



Law Council
OF AUSTRALIA

Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre

Senate Legal and Constitutional Affairs References Committee

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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.

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

Acknowledgement

The Law Council acknowledges the assistance of its National Human Rights Committee, the Law Society of New South Wales and the Law Society of South Australia in the preparation of this submission.

Introduction

1. The Law Council welcomes the opportunity to provide the following comments to the Senate Legal and Constitutional Affairs References Committee (**References Committee**) in respect of its inquiry into serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre (**the Inquiry**).

2. The Law Council's submission will focus on the following Terms of Reference:

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

...

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

f. the effect of Part 6 of the Australian Border Force Act 2015,

...

i. any other related matters

3. The Law Council notes that the References Committee will have access to all inquiry submissions and documents of the preceding committee relating to 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 (**PNG**). The Law Council therefore recommends the References Committee consider its submission to that inquiry (**Nauru and PNG Submission**),¹ as well as its submission to the Select Committee on Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru.²

4. The Law Council makes the following recommendations to the References Committee in respect of the Inquiry:

- a) The Commonwealth Government engage with the Office of the United Nations High Commissioner for Refugees (**UNHCR**) to ensure its regional processing arrangements accord with its international obligations;
- b) The Commonwealth Government ensures that officers of the Commonwealth and its contractors observe duty of care obligations and remedy any breaches;

¹ Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs References Committee 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, 17 March 2016 (**LCA Nauru and PNG submission**), available at: https://www.lawcouncil.asn.au/lawcouncil/images/3129_-_Nauru_PNG_Inquiry_2016.pdf.

² 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.

- c) The Commonwealth Government appoint an independent guardian for unaccompanied asylum-seeking children in Australia;
- d) The Commonwealth Government work with the Nauruan Government to implement the recommendations of the Committee on the Rights of the Child (**CRC**) in its recent Concluding Observations on Nauru, including by facilitating and providing funding for legal aid;
- e) Extend the jurisdiction of the Australian Human Rights Commission (**the Commission**), including the National Children’s Commissioner, to regional processing centres, including Nauru;
- f) In respect of the Immigration Ombudsman:
 - (i) Introduce a statutory requirement to conduct monitoring every quarter and increase resources for greater monitoring; and
 - (ii) Introduce a statutory requirement to publish reports of detention visits and the Minister’s response to recommendations therein;
- g) The Commonwealth Government review and implement relevant recommendations arising from the October 2016 visit by the United Nations Special Rapporteur on the Situation of Human Rights Defenders;³
- h) Ratify the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*,⁴ allowing for the scrutiny of all places of detention, including regional processing centres;
- i) Introduce statutory limits on detention, in accordance with the best interests of the child principle;
- j) Amend the *Australian Border Force Act 2015 (Cth) (ABF Act)* to include a public interest disclosure exception to the secrecy provisions 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;
- k) The Attorney-General refer to the Parliamentary Joint Committee on Human Rights the ABF Act, for the purpose of conducting an assessment of the operation and effectiveness of the Act and the adherence by authorised persons to Australia’s human rights obligations;⁵
- l) Undertake an assessment of the Government’s responses to previous independent and parliamentary reports, including in respect of timelines for implementation, adequacy of measures in respect of implemented recommendations, and the Government’s position on outstanding recommendations; and

³ End of Mission Statement by Michel Forst, United Nations Special Rapporteur on the Situation of Human Rights Defenders, Visit to Australia, 18 October 2016. Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E>.

⁴ *Optional Protocol to the Convention against Torture*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006).

⁵ Pursuant to para 7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)*.

- m) Recommend the Commonwealth Government respond to the Commission's recent report, *Pathways to Protection: A human rights-based response to the flight of asylum seekers by sea*, specifically the recommendations in respect of safe entry.

Obligations of the Commonwealth Government and contractors relating to the treatment of asylum seekers

5. The Law Council's response to this Term of Reference will be restricted to discussion of the standards to which the Commonwealth Government and its contractors must adhere in respect of the treatment of asylum seekers and refugees over whom the Government is responsible.
6. The Law Council refers the References Committee to the Law Council's discussion of the Commonwealth Government's responsibility over asylum seekers and refugees in regional processing centres in its Nauru and PNG submission: the Law Council recognises that the Commonwealth Government's responsibility over asylum seekers and refugees sent to Nauru and Manus Island derives from the common law duty of care and international law.⁶
7. This view is echoed in contributions provided by two of the Law Council's Constituent Bodies in contributing comments for this submission, the Law Society of New South Wales (**LSNSW**)⁷ and the Law Society of South Australia (LSSA). In respect of Australia's obligations under international human rights law specifically (as opposed to state responsibility under international law more generally), the LSNSW observes that if Australia is found to have 'effective control' over the treatment of the asylum seekers it has transferred to another country, the Commonwealth Government continues to be responsible for ensuring their treatment is consistent with Australia's international human rights obligations.⁸
8. The LSNSW also considers that the issue of 'effective control' arising out of Australia's international human rights law obligations should be given greater consideration in light of the recent decision of the Supreme Court of PNG regarding the legality of the detention of asylum seekers on Manus Island. On 26 April 2016, the Supreme Court of PNG held that the detention of asylum seekers on Manus Island was unconstitutional on the basis that the detention breached the right to personal liberty in the PNG Constitution.⁹ The Court ordered that:

⁶ LCA Nauru and PNG submission, [4].

⁷ Law Society of New South Wales, Submission to the Select Committee on Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, 4 May 2015, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Submissions.

⁸ 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.

⁹ Eric Tlozek and Stephanie Anderson, 'PNG's Supreme Court rules detention of asylum seekers on Manus Island is illegal', *ABC Online*, 27 April 2016, available at: <http://www.abc.net.au/news/2016-04-26/png-court-rules-asylum-seeker-detention-manus-island-illegal/7360078>.

