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# Submission on the Conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea

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## **Senate Legal and Constitutional Affairs References Committee**

**17 March 2016**

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## Acknowledgement

The Law Council of Australia wishes to acknowledge the assistance of the following Constituent Bodies in the preparation of this submission:

Law Society of South Australia

Law Society of New South Wales

## Introduction

1. The Law Council welcomes the opportunity to provide the following comments to the Senate Legal and Constitutional Affairs References Committee (**the Committee**) on its 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.
2. The Law Council's submission will focus on the following Terms of Reference:
  - b) transparency and accountability mechanisms that apply to the regional processing centres in the Republic of Nauru and Papua New Guinea;*
  - ...
  - d) the extent to which the Australian-funded regional processing centres in the Republic of Nauru and Papua New Guinea are operating in compliance with Australian and international legal obligations;*
3. The Law Council notes that the Committee has requested that if submissions were made to the Select Committee on Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru (**Select Committee on Nauru**), submitters do not re-submit that material to the current inquiry.
4. The Law Council therefore reiterates its position in that submission<sup>1</sup> that the Commonwealth retains responsibility, either wholly or in part, 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*.<sup>2</sup> Australia's responsibility derives from:
  - (a) the Commonwealth's potential common law duty of care; and
  - (b) international law under:
    - (i) the joint and several responsibility for internationally wrongful acts; and
    - (ii) Australia's effective control of its regional processing centres in relation to the extraterritorial application of human rights treaties to which it is party.
5. As identified in its previous submission, the Law Council considered that to address the related issue of preventing or lessening the future risk of physical and/ or sexual abuse:
  - (a) effective independent monitoring and review of detention centres, including those offshore, should be established; and
  - (b) asylum seekers and detainees applying for protection and those subject to physical and/or sexual abuse are provided with legal advice and representation.

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<sup>1</sup> Law Council of Australia, Submission to the Select Committee on Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, 12 May 2015, available at: [http://www.lawcouncil.asn.au/lawcouncil/images/2988 - S - Naru\\_Inquiry.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/2988 - S - Naru_Inquiry.pdf).

<sup>2</sup> *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) (collectively, 'the Refugee Convention').

6. The Law Council will not revisit its earlier submission, which it recommends to the Committee. Rather, this submission will focus on the *Australian Border Force Act 2015* (Cth) (**ABF Act**), enacted after the Law Council's submission to the Select Committee on Nauru, and recent developments in domestic jurisprudence. This submission will also provide further detail on the Law Council's proposals for improvements to offshore detention.
7. The Law Council makes the following recommendations to the Committee in respect of offshore processing:
  - (a) recommend amending the ABF Act to include a public interest disclosure exception to the secrecy provisions where the disclosure would, on balance, be in the public interest;
  - (b) recommend amending the ABF Act to include an express requirement that, for an offence to be committed, the unauthorised disclosure caused, or was likely or intended to cause, harm to an identified essential public interest;
  - (c) consider the extent to which the Commonwealth has complied with its domestic and international legal obligations, and how that compliance monitored;
  - (d) recommend establishing an independent visitor/ inspector to visit and monitor detention centres paid for and/ or administered by the Australian Government both in Australia and offshore;
  - (e) recommend establishing an Independent Monitor for Migration Laws to review migration-specific legislation; and
  - (f) recommend amending the *Migration Act 1958* (Cth) to include statutory limits on detention, and set out that detention of children should be for the shortest period of time possible and in accordance with the child's best interests.

## Transparency and accountability mechanisms

8. The Law Council is concerned that consultants to and contractors of the Department of Immigration and Border Protection (**the Department**) are prevented from making public interest disclosures on conditions in immigration detention facilities, including in regional processing centres, following the passage of the ABF Act. This concern is echoed by one of the Law Council's contributing Constituent Bodies to this submission, the Law Society of South Australia (**LSSA**).
9. The Australian Border Force Bill 2015 was introduced to the House of Representatives by the Government on 25 February 2015, and passed both Houses on 14 May 2015. It established the statutory office and role of the Australian Border Force (**ABF**) Commissioner and provides for the exercise of powers and obligations of the Commissioner and ABF employees. The ABF is part of the Department and is tasked with enforcing Australia's customs and immigration laws.
10. Part 6 of the ABF Act contains certain secrecy and disclosure provisions which are capable of applying to any information obtained by a person in the course of performing services for the Department.
11. The LSSA stated that of particular concern is the prohibition on ABF employees, including various government employees such as journalists and medical staff, from

publicly discussing conditions at the regional processing centres in Nauru and Papua New Guinea. It also considers that visas issued to foreigners are prohibitively expensive and restrictive, and that only one journalist has gained entry to Nauru in at least the last 18 months.<sup>3</sup> The LSSA has observed that this lack of transparency makes it very difficult to corroborate unverified reports from asylum seekers and refugees in regional processing centres.

