THE LAW SOCIETY
OF NEW SOUTH WALES

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26 August 2016

The Hon Malcolm Turnbull MP
Prime Minister
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600

By email: Malcolm.Turnbull.MP@aph.gov.au

Dear Prime Minister,

Offshore processing and the treatment of asylum seekers

I am writing on behalf of the Law Society of NSW in relation to a number of recent reports detailing the treatment of asylum seekers in the offshore processing centre in Nauru.

In particular, we are concerned about the ongoing reports of assaults, sexual abuse, self-harm attempts, child abuse and living conditions of asylum seekers held by the Australian Government.

There have been a number of reports that have detailed the abuse and discrimination experienced by asylum seekers on Nauru, including but not limited to:

- The recent report produced by Australian Women in Support of Women on Nauru, *Protection Denied, Abuse Condoned: Women on Nauru at Risk*, which contains stories of alleged abuse and discrimination experienced by women on Nauru, and its impacts on their mental health;[1]

- Reports from Amnesty International and Human Rights Watch into the living and health care conditions for refugees in the offshore processing centre in Nauru;[2] and

- *The Nauru files: cache of 2,000 leaked reports reveal scale of abuse of children in Australian offshore detention*, which set out allegations of assaults, sexual abuse, self-harm attempts, child abuse and the living conditions of asylum seekers held by the Australian Government.[3]

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[1] Wendy Bacon, Pamela Curr, Carmen Lawrence, Julie Macken and Claire O'Connor, *Protection denied, abuse condoned: women on Nauru at risk*, (2016), access at http://apo.org.au/files/Resource/women_on_nauru_web.pdf.

[2] Amnesty International, *Australia: Appalling abuse, neglect of refugees on Nauru*, 2 August 2016, accessed at https://www.amnesty.org/en/latest/news/2016/08/australia-abuse-neglect-of-refugees-on-nauru/.

[3] Paul Farrell, Nick Evershed and Helen Davidson, 'The Nauru Files', *The Guardian Australia*, 10 August 2016, accessed at https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children-in-australian-offshore-detention.

Having ratified a number of international Conventions which were established to provide fundamental protections for individual human rights, Australia is bound to deal with those who seek asylum from persecution in accordance with specific standards.[4] These standards support the position that those persons legitimately seeking recognition as refugees, or complementary protection, must be treated with fairness, humanity and respect.[5]

If offshore processing continues to be Government policy, there are a number of standards that should nevertheless be adhered to, to ensure that Australia complies with its international obligations.

The Law Society remains concerned about the inordinate and, in some cases, indefinite length of time individuals subjected to immigration detention can be held under the current regime. The Law Society is also concerned about restrictions on access to legal advice for certain people held in immigration detention and restrictions on access to administrative and judicial review of decisions which affect them.[6] The lack of independent oversight of immigration authorities and detention centres gives rise to significant potential for harm to vulnerable individuals, including children, who are subject to the very broad powers exercised by the Department of Immigration and Border Protection and the Minister for Immigration and Border Protection.

We support recent comments made by the Law Council of Australia for the need to appoint an Independent Inspector of Immigration Detention and an Independent Monitor for Migration Laws.[7] This oversight is necessary to ensure confidence in the safety and integrity of the operation of offshore processing centres.

We also echo the statements made by the Law Council 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").[8]

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[4] Australia is a party to the seven key international human rights treaties and has also signed or ratified a number of optional protocols to those treaties. The instruments which are most relevant to the detention of asylum seekers include: the *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) and the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967); the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 277 (entered into force 23 March 1976); the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force in 3 January 1976); the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); the *Optional Protocol to the Convention against Torture*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006); and the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 3 (entered into force 2 September 1990).

[5] Law Council of Australia, *Asylum Seeker Policy*, accessed at http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker_Policy_web.pdf, 11.

[6] Law Council of Australia, *Asylum Seeker Policy*, 4.

[7] Law Council of Australia, 'Independent oversight of immigration detention and border protection laws needed following Nauru leaks', *Media Release*, 12 August 2016, accessed at http://www.lawcouncil.asn.au/lawcouncil/images/1653_--_Independent_oversight_of_immigration_detention_and_border_protection_laws_needed_following_Nauru_leaks.pdf.

[8] Ibid.

It is well established that, under international law, Australia does not avoid responsibility for refugees simply by transferring them to another country.[9] 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.[10]

The Law Society's position is consistent with that of the United Nations High Commissioner for Refugees ("UNHCR") – that asylum seekers should be processed in the State where they arrive. However, the Law Society notes that the 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.[11]

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.[12] 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.[13]

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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[9] G Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd ed, 2007), 408-4011.
[10] 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.
[11] 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).
[12] 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.
[13] 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.

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.[14]

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.

Thanks you for considering this letter. Please do not hesitate to contact Anastasia Krivenkova, Principal Policy Lawyer, on 02 9926 0354 or anastasia.krivenkova@lawsociety.com.au if you would like to discuss this further.

Yours sincerely,

Gary Ulman
President

[14] Law Council of Australia, *Asylum Seeker Policy*, 4.