Both the Australian and Papua New Guinea governments shall forthwith take all steps necessary to cease and prevent the continued unconstitutional and illegal detention of the asylum seekers or transferees at the relocation centre on Manus Island and the continued breach of the asylum seekers or transferees Constitutional and human rights.¹⁰

9. The LSNSW considers that the judgment provides an impetus for Australia to work towards lasting, third country resettlement options, and also brings into further consideration the claim that Australia may be breaching its duty of care to asylum seekers.¹¹
10. The LSNSW also notes that in February 2016, the High Court of Australia handed down its decision in *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors*.¹² The LSNSW considers that although this decision provided a position on the constitutionality of Australia's offshore immigration detention arrangements (and matters associated, including the Commonwealth's contracts and effective control in respect of those arrangements), the decision does not affect Australia's obligations under international human rights law.
11. The LSSA adds that in considering the obligations of contractors relating to the treatment of asylum seekers consideration should had by the References Committee to the procedures and penalties or other consequences that are mandated and used in practice, and how enforcement is monitored.
12. The Law Council also notes that the *United Nations Guiding Principles on Business and Human Rights* (the Guiding Principles) call upon businesses to respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.¹³ Addressing adverse human rights impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation.

Standards in detention

13. As a result of Australia's responsibility over asylum seekers and refugees in regional processing centres, the Commonwealth Government is required to meet certain standards in respect of conditions in detention. The Law Council's *Asylum Seeker Policy*¹⁴ observes that conditions of immigration detention must be humane and dignified, such that:

¹⁰ *Namah v Pato* [2016] PGSC 13; SC1497, [72(6)].

¹¹ See: Dr Stephen Tully, 'Manus Island Regional Processing Centre Illegal Under PNG Law', *Law Society of NSW Journal*, issue 23, June 2016, 84-85.

¹² [2016] HCA 1.

¹³ Principle 11, *United Nations Guiding Principles on Business and Human Rights* (2011).

¹⁴ Law Council of Australia, *Asylum Seeker Policy*, (6 September 2014), available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker_Policy_web.pdf. See also: Law Council of Australia, *Principles Applying to the Detention of Asylum Seekers*, (22 June 2013), available at: https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Final_PDF_18_Oct_Asylum_Seekers_Principles.pdf.

- a) No asylum seeker is held in conditions of detention which amount to torture or cruel, inhuman or degrading treatment,¹⁵ including being held in incommunicado or lengthy solitary detention;¹⁶
 - b) Asylum seekers should not be held with prisoners or in prison-like facilities;¹⁷
 - c) Asylum seekers should be detained in a manner appropriate to their status, including segregation of men from women and children from adults unless part of a family unit;¹⁸
 - d) Detained asylum seekers should have appropriate access to key services such as education and health services, including appropriate mental health services;¹⁹ and
 - e) Risks of suicide and self harm by detained asylum seekers must be identified and removed or minimised.²⁰
14. The Law Council considers that, at a minimum, the treatment of asylum seekers and refugees in offshore processing centres must comply with the agreed standards set out in international legal instruments to which Australia is party.
15. The LSSA has submitted similar views, noting that particular attention should be paid by the References Committee to the effectiveness of past and current support services in maintaining the physical and mental wellbeing of asylum seekers, as well as what changes in conditions and practices might better safeguard asylum seekers from foreseeable physical and psychological harm as well as ensure compliance with domestic and international obligations.
16. The Law Council recognises that UNHCR is an authoritative source of legal interpretation of the 1951 *Convention relating to the Status of Refugees* (the **Refugee**

¹⁵ Art 7 of the *International Covenant on Civil and Political Rights (ICCPR)*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); art 16 of 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); Principle 6 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA res 43/ 173 (1998) (**UN Detention Principles**) and Principle 7 of the Law Council's *Policy Statement: Rule of Law Principles*, (March 2011), available at: <https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>.

¹⁶ Human Rights Committee, *General Comment 20: Article 7 (Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment)*, 44th sess, HRI/GEN/1/Rev.9 (Vol. I) (10 March 1992); Office of the High Commissioner for Human Rights, United Nations Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, A/HRC/16/47(2010); Office of the High Commissioner for Human Rights, United Nations Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, E/CN.4/2005/6 (2005). See also: Law Council of Australia, submission to National Consultation on Human Rights, *A Charter: Protecting the rights of all Australians*, 6 May 2009.

¹⁷ Art 10.2(a) of the ICCPR; Principle 8 of the UN Detention Principles; Guideline 8 of the Office of the United Nations High Commissioner for Refugees, 'Detention Guidelines: guidelines on the Applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention' (2012) (**UNHCR Guidelines**).

¹⁸ Guideline 8, UNHCR Guidelines, see discussion for example in Law Council of Australia, submission to Joint Select Committee on Australia's Immigration Detention Network, *Inquiry into Australia's Immigration Detention Network*, 17 August 2011 (**LCA Immigration Detention Submission**).

¹⁹ Ibid.

²⁰ Guideline 8 of the UNHCR Guidelines. See also LCA Immigration Detention Submission.