12. The Law Council refers to the submission made to this Committee's current inquiry by the Australian Medical Association, which recognises that:

*The longer a person is in detention, the higher their risk of mental illness. The impact on children is magnified.*<sup>4</sup>

13. The Law Council considers that it is critical that consultants and contractors, including medical professionals, working for the Department in immigration detention facilities both onshore and offshore 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.
14. Since the passage of the ABF Act, the ability of Australian consultants or contractors to lawfully report publicly on conditions in detention and regional processing centres is limited, as in most cases, such public disclosure of information will be an offence against section 42(1) of the ABF Act.
15. The Law Council considers 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 for the Department.
16. There are exceptions to the secrecy provisions. The main exception is where the person making the disclosure believes, on reasonable grounds, that the disclosure *must* be made to prevent or lessen a *serious* threat to the life or health of an individual, and makes the disclosure for the purpose of preventing or lessening that threat.
17. The Law Council notes that the exceptions will only apply in the following circumstances:
- (a) pursuant to a legal obligation or authority to do so, but only to certain individuals, such as the head of the Department, and not to the public;<sup>5</sup>
  - (b) if disclosure is to The Australian Red Cross Society or certain government departments, agencies and authorities with the consent of the Secretary of the Department, and not to the public;<sup>6</sup>
  - (c) the disclosure concerns information relating to the affairs or a person or body, where the relevant person or body has consented and the disclosure is made in accordance with the consent;<sup>7</sup> and

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<sup>3</sup> Stephanie Anderson, 'Peter Dutton cannot confirm if journalist Chris Kenny was assisted with Nauruan visa', ABC News, 29 October 2015, available at: <http://www.abc.net.au/news/2015-10-29/no-answers-on-nauru-visa-assistance-for-chris-kenny/6894208>.

<sup>4</sup> Australian Medical Association, Submission to the Senate Legal and Constitutional Affairs References Committee Inquiry into Conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea, 2 February 2016, 1.

<sup>5</sup> *Australian Border Force Act 2015* (Cth) s 42(2)(c).

<sup>6</sup> *Ibid* s 44, see also s 42(2)(a). The Australian Red Cross Society is a body prescribed by the *Australian Border Force (Secrecy and Disclosure) Rule 2015* (Cth), cl 5, Sch 1, for the purposes of s 44(4)(f) of the Act.

- (d) the disclosure is made by an entrusted person who reasonably believes that the disclosure is necessary to prevent or lessen a serious threat to the life or health of an individual, and for the purpose of preventing or lessening that threat.<sup>8</sup>

18. The Law Council acknowledges that the Government has cited the *Public Interest Disclosure Act 2013* (Cth) (**PID Act**) as sufficient and effective protection for whistle-blowers:

*The PID Act provides protections for officials, including contractors, who wish to make disclosures in the public interest. Any person who makes a public interest disclosure, as defined within the PID Act, will not be subject to any criminal prosecution under the ABF Act.*<sup>9</sup>

19. However, the Law Council considers that the PID Act nevertheless limits the ability of Australian consultants or contractors to make public interest disclosures in respect of conditions in detention and regional processing centres, because:

- (a) the requirements of the PID Act in respect of making of a public disclosure is a lengthy and involved process;
- (b) it is unclear that a person who makes a public disclosure in reliance on the PID Act will be able to meet the requirements of disclosure; and
- (c) the maximum penalty for an offence against section 42(1) of the ABF Act is imprisonment for 2 years. A person who claims the protection from criminal liability afforded by section 10 of the PID Act must demonstrate that there is evidence to suggest a reasonable possibility that that their claim is made out.

20. The Law Council is concerned that the heightened secrecy provisions, as well as the broader powers to dismiss staff and contractors, may discourage legitimate whistle-blowers from speaking out publicly. To aid transparency, the Law Council considers that there should be a public interest disclosure exception to the secrecy provisions where the disclosure would, on balance, be in the public interest.

