNG because of the extremely high rate of serious crime, including sexual assault, perpetrated against locals and foreigners. The Committee notes also that in its experience, Australians who have worked in PNG travel with bodyguards, do not go out at night and do not catch public transport. The Committee queries whether the Australian government is planning to provide the same protections for refugees.

³¹ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.refworld.org/docid/3ae6b3a94.html> [accessed 22 November 2013]

³² UN General Assembly, *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, 15 December 1989, A/RES/44/128, available at: <http://www.refworld.org/docid/3ae6b3a70.html> [accessed 22 November 2013]

³³ UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, available at: <http://www.refworld.org/docid/4720706c0.html> [accessed 22 November 2013].

The Committee is concerned that there will be significant cultural and religious issues with resettling refugees in PNG, particularly given that the majority of those being resettled are likely to be Muslim.

The Committee is also troubled by the criminalisation of homosexuality in PNG. This may put at risk LGBTI asylum seekers.

The Committee notes that refugees have been resettled on the PNG mainland before, by its own government, but by and large it has not been successful and in some instances has resulted in violence and social unrest and resentment. Recent reports have indicated that in the past few years, refugees resettled from nearby islands due to volcanic eruptions resulted in violence.³⁴ This ultimately required the removal of the women and children from the area and also the need to close local schools.

The policy rationale underpinning the decision to resettle the world's most vulnerable people into a country that is experiencing its own challenges with development and governance remains unclear to the Committee. As noted previously, PNG is itself a refugee-producing nation.

Further, in relation to the prospects of successful resettlement, the Committee notes that there is little to no vacant land for refugees to be resettled on, as approximately 97% of land in PNG is owned by clans under customary arrangements. The land cannot be sold but may be leased.³⁵

5. Minimum requirements if the PNG Arrangement becomes the status quo

The Committee remains opposed to the PNG Arrangement and is of the view that the Manus Island detention centre should be closed.

However, if the PNG Arrangement is not dismantled, the Committee submits that the Government should at least ensure that:

- a) It urges PNG to remove its reservations to the Refugees Convention as a matter of urgency, if it has not done so already;
- b) There should be a robust pre-transfer screening process that ensures that vulnerable people, including unaccompanied minors, are not transferred offshore;
- c) The Refugee Status Determination (RSD) process in PNG is prompt, procedurally fair, and impartial. The process should include legal representation and independent merits review, as well as access to judicial review;
- d) While the processing occurs, asylum seekers should not be held in custody as a general rule without having the opportunity of satisfying the appropriate authority that they be released during that period, if it be an extended period; and
- e) Asylum seekers should be housed to an appropriate standard, be provided with appropriate medical care, a reasonable standard of living, work rights and access to educational opportunities.

³⁴ Andrea Babon, "What life can a resettled refugee expect in PNG?" *The Conversation*, 23 July 2013, available online at <https://theconversation.com/what-life-can-a-resettled-refugee-expect-in-png-16297> [accessed 18 November 2013].

³⁵ *Ibid.*

The Committee is of the strong view that the requirement of procedural fairness should at least be present to a standard acceptable to the UNHCR, including access to lawyers and appeal rights. The Committee notes that these issues are even more urgent now that IAAAS funding has ceased.

6. Conclusion

The Committee notes that the Report of the Expert Panel on Asylum Seekers³⁶ made a suite of recommendations, including recommendation 4, which suggests increased spending on regional policing (that is, to prevent people smugglers from operating) and increased spending on regional resettlement and housing projects. Given the Government's stated objective of stopping deaths at sea, the Committee queries the Government's allocation of priority to the more punitive recommendations made by the Expert Panel and apparent neglect of other recommendations that appear to be aimed at constructing fairer and more durable regional arrangements. In making this comment, the Committee notes that the total estimated operating cost of the PNG Arrangement as stated in the Economic Statement August 2013 is "\$175 million in 2013-14, and \$1.1 billion over four years, partially funded from a \$423 million reduction in the operating costs of the onshore detention network (a net impact of \$632 million) over the four years to 2016-17. Capital costs of \$194 million are included in 2013-14 to expand Manus Island facilities."³⁷

The Committee is of the view that the most effective and humane way of reducing irregular migration to Australia begins with longer term strategies to reduce the "push factors" underlying forced migration, such as conflict, political oppression and poverty. By building and maintaining a robust aid program to promote human rights and development in both refugee-producing and transit countries; and by building solid diplomatic relationships with countries in the region including engaging in effective capacity building and training on refugee protection, Australia can reduce the incentive of migrants to begin dangerous journeys to Australia.