Convention) and the 1967 *Protocol relating to the Status of Refugees*,²¹ and notes that the treatment of asylum seekers in regional processing centres should adhere to the UNHCR's interpretation of the Refugee Convention, including the principles articulated in UNHCR's *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers* (the **Guidance Note**).²² The Guidance Note provides that transfer arrangements need to guarantee that each asylum seeker:

- a) will be individually assessed as to the appropriateness of the transfer, subject to procedural safeguards, prior to transfer...The best interests of the child must be a primary consideration;
- b) will be admitted to the proposed receiving State;
- c) will be protected against refoulement;
- d) will have access to fair and efficient procedures for the determination of refugee status and/or other forms of international protection;
- e) will be treated in accordance with accepted international standards (for example, appropriate reception arrangements, access to health, education and basic services, safeguards against arbitrary detention, persons with specific needs are identified and assisted); and
- f) if recognised as being in need of international protection, will be able to enjoy asylum and/ or access to a durable solution.²³

17. The Guidance Note also provides that the transferring State bears the obligation to ensure that conditions in the receiving State meet these requirements prior to entering into any arrangement. The transferring State must conduct regular monitoring and/or review to ensure the receiving State continues to meet international standards.²⁴

Plaintiff S99

18. The matter *Plaintiff S99/2016 v Minister for Immigration and Border Protection*²⁵ in the Federal Court of Australia concerned the duty of care held by the Minister for Immigration and Border Protection (the **Minister**) to the applicant, a woman transferred from Australia to Nauru for the purpose of processing her protection claim and to whom Australia was found to have protection obligations. Whilst on Nauru awaiting resettlement, the applicant fell pregnant as a result of rape. The applicant was in Port Moresby at the time of the hearing.

²¹ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954); *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) .

²² Division of International Protection, United Nations High Commissioner for Refugees, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, (May 2013), available at: <http://www.refworld.org/pdfid/51af82794.pdf> ('UNHCR Guidance Note').

²³ *Ibid* at [3(vi)]. Namely, voluntary repatriation, resettlement or local integration, As the UNHCR has noted, '[c]omprehensive durable solutions have legal, economic, cultural, political, and civil dimensions that need to be addressed so that a refugee, internally displaced person, or stateless person is able to enjoy the same rights as a national. See also: Office of the United Nations High Commissioner for Refugees, *Global Trends: Forced Displacement in 2015* (20 June 2016), 23.

²⁴ UNHCR Guidance Note, [3(viii)].

²⁵ [2016] FCA 483.

19. The applicant sought an abortion, which was not contested by the parties. The abortion was not safe or legal in Nauru, and medical evidence showed that the abortion could be carried out safely in Australia. However, the Minister refused the applicant's transfer to Australia for the purposes of an abortion, instead contending that the abortion could take place in PNG.
20. In determining whether a duty of care existed, Bromberg J stated that the approach to is multi-factorial,²⁶ and considered the 17-step 'salient features' approach set out by Allsop P in *Caltex Refineries (Qld) Pty Ltd v Stavar*.²⁷ By reference to the facts of the case and through the application of *Stavar*,²⁸ Bromberg J examined the salient features of the relationship between the applicant and the Minister, concluding that:
- ...on balance, there are sufficient characteristics displayed answering the criteria for intervention by the tort of negligence. Accordingly, the applicant has established a duty of care owed to her by the respondents that they will exercise reasonable care in the discharge of the responsibility that they assumed to procure for her a safe and lawful abortion.*²⁹
21. Bromberg J therefore found that the Minister owed a duty of care to the applicant 'to exercise reasonable care to discharge the responsibility he assumed to procure for the applicant a safe and lawful abortion', and that 'the abortion made available to the applicant in [PNG] is not safe or lawful and was not procured in discharge of the Minister's duty of care'.³⁰
22. Although the duty of care turns on the facts of this case, the Law Council notes that many of those salient features considered by Bromberg J – or indeed others, as the circumstances dictate – could be applied to asylum seekers and refugees on Nauru, such that a duty of care may be owed by the Minister to all asylum seekers and refugees on Nauru, and likewise, Manus Island.
23. On this basis, the Commonwealth and its contractors are required to uphold certain obligations that attach to such duty of care, and remedy any breaches.

Recommendations:

- **The Commonwealth Government engage with UNHCR to ensure its regional processing arrangements accord with its international obligations; and**
- **The Commonwealth Government ensures that officers of the Commonwealth and its contractors observe duty of care obligations and remedy any breaches.**

²⁶ Ibid [229(1)].

²⁷ [2009] NSWCA 258; (2009) 75 NSWLR 649, [103].

²⁸ *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483, [256]-[275].

²⁹ Ibid [276].

³⁰ Ibid [14].

Children in Immigration Detention

Guardianship

24. The Law Council has consistently called for further protections for unaccompanied minors, including an independent guardian for unaccompanied minors.³¹

25. The Law Council notes that the CRC has addressed the appointment of a guardian and advisor or legal representative pursuant to Articles 18(2)³² and 20(1)³³ of the *Convention on the Rights of the Child* (CROC).³⁴ The CRC's *General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin* (**General Comment 6**) states:

*Review mechanisms shall be introduced and implemented to monitor the quality of the exercise of guardianship in order to ensure the best interests of the child are being represented throughout the decision-making process and, in particular, to prevent abuse.*³⁵

26. The Law Council also notes that UNHCR's Guidelines and Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum recommends that:

*...an independent and formally accredited organisation be identified/ established in each country, which will appoint a guardian or adviser as soon as the unaccompanied child is identified.*³⁶

27. In Australia, the *Immigration (Guardianship of Children) Act 1946* (Cth)³⁷ provides that the Minister is considered to be the legal guardian of every unaccompanied child who arrives in Australia. Under this Act, the Minister may delegate his powers and functions as guardian to Commonwealth officers, or officers of a State or Territory government. A private individual or entity may be appointed as 'custodian' by the Minister or delegated guardian. The custodian provides for the care and welfare needs of the unaccompanied minors and can make decisions about routine, day-to-day matters. The delegated guardian retains legal responsibility for the unaccompanied minor. The care arrangements for unaccompanied minors in the community will

³¹ See for example: Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration Guardian for Unaccompanied Children Bill 2014, 5 November 2014, available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2899 - Guardian for Unaccompanied Children Bill.pdf>.

