THE LAW SOCIETY
OF NEW SOUTH WALES

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30 June 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,

Supplementary submission: Inquiry into the incident at the Manus Island Detention Centre during 16 to 18 February 2014 ("Inquiry")

The Law Society of New South Wales thanks the Senate Committee for the opportunity to appear before it on 13 June 2014 to give evidence to the Inquiry, and expand on the written submissions of its Human Rights Committee ("HRC") on the incident at the Manus Island Detention Centre from 16 to 18 February 2014.

At this hearing the Law Society was invited to provide further written submissions detailing proposed amendments to the *Migration Act 1958* (Cth) ("Act") which, it was submitted, would be consistent with Australia's international obligations and assist to safeguard against a repeat of the incident at the focus of the Inquiry. This supplementary submission has been prepared for the Law Society by the HRC.

The HRC reiterates that while it does not necessarily oppose durable regional processing arrangements, it remains opposed to the current arrangements which fail to provide sufficient protection to people seeking to engage Australia's protection obligations. Should the policy of regional processing continue, the HRC submits that amendments to the Act are appropriate to address current shortcomings.

The regional processing provisions are found in Part 2, Division 8, Subdivision B of the Act. Section 198AA, which sets out the reason for the subdivision, provides that unauthorised maritime arrivals (including those in respect of whom Australia has protection obligations under the *Refugee Convention*[1] as amended by the *Refugee Protocol*[2]), should be able to be taken to any country designated to be a regional

[1] 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 30 June 2014]
[2] UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: http://www.refworld.org/docid/3ae6b3ae4.html [accessed 30 June 2014]

processing country. That section further states that it is a matter for the Minister and Parliament to decide which countries should be designated as a regional processing country; and, that such designation need not be determined by reference to the international obligations or domestic laws of that country.

Section 198AB(2) of the Act identifies that the only condition for the designation of a country as a regional processing country is that the Minister thinks that the designation is in the national interest. The term "national interest" is not defined; however, s 198AB(3) of the Act provides that in considering the "national interest" the Minister:

> (a) must have regard to whether or not the country has given Australia any assurances to the effect that:
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> (i) the country will not expel or return a person taken to the country under section 198AD to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; and
>
> (ii) the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the definition of refugee in Article 1A of the Refugees Convention as amended by the Refugees Protocol; and
>
> (b) may have regard to any other matter which, in the opinion of the Minister, relates to the national interest.

Relevantly, s 198AB(4) provides that the assurances referred to in s 198AB(3)(a) need not be legally binding, and s 198AB(7) provides that the rules of natural justice do not apply.

The HRC notes that there is no stated requirement for the Minister to consider other international obligations such as the *International Covenant on Civil and Political Rights*[3] ("ICCPR"), the *Convention on the Rights of the Child*[4] ("CROC") or the *Convention Against Torture*[5] ("CAT").

The HRC directs the Senate Committee's attention to the fact that the Government responded to the decision of the High Court of Australia in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 ("*Plaintiff M70/2011*") by enacting the current provisions. In *Plaintiff M70/2011,* it was held that under the then s 198A of the Act, the Minister could not validly declare a country for off-shore processing unless the country was legally bound by international law or domestic law to:

- Provide access for asylum seekers to effective procedures for assessing their need for protection; and
- Provide protection for asylum seekers pending determination of their refugee status; and

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[3] 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 30 June 2014]

[4] 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 30 June 2014]

[5] 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 30 June 2014]

- Provide protection for persons given refugee status pending their voluntary return to their country of origin or their resettlement in another country; and
- Meet relevant human rights standards in providing that protection.

The *Plaintiff M70/2011* challenge before the High Court was ultimately decided on the question of what the correct construction of the then s 198A of the Act was, and the assessment made by the Minister as to whether or not Malaysia met the relevant requirements. After finding that the criteria set out in the then s 198A(3)(a) were jurisdictional facts, four Justices of the High Court observed that the "facts necessary to making a valid declaration under s.198A(3)(a) were not and could not be established."[6]

The HRC submits that the current regional processing provisions should be repealed and replaced with provisions similar to those considered by the High Court in *Plaintiff M70/2011* and reflecting the Court's findings in that matter. The proposed provision may be drafted in the following terms:

(1) An officer may take an offshore entry person from Australia to a country in respect of which a declaration is in force under subsection (2).

(2) The Minister may on reasonable grounds:

(a) declare in writing that a specified country:

(i) provides access, for persons seeking asylum, to efficient and effective procedures for assessing their need for protection; and
(ii) provides protection for persons seeking asylum, pending determination of their refugee status; and
(iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
(iv) meets relevant human rights standards in providing that protection; and
(v) The transfer would be consistent with Australia's obligations under the CROC, the CAT and the ICCPR.

Notwithstanding anything else in this Act, a declaration made by the Minister by authority of (2) above shall be subject to judicial review.

Under the HRC's proposed amendments, the Minister could only lawfully declare a country a regional processing country if it has effective procedures in place for assessing protection claims; can provide protection to asylum seekers during and after the assessment of their claims (and through to resettlement); meets relevant human rights standards and the transfer would be consistent with Australia's obligations under the ICCPR, CROC and CAT. The amendments would ensure that asylum seekers do not wait for a prolonged (indeed, seemingly indefinite) period of time to have their claims assessed. The HRC notes that this factor was considered one of the principal causes leading to the incident on Manus Island in the Cornall report.[7] The HRC's view is that its proposed provisions might therefore provide for some protection against detention that becomes arbitrary or conditions that amount to torture, or to cruel, inhuman or degrading treatment or punishment.

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[6] Per Gummow, Hayne, Crennan and Bell JJ at [135]
[7] Robert Cornall, *Review into the events of 16 to 18 February 2014 at the Manus Regional Processing Centre - Report to the Secretary, Department of Immigration and Border Protection*, 23 May 2014, at p 81, available at https://www.immi.gov.au/about/dept-info/_files/review-robert-cornall.pdf [accessed 30 June 2014].

The HRC considers that while it is appropriate for the Minister to provide relevant assurances as to the existence of these conditions, it would be appropriate for the existence of these important safeguards to be subject to judicial review.

Thank you once again for the opportunity to give evidence, and for the opportunity to provide further submissions.

Yours sincerely,

Ros Everett
President