If your office has any questions please contact Vicky Kuek, policy lawyer for the Human Rights Committee, on victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Yours sincerely,



Ros Everett
President

³⁶ Australian Government, *Report of the Expert Panel on Asylum Seekers*, August 2012, available online at http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/report/expert_panel_on_asylum_seekers_full_report.pdf [accessed 18 November 2013].

³⁷ *Portfolio budget statements 2013–14: budget related paper no. 1.11: Immigration and Citizenship Portfolio* cited in Harriet Spinks, Cat Barker and David Watt, "Australian Government spending on irregular maritime arrivals and counter-people smuggling activity" *Parliamentary Library Research Papers 2013-2014*, updated 4 September 2013 available online at http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pub/s/rp/rp1314/PeopleSmuggling#_ftn50 [accessed 18 November 2013].



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HumanRightsCommittee:VK:456107

24 June 2011

Committee Secretary
Senate Legal and Constitutional Committees
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee,

Re: Inquiry on the Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010

The Law Society's Human Rights Committee (the "Committee") has responsibility to consider and monitor Australia's obligations under international law in respect of human rights; to consider reform proposals and draft legislation with respect to issues of human rights; and to advise the Law Society of NSW on any proposed changes. The Committee is a long-established committee of the Society, comprised of experienced and specialist practitioners drawn from the ranks of the Society's members who act for the various stakeholders in all areas of human rights law in this State.

The Committee welcomes the opportunity to make submissions to the Senate Standing Committee on Legal and Constitutional Affairs. The *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010* (the 'Bill') proposes amendment to the *Migration Act 1958* (Cth) (the 'Act') which would see an end to Australia's current offshore processing and excision policy. The Bill would also make amendments relating to mandatory detention and the introduction of judicial review of prolonged detention. It is on these matters that the Committee seeks to comment.

Mandatory detention and offshore entry persons

While the Committee recognises that immigration detention is not prohibited by international law, its view is that Australia's current mandatory detention laws can violate the rights of asylum seekers to liberty¹ and deny the right to be treated with humanity and with respect for the inherent dignity of the human person².

The Committee is concerned that Australia's current immigration policy, whether or not deliberate, punishes asylum seekers based on their mode of arrival. Article 31 of the *Convention Relating to the Status of Refugees* ("Refugee Convention"), to which Australia is a signatory, explicitly prohibits the imposition of penalties on such account. Under the Act, offshore entry persons are prevented from making a valid

¹ Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR)

² Article 10 of the ICCPR



application for a protection visa³; they are detained under section 189(3) and continue to be so detained until they are granted a visa, removed or deported⁴. The law, as it currently stands, allows for indefinite detention⁵ and it fails to differentiate between adults and minors.⁶ This detention remains lawful despite harsh conditions⁷.

This unnecessary and costly process usually sees asylum seekers detained for long periods of time in remote locations. This not only impacts on their mental health, but also places great constraints on their ability to communicate with their legal representative and adequately present their claims for protection. Those seeking asylum on the mainland are not, under policy, subject to mandatory detention, nor are they prevented from lodging a valid application for a protection visa.

The United Nations High Commissioner for Refugees (UNHCR) Guidelines on Detention provide⁸:

Detention of asylum-seekers may exceptionally be resorted to for the reasons set out below as long as this is clearly prescribed by a national law which is in conformity with general norms and principles of international human rights law. These are contained in the main human rights instruments.

There should be a presumption against detention. Where there are monitoring mechanisms which can be employed as viable alternatives to detention, (such as reporting obligations or guarantor requirements [see Guideline 4]), these should be applied first unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose.

In assessing whether detention of asylum-seekers is necessary, account should be taken of whether it is reasonable to do so and whether it is proportional to the objectives to be achieved. If judged necessary it should only be imposed in a non discriminatory manner for a minimal period.