³² 'For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.'

³³ 'A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.'

³⁴ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 3 (entered into force 2 September 1990).

³⁵ General Comment 6, [35].

³⁶ Office of the United Nations High Commissioner for Refugees, 'Guidelines and Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum' (February 1997) [5.7], available at: <http://www.refworld.org/docid/3ae6b3360.html>.

³⁷ Section 6(1).

generally be a relative or approved carer under the supervision of the relevant State or Territory child welfare agency, or a contracted service provider.

28. However, the Law Council is concerned that the Minister cannot adequately perform the role of guardian as the Minister's role is necessarily political. In respect of unaccompanied children, and in addition to the guardianship role discussed above, the Minister is also responsible for determining the visa status of non-citizens and for making a range of other decisions that affect their rights and liberties, pursuant to the *Migration Act 1958* (Cth). Furthermore, the Minister and his predecessors have adhered to a strong policy message aimed at deterring asylum seekers intending to travel to Australia by boat.³⁸
29. The Law Council also notes that when an unaccompanied child is transferred to a regional processing centre, he or she will be subject to the domestic legal framework governing guardianship of children in that jurisdiction. The regional processing centre on Nauru is currently the only regional processing centre to have housed asylum seeking children since the reinstatement of offshore processing in 2012. In Nauru, guardianship of children is governed by the *Guardianship of Children Act 1975* (Nauru), but there is no provision for automatic guardianship of unaccompanied minors seeking protection status.

Further recommendations in respect of asylum-seeking and refugee children in Nauru

30. The Law Council directs the References Committee to consider the recent Concluding Observations by the CRC on Nauru.³⁹ In respect of special protection for asylum-seeking and refugee children, the CRC recommended Nauru immediately:
- a) Ensure that the best interests of the child are a primary consideration in all decisions and agreements in relation to the transfer of any asylum-seeking and refugee children from Australia;
 - b) Expeditiously process cases involving unaccompanied asylum seeking and refugee children in a positive and humane manner for the purpose of durable solutions in line with article 10 (1) of the Convention;
 - c) Prioritize the immediate transfer of asylum-seeking children and their families out of Regional Processing Centres, adopt permanent and sustainable resettlement options for refugees, in particular, for children and their families, to ensure that they are given lawful stay and reasonable access to employment and other opportunities;
 - d) Facilitate access to the asylum system for children in need of international protection in line with Articles 6, 22 and 37 of the Convention and General Comment No.6;

³⁸ See, for example, The Hon Peter Dutton MP, 'Australia's border protection measures remain in force', (Media Release, 4 February 2016), available at: <http://www.minister.border.gov.au/peterdutton/2016/Pages/border-protection-measures.aspx>.

³⁹ Committee on the Rights of the Child, *Concluding observations on the initial report of Nauru*, CRC/C/NRU/CO/1 (30 September 2016), available at: http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/NRU/INT_CRC_COC_NRU_25458_E.pdf.

- e) Develop comprehensive referral and case management frameworks for services to children, including, health (encompassing physical and mental health services), education, police and justice sectors, including the provision of free legal aid in particular for unaccompanied and separated children;
- f) Develop campaigns to counter hate speech against asylum seekers and refugees, particularly children; and
- g) Consider acceding to the 1954 Convention Relating to the Status of Stateless Persons and to the 1961 Convention on the Reduction of Statelessness and the Convention on refugees.⁴⁰

Existing oversight mechanisms

31. The Law Council acknowledges that there are several monitoring and oversight bodies that exist to oversee the operation of regional processing centres. However, the fact that allegations of mistreatment continue to arise suggests that such mechanisms may fall short of adequately addressing abuse, self-harm and neglect of asylum seekers in Nauru and on Manus Island.
32. The LSSA also notes that in considering existing oversight mechanisms it is important to not only take account of their capacity to conduct an investigation, but also whether they are able to operate independently to determine whether the Commonwealth or a party discharging the responsibilities of the Commonwealth has complied with the Commonwealth's domestic and international obligations.

Australian Human Rights Commission

33. The Commission conducts visits to Australia's immigration detention facilities to monitor conditions of detention.⁴¹ The Commission aims to ensure that conditions in detention meet internationally accepted human rights standards and releases public reports outlining issues of concern arising from these visits.
34. The Commission also has statutory powers to investigate and resolve complaints about alleged breaches of human rights against the Commonwealth and its agencies, including complaints regarding immigration detention. The Commission will first attempt to resolve such complaints through conciliation, however, if the complaint is not resolved or is discontinued, the President of the Commission will decide whether there has been a breach of human rights, pursuant to Australia's human rights obligations.
35. The Law Council notes that the Commission is prevented from performing these functions in respect of Australia's regional processing centres. However, the

⁴⁰ Ibid, [53].

⁴¹ Pursuant to the Commission's inquiry function outlined at para 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) and the operation of this function pursuant to s 20. See also s 13. Section 21 concerns the Commission's power to obtain documents, and s 22 the power to examine witnesses Section 29 compels the Commission to make a report with recommendations following an inquiry where an act or practice is inconsistent with human rights.