21. The Law Council also considers that the secrecy offences should include an express requirement that, for an offence to be committed, the unauthorised disclosure caused, or was likely or intended to cause, harm to an identified essential public interest. Such an element would address concerns about the broad scope of criminal secrecy provisions, which may capture disclosure of information that is already in the public domain or is otherwise innocuous. Where no harm is likely, other responses to the unauthorised disclosure of Commonwealth information are appropriate, including the imposition of administrative sanctions or the pursuit of contractual or general law remedies.

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<sup>7</sup> Ibid s 47, see also s 42(2)(a).

<sup>8</sup> Ibid s 48, see also s 42(2)(a).

<sup>9</sup>The Hon Peter Dutton MP, Minister for Immigration and Border Protection, 'Inaccurate media statements on ABF Act' (Media Release, 1 July 2015).

**Recommendation:**

- **amend the ABF Act to include a public interest disclosure exception to the secrecy provisions where the disclosure would, on balance, be in the public interest; and**
- **amend the ABF Act to include an express requirement that, for an offence to be committed, the unauthorised disclosure caused, or was likely or intended to cause, harm to an identified essential public interest.**

## Offshore processing and Australian and international legal obligations

22. The Law Council does not reproduce its submission to the Select Committee on Nauru in relation to Australia's domestic and legal obligations. However, it invites the Committee to consider the Law Council's discussion on those issues as set out in that submission. In addition to that discussion, the Law Council identifies below two particular developments in respect of Australia's domestic legal obligations that have taken place since the report of the Select Committee on Nauru.
23. The Law Council also notes that the LSSA recommends that the Committee consider the extent to which the Commonwealth has complied with its domestic and international legal obligations, and how that compliance monitored. The LSSA suggests it is appropriate to examine the following questions:
- (a) what, if any, independent avenues of oversight are in place to review the discharge of the relevant legal responsibilities by the Commonwealth, Nauru and Papua New Guinea, and any relevant third parties?
  - (b) which of the Commonwealth's obligations (e.g. domestic, international, contractual) are routinely discharged, and which have a pattern of failing to comply?
  - (c) how accessible is information, including reports and other evidence of the conditions in the regional processing centres, to refugees and asylum seekers and their representatives, including legal representatives?
  - (d) how would the Australian Border Force Act 2015 (Cth) apply to any proposed independent monitoring mechanisms?
  - (e) which office or body, or offices or bodies, are most appropriate and able to conduct effective independent monitoring and review of the conditions in the regional processing centres?
  - (f) which office or body, or offices or bodies, are most appropriate and able to conduct effective independent monitoring and review of whether the Commonwealth has complied with its legal obligations?
  - (g) when a party has failed to comply with their obligations, what penalties or other consequences are mandated, which are used in practice, and how is their enforcement monitored?

**Recommendation:**

- **the Committee consider the extent to which the Commonwealth has complied with its domestic and international legal obligations, and how that compliance monitored.**

## **Developments in respect of domestic legal obligations**

### The High Court's position on the legality of offshore processing: *Plaintiff M68*

24. On 14 May 2015, a case was brought in the High Court's original jurisdiction under sections 75(iii) and 75(v) of the Constitution on behalf of a Bangladeshi woman who was detained on Nauru from 23 January to 2 August 2014, but brought to Australia in the latter stages of her pregnancy. It was alleged by the plaintiff that the Commonwealth 'funded, authorised, caused, procured and effectively controlled' her detention by Nauru.
25. The case raised the issue of whether the Commonwealth can take 'transitory persons' who are prevented by the operation of the Migration Act from applying for a protection visa in Australia because their claims are being processed elsewhere, to a foreign country for the purposes of extra-judicial and extraterritorial detention, where the detention is funded, caused and effectively controlled by the Commonwealth but lacks the Commonwealth's Constitutional protections.
26. The outcome of the case also had implications for 267 other transitory persons, including 39 children, and 33 babies born in Australia.
27. Following the commencement of proceedings, the Governments of Australia and Nauru made the following significant statutory and procedural changes:
- (a) on 24 June 2015, the Migration Amendment (Regional Processing Arrangements) Bill 2015 was passed in the Australian Parliament, which retrospectively and prospectively authorised payments made to establish and operate offshore detention centres; and
  - (b) on 5 October 2015, Nauru became an 'open centre' such that detainees were free to move around the whole Island.
28. The judgment in *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors*<sup>10</sup> was handed down on 3 February 2016.
29. Chief Justice French, Kiefel and Nettle JJ, with whom Keane J agreed, stated that Nauru, not the Commonwealth, was responsible for the plaintiff's detention.<sup>11</sup> The Commonwealth's involvement with Nauru's detention of the plaintiff was authorised by new section 198AHA of the Migration Act, a valid piece of legislation introduced within the scope of the aliens power in the Constitution<sup>12</sup> by the *Migration Amendment (Regional Processing Arrangements) Act 2015* (Cth).<sup>13</sup>

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<sup>10</sup> [2016] HCA 1.