The law fails to meet these guidelines in that it allows for indefinite detention even though an asylum seeker has been found to be of no threat to the community. Currently, the only safeguard for a detainee appears within section 4AA of the Act, which affirms Parliament's intention that a minor shall only be detained as a measure of last resort. Despite this, a significant number of children continue to be held in immigration detention⁹. As such, the section has failed to fulfill its purpose. This presents a breach of Australia's obligations under Article 37(b) of the *Convention on the Rights of the Child* (the 'CRC'). While the Committee would welcome the introduction of 'Asylum Seeker Principles' under a new section 4AAA, it strongly supports amendments to the Act that would bring to force such intentions of Parliament.

³ See section 46A of the Act

⁴ See section 196 of the Act

⁵ See *Al-Kateb v Godwin* (2004) 219 CLR 562

⁶ See *Re Woolley* (2004) 225 CLR 1

⁷ See *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486

⁸ Office of the United Nations High Commission for Refugees, "UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers" (1999, Geneva) available online: www.unhcr.org.au/pdfs/detentionguidelines.pdf (accessed 24 June 2011)

⁹ 1083 children in immigration detention as at 13 May 2011 see <http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/> (viewed 15 June 2011)

The Committee's view is that even if detention is required for initial identity, health and security screenings, it need not extend beyond that. The arguments against mandatory detention are compelling and can no longer be ignored. In a recent report on immigration detention the Australian Human Rights Commission provided the following insight¹⁰:

The Commission has long held serious concerns about the detrimental impacts on people's mental health and wellbeing when they are held in immigration detention facilities for prolonged and indefinite periods of time. The Commission has repeatedly raised these concerns with DIAC and successive Ministers for Immigration, and in public reports regarding conditions in immigration detention facilities.

The Commission's concerns have escalated over the past year as thousands of people are being detained for prolonged periods, and clear evidence has become available of the poor mental health of many people in detention. This includes high rates of self-harm and five apparent suicides in immigration detention facilities – three of which occurred at Villawood IDC.

The Committee supports the proposed amendments to the Act that ensure that asylum seekers who arrive by boat are afforded the same rights and protections as those arriving on the mainland. In the same vein, the Committee welcomes amendments that see an end to mandatory detention; a policy that violates Australia's international obligations¹¹ and places at harm a group of the most vulnerable. Such amendments to the Act are appropriate and overdue.

Challenging detention

Under Australia's international obligations every adult or child deprived of his or her liberty is entitled to challenge the lawfulness of their detention before a court¹². Currently Australian law does not allow for such access, nor are courts granted the power to make orders releasing a person subject to arbitrary detention. In *Re Woolley*¹³, his Honour McHugh J highlighted that a number of decisions of the United Nations Human Rights Committee, the deliberation of the United Nations Working Group on Arbitrary Detention and the detention regimes in the United States, Canada, the United Kingdom and New Zealand indicate that a "regime which authorises the mandatory detention of unlawful non-citizens may be arbitrary notwithstanding that the regime may allow for the detainee to request removal at any time". His Honour postulated that "periodic judicial review of the need for detention, some kind of defined period of detention and the absence of less restrictive means of achieving the purpose served by detention of unlawful non-citizens" may serve to avoid breaches of the Refugee Convention, the ICCPR, the CRC and international law. The Committee understands this to be precisely what the present Bill aims to achieve.

While the Committee appreciates that the processing of initial identity, health and security clearances may take in excess of 30 days, it notes the proposed insertion of

¹⁰ Australian Human Rights Commission, "Immigration detention at Villawood: Summary of observations from visit to immigration detention facilities at Villawood" (2011) available online: http://www.hreoc.gov.au/human_rights/immigration/idc2011_villawood.html#s12 (accessed 24 June 2011)

¹¹ See for example *Bakhtiyari v Australia*, Human Rights Committee Communication No 1069/2002 (2003)


¹² See Article 37 of the CRC and Article 9 of the ICCPR

¹³ 225 CLR 1 at [114]

sections 195B and 195C do no more than give legitimacy to detention and make prolonged detention subject to judicial scrutiny. This, in the Committee's respectful submission, not only provides a safeguard against arbitrary detention, it ensures transparency and promotes compliance with international obligations. The Committee's view is that the Bill should be supported.

Thank you once again for the opportunity to comment.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Stuart Westgarth', written in a cursive style.

Stuart Westgarth
President