Commission still retains jurisdiction to consider the legality of Commonwealth activities in regional processing centres.⁴²

Immigration Ombudsman

36. The Immigration Ombudsman, established in 2005, has oversight of the Department of Immigration and Border Protection (**DIBP**), exercised through four core functions:

- a) Inspection of immigration detention facilities, including those offshore;⁴³
- b) Monitoring of immigration compliance activities;⁴⁴
- c) Reporting to the Minister for Immigration and Border Protection in respect of people detained for over two years, including in respect of offshore detention;⁴⁵ and
- d) Investigating individual complaints about detention, including in respect of offshore detention.⁴⁶

37. Although the Ombudsman conducts visits to all immigration detention facilities every six months, including those offshore under the own motion investigative power, the Law Council notes that reports into these visits are not publically available, nor are the Minister's responses to the recommendations therein. The Ombudsman's Annual Report provides detail as to when these visits have taken place and limited information on key issues of concern.⁴⁷

38. The Law Council identifies that a further limitation on the powers of the Immigration Ombudsman is that which may be imposed by the Attorney-General pursuant to sub-s 9(3). Under this provision, the Attorney-General may issue a certificate preventing the Ombudsman from requesting documentation or answers to questions if this would be contrary to the public interest.⁴⁸

⁴² For example, Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention*, 2014, available at:

https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf.

⁴³ Section 5(1) of the *Ombudsman Act 1976* (Cth) provides that the Ombudsman: (a) shall investigate action, being action that relates to a matter of administration taken by DIBP, and in respect of which a complaint has been made to the Ombudsman; and (b) may, of his or her own motion, investigate any action, being action that relates to a matter of administration taken by DIBP.

⁴⁴ As above.

⁴⁵ Section 486N of the *Migration Act 1958* (Cth) provides that, after a person has been detained for two years and every six months thereafter, the Secretary of DIBP must give the Ombudsman a report relating to the circumstances of that person's detention. Section 486O of the Migration Act requires the Ombudsman to give the Minister an assessment of the appropriateness of that person's detention. A de-identified version is also provided to Parliament by the Minister pursuant to s 486P.

⁴⁶ Section 7 of the *Ombudsman Act 1976* (Cth) provides that a complaint may be made orally or in writing to the Ombudsman with respect to action taken by DIBP. However, s 6 sets out the circumstances in which the Ombudsman may exercise discretion not to investigate certain complaints

⁴⁷ Reports to the Minister in respect of people who have been detained for over two years are published every six months pursuant to s 486O of the *Migration Act 1958* (Cth), along with the Minister's response to the recommendations therein.

⁴⁸ Sub-section 14(1) provides that:

Where the Attorney-General is satisfied that the carrying on of an investigation at a place might prejudice the security or defence of the Commonwealth, the Attorney-General may, by notice in writing delivered to the Ombudsman, declare the place to be a place to which this subsection applies

UNHCR

39. The UNHCR Regional Representation Office is responsible for the promotion and protection of refugee rights in the region, including Australia, Nauru and PNG.
40. UNHCR undertakes regular visits pursuant to its supervisory role under Article 35 of the Refugee Convention, to which Australia, Nauru and PNG are parties.
41. In 2013, UNHCR released public reports on visits it conducted in October and November of that year to immigration detention centres in Nauru and on Manus Island. The core objectives of UNHCR's visits were to:
 - a) Assess the extent to which Australia and Nauru and PNG are implementing their obligations under the Refugee Convention and other international human rights instruments;
 - b) Review reception conditions for asylum-seekers at the detention centres; and
 - c) Meet with Nauruan and PNG officials to discuss the legal and operational implications of the transfer arrangements, with particular reference to Nauru and PNG's commitments under the Refugee Convention.
42. Following those 2013 visits, the UNHCR reported that 'it was deeply troubled to observe that the current policies, operational approaches and harsh physical conditions at the centres, not only do not meet international standards, but impact very profoundly on the men, women and children housed there.'⁴⁹
43. In April and May of 2016, UNHCR again visited the Nauru and Manus Island, writing draft reports on both of these visits in June 2016. The reports are not publically available, but it has been reported that the information therein is the subject of discussions with DIBP.⁵⁰
44. The Law Council observes with concern the limitations on UNHCR reports in that they are often only provided to the Governments concerned and are not necessarily made public. Information contained in the reports is of broader public interest, containing details about refugee determinations, including whether asylum seekers have been at risk of being refouled by Australia, and whether international protection needs have been met by the Commonwealth Government.⁵¹

and, while the declaration is in force, subsection (1) does not authorize a person to enter, or carry on an investigation at, the place unless a Minister specified in the declaration, or another Minister acting for and on behalf of that Minister, has approved the person entering the place and he or she complies with any conditions imposed by the Minister giving the approval in relation to his or her entering the place and the manner in which his or her investigation is to be conducted at that place.

Sub-section 15(5) provides that DIBP may provide such comments concerning the report as it wishes to make.

⁴⁹ United Nations High Commissioner for Refugees: Regional Office - Australia, New Zealand, Papua New Guinea and the Pacific, *Men, women and children suffering from harsh physical conditions and legal shortcomings at Pacific Island asylum centres: UNHCR reports* (26 November 2013), available at: http://www.unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=351.

⁵⁰ Martin McKenzie-Murray, 'Leaked UNHCR report: Manus Island world's worst', *The Saturday Paper*, 8 October 2016, available at: <https://www.thesaturdaypaper.com.au/news/immigration/2016/10/08/leaked-unhcr-report-manus-island-worlds-worst/14758452003831>.

⁵¹ Ibid.