<sup>11</sup> *Ibid* at [34] (French CJ, Kiefel and Nettle JJ) and [239] (Keane J) ('*Plaintiff M68*').

<sup>12</sup> At s 51(xix).

<sup>13</sup> *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors* [2016] HCA 1 ('*Plaintiff M68*'), [45].



30. Writing separately, both Bell and Gageler JJ found that the Commonwealth detained the plaintiff and that the detention was authorised by section 198AHA, which was a valid piece of legislation. Indeed, Bell J found that ‘the Commonwealth funded the [regional processing centre] and exercised effective control over the detention of the transferees through the contractual obligations it imposed on [its garrison and welfare services contractor] Transfield.’<sup>14</sup>
31. Justice Gordon, in dissent, also found that the Commonwealth did detain the plaintiff. However, in contrast to Bell J, who found that the principles in *Chu Kheng Lim v Minister for Immigration* were not contravened by the plaintiff’s detention,<sup>15</sup> Gordon J found that the detention would have been authorised by section 198AHA but for *Lim*, which states the detention provisions of the Migration Act:
- will be valid laws if the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered. On the other hand, if the detention which those sections require and authorize is not so limited, the authority which they purportedly confer upon the Executive cannot properly be seen as an incident of the executive powers to exclude, admit and deport an alien. In that event, they will be of a punitive nature and contravene Ch. III’s insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates.*<sup>16</sup>
32. Justice Gordon found that for the same reason that section 198AHA was invalid – because it contravenes Chapter III of the Constitution that requires the judicial powers of the Commonwealth be vested in the courts Chapter III designates<sup>17</sup> – the Commonwealth lacked the non-statutory executive power to detain the plaintiff.<sup>18</sup>
33. While the High Court therefore upheld the validity of offshore detention on Nauru, the different approaches of the four separate judgments demonstrate there are some unresolved issues in respect of the question of who was detaining the plaintiff, and the question of the scope of the Commonwealth’s executive power in circumstances where there is no statutory authorisation of that power.
34. As noted by one of the Law Council’s Constituent Bodies, the Law Society of New South Wales, while the decision has provided a position on the Constitutionality of Australia’s offshore immigration detention arrangements, the decision does not affect Australia’s obligations under international law.

#### Duty of Care

35. In its submission to the Select Committee on Nauru, the Law Council briefly discussed the class action brought by lead plaintiff, Majid Karami Kamasae, on 14 December 2014 on behalf of persons detained on Manus Island between 21 November 2012 and 19 December 2014. The plaintiff’s claim is in negligence and is against the Commonwealth of Australia, and its contractors, G4S Australia Pty Ltd and Transfield Services (Australia) Pty Ltd.

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<sup>14</sup> Ibid at [93].

<sup>15</sup> Ibid at [99].

<sup>16</sup> (1992) 176 CLR 1, 33 (Brennan, Deane and Dawson JJ).

<sup>17</sup> *Plaintiff M68* at [388] in respect of the aliens power at s 51(xix), at [403] in respect of the immigration power at s 51(xxvii), at [411] in respect of the external affairs power at s 51(xxix), and at [412] in respect of the Pacific Islands power at s 51(xxx).

<sup>18</sup> Ibid at [360].

36. The plaintiff is an Iranian national who, as a minor in Iran, suffered burns to his body that required several surgical procedures for treatment or management. The plaintiff was detained by Australian authorities as an adult in August 2013 and was subsequently removed to the Manus Island regional processing centre in September 2013. As a result of pain and irritation to his skin, and other physical and psychological injuries, the plaintiff was transferred to Melbourne for medical treatment in June 2014. The plaintiff remained in detention in Melbourne at the time of the commencement of the proceedings.
37. The plaintiff brought the proceedings on his own behalf, but also on behalf of all persons detained on Manus Island during the same period and who suffered personal injury.
38. The Law Council reiterates its position in its earlier submission – that this case may have significant implications for the Commonwealth, as it will provide clarity about the Commonwealth’s duty of care for asylum seekers in regional processing centres. It notes that the trial in this matter is listed for 1 August 2016.