Other international oversight mechanisms

45. The special procedures of the United Nations (UN) Human Rights Council (HRC) have mandates to report and advise on human rights from a thematic or country-specific perspective. With the support of the Office of UN High Commissioner for Human Rights, special procedures, including Special Rapporteurs, perform a variety of functions, such as undertaking country visits and acting on individual cases by sending communications to States and others. In these communications, the Special Rapporteur will bring alleged violations or abuses to the recipient's attention.
46. Although visits are undertaken only at the invitation of a Government, a Special Rapporteur may solicit an invitation, based on factors such as the number, credibility and gravity of the allegations received, and the potential impact that the mission may have on the overall human rights situation.
47. On 24 February 2016, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, published a Report addressing communications transmitted to Governments and replies received, including in respect of Australia.⁵² The Report addressed allegations concerning undue restrictions, harassment, and reprisals against asylum seekers in Nauru, despite the Special Rapporteur not having visited the detention facility.⁵³ It was found that Australia's failure 'to prevent ill-treatment, incommunicado detention in solitary confinement and restriction on the access to food, medical care, water and sanitation, has violated the rights of the human rights defenders to be free from torture and other forms of cruel, inhuman and degrading treatment'.⁵⁴
48. Earlier, in March 2015, the Special Rapporteur addressed complaints in respect of offshore detention on Manus Island, again despite not having visited the detention facility.⁵⁵ The Report addressed complaints of violent attacks against asylum-seekers between 16 and 18 February 2014, the Special Rapporteur finding that:
49. There was substance to the complaints; and
50. The failure of the Australian Government to provide any additional information or details of investigations into the alleged abuses violated the rights of the victims to be free from torture or cruel, inhuman or degrading treatment.⁵⁶
51. On 25 September 2015, the UN Special Rapporteur on the human rights of migrants, Francois Crépeau, announced the postponement of his planned official visit to Australia due to the lack of full cooperation from the Government regarding protection concerns and access to detention centres.⁵⁷ The visit would have included receiving first-hand information about offshore detention facilities. The Law Council notes that the Special Rapporteur is in Australia from 1 November to 18 November

⁵² *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 24 February 2016, 31st sess, Agenda Item 3, UN Doc A/HRC/31/57/Add.1.

⁵³ *Ibid.*, pp 10-11.

⁵⁴ *Ibid.*

⁵⁵ *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 5 March 2015, 28th sess, Agenda Item 3, UN Doc A/HRC/28/68/Add.1, pp 8-9.

⁵⁶ *Ibid.*

⁵⁷ See: <http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16503&LangID=E>.

2016.⁵⁸ The visit will include meetings in Canberra, Melbourne, Perth, Brisbane and Sydney, and in on-shore detention centres and off-shore detention centres in Nauru. On 3 November 2016, the Law Council met with the Special Rapporteur in Canberra. The Law Council encourages the Government to cooperate fully with the Special Rapporteur and carefully consider recommendations arising from the visit.

52. On 18 October 2016, the UN Special Rapporteur on the situation of human rights defenders, Michel Forst, released his end of mission statement following his official mission to Australia from 4 October to 18 October. On 10 October 2016, the Law Council met with the Special Rapporteur in Canberra. In the end of mission statement, the Special Rapporteur expressed concerns with the legal framework that applies to asylum seekers and refugees, noting that it is complex and continuously amended, making it challenging for individuals to understand their rights and the options available to them, without assistance.⁵⁹ With respect to Nauru, the Special Rapporteur noted with concern efforts to monitor and control any public disclosures about conditions.⁶⁰
53. The Law Council also notes that the International Committee of the Red Cross (ICRC) makes confidential recommendations to the Nauruan and PNG Governments in respect of case management of individuals. The ICRC reports are not made public, and liaison with the ICRC is through the country in which the detention centres are run.

OPCAT

54. Australia signed the OPCAT on 19 May 2009, but has not yet ratified the protocol. The Law Council understands that ratification of OPCAT is currently under consideration by the Commonwealth Government, and that the Government is actively engaging with the Commission, State and Territory Governments in respect of this issue.
55. The Law Council has consistently stated its support for the ratification of OPCAT,⁶¹ and has previously identified several benefits of ratification: preventing cruel, inhuman and degrading treatment in all places of detention in Australia; improving conditions of detention in Australia in line with human rights standards; enhancing Australia's compliance with the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* and other international human rights treaties; enhancing accountability, transparency and coordination between agencies and

⁵⁸ UN rights expert to assess situation of migrants in Australia and off-shore detention centres in Nauru, 31 October 2016, available at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20792&LangID=E#sthash.XE8QuBlJ.dpuf>

⁵⁹ Ibid n3.

⁶⁰ Ibid.

⁶¹ See, for example: Law Council of Australia, submission to Attorney General's Department, *Optional Protocol to the UN Convention Against Torture*, (1 July 2008); Law Council of Australia, 'Shadow Report to Australia's Common Core Document', Report to the United Nations Human Rights Committee, (29 August 2008), available at: http://www2.ohchr.org/english/bodies/hrc/docs/ngos/LCA_Australia95.pdf; Law Council of Australia, Submission to the Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention*, (30 May 2014), available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2834_-_Submission_to_National_Inquiry_into_Children_in_Immigration_Detention_2014.pdf.

organisations responsible for managing and monitoring places of detention; and effective risk management and potential cost savings.⁶²

56. The key feature of the OPCAT is that it establishes a two-tiered prevention mechanism: the United Nations Subcommittee on the Prevention of Torture (the Subcommittee), and a National Preventative Mechanism (NPM). The Law Council notes that implementing OPCAT would require Australia to establish an independent NPM and identify suitable bodies to conduct inspections of all places of detention.⁶³ The ratification of OPCAT could therefore lead to an expanded function for the Commission. Furthermore, upon ratification, Australia must ensure that it complies with OPCAT, or risk being in breach of its international human rights obligations – unlike certain treaties, OPCAT does not contemplate progressive realisation.
57. Although PNG is not party to OPCAT, the Law Council notes that Nauru is a party and that the Subcommittee conducted a visit to Nauru from 4 May 2015 to 6 May 2015 and released a confidential report on 11 December 2015. The Law Council notes that, consistent with standard practice, this report is not publically available.⁶⁴

Recommendations:

- **The Commonwealth Government appoint an independent guardian for unaccompanied asylum-seeking children in Australia;**
- **The Commonwealth Government work with the Nauruan Government to implement the recommendations of the CRC in its recent Concluding Observations on Nauru, including by facilitating and providing funding for free legal aid;**
- **Extend the jurisdiction of the Commission, including the National Children’s Commissioner, to regional processing centres, including Nauru;**
- **In respect of the Immigration Ombudsman:**

⁶² Law Council of Australia, Submission to the Joint Standing Committee on Treaties, *Inquiry into the Optional Protocol to the Convention Against Torture*, (30 March 2012), available at: <https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2628%20-%20Optional%20Protocol%20to%20the%20Convention%20against%20Torture.pdf>.

⁶³ For further discussion of the Law Council’s position on the OPCAT machinery, see: Law Council of Australia, Submission to the National Children’s Commissioner, *Inquiry into the Optional Protocol to the Convention against Torture in the context of Youth Justice Detention Centres*, (27 May 2016), pp 11-14, available at: http://www.lawcouncil.asn.au/lawcouncil/images/3152_-_OPCAT_Inquiry.pdf.

⁶⁴ Article 16 of the OPCAT provides:

1. *The Subcommittee on Prevention shall communicate its recommendations and observations confidentially to the State Party and, if relevant, to the national preventive mechanism.*
2. *The Subcommittee on Prevention shall publish its report, together with any comments of the State Party concerned, whenever requested to do so by that State Party. If the State Party makes part of the report public, the Subcommittee on Prevention may publish the report in whole or in part. However, no personal data shall be published without the express consent of the person concerned.*
3. *The Subcommittee on Prevention shall present a public annual report on its activities to the Committee against Torture.*
4. *If the State Party refuses to cooperate with the Subcommittee on Prevention according to articles 12 and 14, or to take steps to improve the situation in the light of the recommendations of the Subcommittee on Prevention, the Committee against Torture may, at the request of the Subcommittee on Prevention, decide, by a majority of its members, after the State Party has had an opportunity to make its views known, to make a public statement on the matter or to publish the report of the Subcommittee on Prevention.*

- Introduce a statutory requirement to conduct monitoring every quarter and increased resources for greater monitoring; and
- Introduce a statutory requirement to publish reports of detention visits and Minister's response to recommendations therein;
- The Commonwealth Government review and implement relevant recommendations arising from the October 2016 visit by the United Nations Special Rapporteur on the Situation of Human Rights Defenders;
- Ratify OPCAT, allowing for the scrutiny of all places of detention, including regional processing centres; and
- Introduce statutory limits on detention, in accordance with the best interests of the child principle.

Part 6 of the Australian Border Force Act 2015 (Cth)

58. The Law Council has previously expressed concern in relation to Part 6 of the *Australian Border Force Act 2015* (Cth) (**ABF Act**). In its submission to the Senate Legal and Constitutional Affairs Legislation Committee (**Legislation Committee**) on the Australian Border Force Bills 2015, the Law Council stated that:

*...there must be some balance between the desirability of open government and the legitimate public interest in protecting some information from disclosure, for reasons including national security, defence, international relations, and privacy considerations.*⁶⁵

59. The Law Council also stated that 'criminal sanctions for disclosure of information should only be used when strictly required for the effective functioning of government', and supported several recommendations made by the Australian Law Reform Commission arising from its inquiry into *Secrecy Laws and Open Government in Australia*.⁶⁶

60. As set out in the Law Council's Nauru and PNG Submission, under the ABF Act (leaving aside the *Public Interest Disclosure Act 2013* (Cth) (**PID Act**)), the ability of an 'entrusted person' to lawfully report publicly on conditions in detention and regional processing centres is limited – in most cases, public disclosure of information relating to those conditions will amount to an offence pursuant to sub-s 42(1) of the ABF Act.

61. The Law Council has observed that there is one main exception to this: 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. However, the exception only applies where an entrusted person is subject to a

⁶⁵ Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Australian Border Force Bills 2015, (9 April 2015), available at: https://www.lawcouncil.asn.au/lawcouncil/images/2969_-_Final_Submission_Border_Force_Bills_2015.pdf.

⁶⁶ Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009). Those recommendations were: (a) A new criminal offence of general application to the disclosure of Commonwealth information by Commonwealth officers; (b) The amendment and consolidation of existing Commonwealth secrecy law; and (c) The repeal of unnecessary or unjustifiable Commonwealth secrecy laws.

statutory or general law obligation or authority to record or disclose protected information. This does not cover the disclosure of protected information to the public.⁶⁷

62. Under the PID Act, the ability of, and avenues for entrusted persons to make public interest disclosures on conditions in detention and regional processing centres are also limited. The reasons for this limitation were set out in the Law Council's Nauru and PNG Submission:⁶⁸
63. The making of a public disclosure in compliance with the requirements of the PID Act is a lengthy and involved process;
64. A person who makes a public disclosure in reliance on that Act will not be able to be certain that the disclosure meets its requirements; and
65. The maximum penalty for an offence against section 42(1) is imprisonment for 2 years, and a person who claims the protection from criminal liability afforded by s 10 of the PID Act still bears the onus of adducing or pointing to evidence which suggests a reasonable possibility that that claim is made out.
66. The Law Council notes that on 29 June 2015, the Secretary of DIBP made a *Determination of Immigration and Border Protection Workers*, which sets out to whom the secrecy provisions of the ABF Act applies. The Determination has since been amended to exclude 'health practitioners' from certain provisions of the ABF Act, such that health professionals are exempt from prosecution under the ABF Act should they disclose certain information.⁶⁹ The Law Council observes that this change was made following the commencement of a constitutional challenge to Part 6 of the ABF Act in the High Court of Australia by Doctors for Refugees.⁷⁰
67. The Law Council welcomes this exemption, but considers that such protections should apply to all entrusted persons under the Act, and should be statutorily, rather than administratively, prescribed. The Law Council therefore maintains its opposition to Part 6 of the ABF Act.
68. The Law Council also notes the concerns raised by the UN Special Rapporteur on the situation of human rights defenders with regards to Part 6 of the ABF Act. In his end of mission statement the Special Rapporteur stated:

I urge the Government to urgently review the Border Force Act's provisions that seem to be in contravention with human rights principles, including those related to the freedom of expression, and substantially strengthen the Public Interest Disclosure framework to ensure effective protection to whistleblowers.⁷¹

⁶⁷ Pursuant to para 42(2)(c).