## Improving offshore detention

39. In addition to the Law Council’s previous recommendations in its submission to the Select Committee on Nauru for improved oversight and access to free legal advice and representation, the Law Council proposes some further practical measures to improve and increase public confidence in the operation of regional processing centres.
40. As an update to its previous submission, the Law Council acknowledges and welcomes that the Australian Government supports the Government of Nauru in providing legal and interpreter services to asylum seekers on Nauru.
41. The LSSA considers that effective independent monitoring and review of the conditions of regional processing centres in Nauru and Papua New Guinea are necessary to ensure:
- (a) that the common law duty of care and international legal responsibilities have been discharged; and
  - (b) more general adherence to human rights principles.

## Independent oversight

42. The Law Council notes that there are several existing oversight mechanisms in respect of detention centres and migration laws, including:
- (a) the Immigration Ombudsman, established in 2005 in the Office of the Commonwealth Ombudsman, who administers general complaints procedures and reviews cases involving long-term immigration detention, monitors administration of coercive powers and offshore processing of immigration cases, and inspects immigration detention facilities, including those offshore. The Ombudsman no longer has capacity to review detention cases every six months, and reviews them only every two years;
  - (b) the Australian Human Rights Commission (**AHRC**), which, amongst other activities in respect of asylum seekers and refugees, investigates complaints of alleged breaches of human rights in immigration detention, conducts visits

to immigration detention facilities and publishes reports on those visits. The AHRC has developed minimum standards for the protection of human rights in immigration detention and conducts own-motion inquiries concerning the treatment of people in immigration detention;

- (c) the Parliamentary Joint Committee on Human Rights, which has powers to examine Bills, Acts and legislative instruments for compatibility with human rights, and inquire into any matter relating to human rights which is referred to it by the Attorney-General;
- (d) the Independent Reviewer for Adverse Security Assessments, which examines material relied upon by Australian Security Intelligence Organisation in making security assessments against a refugee who has been refused a permanent visa as a result of an adverse security assessment; and
- (e) the Senate Legal and Constitutional Affairs References Committee, which exercises general powers of inquiry under the Standing Orders.

43. The Law Council considers that there would be benefit in establishing immigration-specific oversight mechanisms at operational and systemic levels, similar to those operating in the national security space.

#### Visitor/ Inspector of Detention Centres

44. The Law Council considers that there would be benefit in establishing an independent visitor/ inspector to visit and monitor detention centres paid for and/ or administered by the Australian Government both in Australia and offshore. It identifies two existing independent oversight bodies as potential models.
45. The Inspector of Custodial Services in New South Wales (**the Inspector**) provides independent scrutiny of the conditions, treatment and outcomes for adults and young people in custody, and to promote excellence in staff professional practice.
46. The Inspector has jurisdiction over all correctional facilities, including publicly and privately-run correctional centres and juvenile justice centres, court custody centres, police cells managed by Corrective Services NSW, transitional centres, inmate/detainee transport, and custodial residential facilities. The Inspector is able to examine correctional and juvenile justice facilities at any time and make recommendations about issues of concern.
47. Inspections may be instigated by the Inspector or at the request of the Minister for Justice or a Parliamentary Joint Committee or any public authority or public official.
48. Administration of the office of the Inspector sits within the Department of Justice. The Inspector reports to Parliament and is subject to oversight by the Parliamentary Committee on the Ombudsman, the Police Integrity Commission, and the Crime Commission.
49. In the national security space, the Federal Inspector-General of Intelligence and Security (**IGIS**) has been established pursuant to the *Inspector-General of Intelligence and Security Act 1986* (Cth) to review the activities of the six intelligence agencies referred to as the 'Australian Intelligence Community', thereby ensuring that the agencies act legally and with propriety, comply with ministerial guidelines and directives and respect human rights.

50. The IGIS can undertake a formal inquiry into the activities of an Australian intelligence agency in response to a complaint or a reference from a minister. The Inspector-General can also act independently to initiate inquiries and conducts regular inspections and monitoring of agency activities.
51. In conducting an inquiry, the IGIS has significant powers which include requiring the attendance of witnesses, taking sworn evidence, copying and retention of documents and entry into an Australian intelligence agencies' premises. The IGIS can also conduct preliminary inquiries into matters in order to decide whether to initiate a full inquiry.