⁶⁸ At [19].

⁶⁹ For the amended Determination (as amended at 30 September 2016), see:

<https://www.border.gov.au/AccessandAccountability/Documents/determination-workers.pdf>.

⁷⁰ See:

https://d3n8a8pro7vhmx.cloudfront.net/fitzroylegal/pages/137/attachments/original/1469756721/Doctors_for_Refugees_v_Commonwealth_of_Australia_-_Briefing_Paper_29_July_2016.pdf?1469756721.

⁷¹ Ibid n3.

69. The Law Council contends that it would be appropriate for the Parliamentary Joint Committee on Human Rights to undertake such a review, given its expertise in assessing the compliance of legislation for compatibility with international human rights standards.

Recommendations:

- **Amend the ABF Act to include a public interest disclosure exception to the secrecy provisions 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; and**
- **The Attorney-General refer to the Parliamentary Joint Committee on Human Rights the ABF Act, for the purpose of conducting an assessment of the operation and effectiveness of the Act and the adherence by authorised persons to Australia's human rights obligations.⁷²**

Other related matters

Independent reviews

70. The Law Council recognises that, since offshore processing was reintroduced by the then Labor Government in 2012, a number of reports have identified allegations of abuse, self-harm and neglect of asylum seekers and refugees that have taken place in the regional processing centres on Nauru and Manus Island.

71. The Law Council has observed that successive Governments have failed to adequately respond to and/ or address recommendations arising out of the following reports:

- a) Review by Robert Cornall AO into allegations of sexual and other serious assaults at the Manus Offshore Processing Centre;
- b) Review by Keith Hamburger AM into the 19 July Incident at the Nauru Regional Processing Centre;
- c) Review by Robert Cornall AO into the events of 16-18 February 2014;
- d) The Commission's The Forgotten Children Report;
- e) Senate Legal and Constitutional Affairs References Committee inquiry into Incident at the Manus Island Detention Centre from 16 February to 18 February 2014;
- f) Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru (the Moss Review);
- g) Review of Recommendation Nine from the Moss Review (the Doogan Review); and

⁷² Pursuant to para 7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

- h) The Senate Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru.

72. The Law Council considers it necessary that an assessment of the Government's responses to these reports is undertaken, including in respect of timelines for implementation, adequacy of measures in respect of implemented recommendations, and the Government's position on outstanding recommendations.

Assessment Processes

73. The LSSA notes that the References Committee should give consideration to the average processing times for assessment of applications, and the effect of lengthy processing times and communication of process (or inadequacy thereof) on the health and wellbeing of asylum seekers. This includes consideration against applicable international guidelines and the application of the rule of law.

74. The Law Council notes this issue is of particular relevance in considering the continuing effects of the Government's decision in 2014 to withdraw legal assistance funding for asylum seekers who had arrived in Australia by boat between August 2012 and January 2014 (otherwise known as the 'Legacy Caseload'). The Law Council considers that access to independent legal or migration advice for asylum seekers under Australia's jurisdiction is fundamental to promote compliance by Australia with its international law obligations and to be consistent with the rule of law. As such, the Law Council supports access to legal advice and interpreter services for the Legacy Caseload of asylum seekers as the provision of such services would also enable more efficient processing.⁷³

Additional measures that could be implemented to expedite resettlement

75. The LSNSW acknowledges the Commission's recent report: *Pathways to Protection: A human rights-based response to the flight of asylum seekers by sea*, which recognises that the key driver of flight by sea to Australia is the lack of effective protection for refugees and people seeking asylum in the Asia-Pacific region.⁷⁴

76. The Commission presents alternative policy responses to the current problem of asylum seeker boat arrivals. The Commission recommends that Australia should focus on improving access to effective protection, which would provide the most effective and sustainable means of preventing flight by sea,⁷⁵ including by focussing on expanding opportunities for safe entry to Australia and enhancing foreign policy strategies on migration in the Asia-Pacific region.

⁷³ For more detail, see the Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Seeker Legacy Caseload) Bill 2014, 5 November 2014, available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2898_-_Migration_and_Maritime_Powers_Legislation_Amendment_Resolving_the_Asylum_Legacy_Caseload_Bill_2014.pdf.

⁷⁴ Australian Human Rights Commission, *Pathways to Protection: A human rights-based response to the flight of asylum seekers by sea*, (2016), 5, <http://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/pathways-protection-human-rights-based-response>.

⁷⁵ Ibid.

77. The LSNSW has expressed its strong support for the development of alternative strategies to offshore processing and the need to focus on expanding opportunities for safe entry to Australia for asylum seekers.

78. The LSSA has expressed support for the consideration of humanitarian factors in negotiations for third country resettlement of asylum seekers and refugees.

Recommendation:

- **Undertake an assessment of the Government's responses to previous independent and parliamentary reports, including in respect of timelines for implementation, adequacy of measures in respect of implemented recommendations, and the Government's position on outstanding recommendations; and**
- **Recommend the Government respond to the Commission's report, *Pathways to Protection: A human rights-based response to the flight of asylum seekers by sea*, specifically the recommendations in respect of safe entry.**