#### Independent Monitor for Migration Laws

52. The Law Council considers that there would be benefit in establishing an independent, specialist body to review migration-specific legislation. This would be similar to the role of the Independent National Security Legislation Monitor (**INSLM**).
53. The INSLM is appointed under the *Independent National Security Legislation Monitor Act 2010* (Cth). The INSLM's role is to review the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation on an ongoing basis. This includes considering whether the laws contain appropriate safeguards for protecting the rights of individuals, remain proportionate to any threat of terrorism or threat to national security or both, and remain necessary.
54. The Law Council considers that the role of the proposed Independent Monitor for Migration Laws should include reviewing immigration legislation and focus on how those laws are implemented and administered. For example, in respect of retrospective laws, the Monitor should be able to inquire into whether retrospective migration laws:
- (a) should be changed;
  - (b) has an identifiable purpose requiring retrospective application; and
  - (c) have achieved those purposes.
55. The Monitor's role should also focus on how those laws are implemented and administered, including at sea and offshore in Australia's regional processing centres, pursuant to Australia's obligations under human rights treaties to which it is party. Any actions or omissions affecting rights of individuals subject to Australia's immigration and border control powers should fall within the Monitor's jurisdiction.
56. The Law Council discussed this proposal in its 9 October submission to the Australian Law Reform Commission on its *Interim Report into Traditional Rights and Freedoms – Encroachment by Commonwealth Laws*.<sup>19</sup>

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<sup>19</sup> Law Council of Australia, Submission to the Australian Law Reform Commission's Interim Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws, 9 October 2105, available at: [http://www.lawcouncil.asn.au/lawcouncil/images/3065\\_-\\_Interim\\_Report\\_into\\_Traditional\\_Rights\\_and\\_Freedoms.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/3065_-_Interim_Report_into_Traditional_Rights_and_Freedoms.pdf).

**Recommendation:**

- **the establishment of an independent visitor/ inspector to visit and monitor detention centres paid for and/ or administered by the Australian Government both in Australia and offshore; and**
- **the establishment of an Independent Monitor for Migration Laws to review migration-specific legislation.**

## **Legislative safeguards for the detention of children**

57. The Law Council's *Asylum Seeker Policy* states that rule of law principles require that there are maximum limits on detention to guard against indefinite detention.<sup>20</sup> The Law Council has also previously advocated that the detention of children should only be for a period that is strictly necessary to conduct health, identity and security checks, in accordance with the best interest principle at international human rights law.<sup>21</sup>

58. The Law Council notes that in 2014, the United Kingdom amended the *Immigration Act 1971* (UK) to ensure that detention of children is limited to 72 hours at specially designated accommodation.<sup>22</sup> Under the policy, families with children are no longer detained in Immigration Removal Centres before removal from the UK, although they may be held for up to a week in secure 'pre-departure accommodation'.

59. In practice, families and unaccompanied children can be held in short-term holding facilities at UK ports of entry or immigration removal centres pending their admission to or immediate removal from the UK.

60. In 'exceptional cases', detention may be extended to one week but only with authorisation from the relevant Minister. Unaccompanied children may not be detained for more than 24 hours and additional conditions must be met to detain an unaccompanied child for even this brief period.

61. The Law Council also notes that in Sweden, the *Swedish Aliens Act* states that children may only be detained for 72 hours with a further 72 hours available in exceptional circumstances. Statistics show that the average length of time that children spent in detention in Sweden in 2013 was just five days.

62. The Law Council therefore reiterates its policy position: that legislation should prescribe maximum limits on detention, and that detention of children should be for the shortest period of time possible and in accordance with the child's best interests.

**Recommendation:**

- **amend the Migration Act to include statutory limits on detention, and set out that detention of children should be for the shortest period of time possible and in accordance with the child's best interests.**

<sup>20</sup> Law Council of Australia, *Asylum Seeker Policy*, (6 September 2014), [10(e)], available at:

[http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker\\_Policy\\_web.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker_Policy_web.pdf).

<sup>21</sup> Ibid at [10(h)]. See also: Duncan McConnel, 'Time for protection of children lost in politics' *The Australian Financial Review* (online) 14 May 2015, available at: <http://www.afr.com/business/legal/time-for-protection-of-children-lost-in-the-politics-20150513-gh1506>.

<sup>22</sup> See: House of Commons Library, 'Ending child immigration detention', 4 September 2014.

## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.