INTERNATIONAL
COMMISSION
OF JURISTS

ICJ AUSTRALIA

GPO Box 173
Sydney NSW 2001
Australia
+61 (0)2 8249 3221
+61 (0)2 8249 3223
e info@ICJ-Aust.org.au

WWW.ICJ-AUST.ORG.AU

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

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

Dear Secretary,

Re: Senate Legal and Constitutional Affairs Committee Inquiry into Australia's Agreement with Malaysia in relation to Asylum Seekers

The Australian Section of the International Commission of Jurists (ICJA) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee Inquiry ("the Inquiry") into Australia's Agreement with Malaysia in relation to Asylum Seekers ("the Malaysian Arrangement").

The International Commission of Jurists (ICJ)[1], founded in 1952, has as its mandate the promotion of the rule of law and the legal protection of human rights throughout the world. As a non-governmental organisation it has many national sections and affiliates in all regions of the world, each of which adhere to the ICJ mandate. The Australian Section of the International Commission of Jurists (ICJA)[2] is supported by branches in most States and Territories.

The ICJA holds grave concerns in relation to the Commonwealth government's decision to expel certain asylum-seekers who arrive in Australia by boat and to remove them to Malaysia or any other off-shoring country for that matter, for the processing of their protection claims. These concerns arise from the ethical, legal and policy perspectives addressed below, in accordance with the Inquiry's Terms of Reference.

[1] See www.icj.org for further information about the ICJ.
[2] See http://icj-aust.org.au for further information about the ICJA.

(a) The consistency of the agreement to transfer asylum seekers to Malaysia with Australia's international obligations;

Clause 1 (3) of the Malaysian Arrangement states that it is "subject to the respective Participant's relevant international law obligations in accordance with the applicable international law instruments or treaties to which the Participant is a Party." The ICJA submits, however, that the removal of asylum-seekers to Malaysia violates Australia's obligations under the 1951 Refugee Convention and its 1967 Protocol at the outset.

The principle of non-refoulement

First and foremost, the ICJA submits that the removal of asylum-seekers to Malaysia is contrary to the spirit of, and violates Australia's obligations under the *Refugee Convention.*

The ICJA is concerned about any offshore processing arrangement in which Australia cannot guarantee the safety and satisfactory treatment of asylum-seekers and refugees. If Australia cannot so guarantee the safety, humane treatment and conditions for the asylum-seekers currently held on the Christmas Island Immigration Detention Centre, after they have been removed to Malaysia or any other off-shoring country, the ICJA submits that Australia may be acting in direct contravention of the principle of non-refoulement, enshrined in article 33 of the *Refugee Convention.*

One of the fundamental purposes of the *Refugee Convention* is to assure persons fleeing persecution that they will not be sent back to frontiers where their lives or freedom might be threatened. The principle of non-refoulement encompasses *a duty not to repel a refugee to a third country* where they fear persecution on the grounds of race, religion, nationality, political opinion or membership of a particular social group.

The ICJA submits that there is no legal guarantee that Malaysia, a State that is not a signatory to the *Refugee Convention*, or another off-shoring country, will abide by this principle. There are a number of reasons why the ICJA believes this to be so. Firstly, authorities in Malaysia are not bound by either domestic law or international refugee law to do so. Secondly, there is a real possibility that certain groups of asylum-seekers will face a well-founded fear of persecution in Malaysia itself arising from one or more of the five Convention grounds. Thirdly, the treatment of, and discrimination towards asylum-seekers and refugees in Malaysia is well documented. ICJA would draw the Committee's attention to reports on this subject published by UNHCR[3], the US State Department[4], The International Federation for Human Rights (FIDH) and SUARAM, a leading Malaysian human rights NGO[5], Amnesty International[6] and Human Rights Watch[7].

The principle of *non-refoulement* is part of the customary international law. [8] The principle has been recognized as customary international law since 2001 when States parties to the *Refugee*

[3] UNHCR, 2011, "UNHCR 2011 Country Operations Profile – Malaysia", available at http://www.unhcr.org/pages/49e4884c6.html, [accessed 29 August 2011]
[4] US State Department, Country Report on Malaysia, 2010, http://www.state.gov/g/drl/rls/hrrpt/2010/eap/154391.htm, [accessed 29 August 2011]
[5] FIDH and SUARAM, "Undocumented migrants and refugees in Malaysia: Raids, Detention and Discrimination", March 2008, No 489/2, available at http://www.fidh.org/Undocumented-migrants-and-refugees-in-Malaysia, [accessed 29 August 2011]
[6] Amnesty International, 16 June 2010, "Abused and Abandoned: Refugees Denied Rights in Malaysia" available at http://www.amnesty.org/en/news-and-updates/report/refugees-malaysia-arrested-abused-and-denied-right-work-2010-06-16, [accessed 29 August 2011]
[7] HRW, "" available at http://www.hrw.org/legacy/reports/2000/malaysia/, [accessed 29 August 2011]
[8] Declaration of States parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Ministerial Meeting of States Parties, Geneva, Switzerland, 12-13 December 2001, UN Doc. HCR/MMSP/2001/09, 16

Convention issued a Declaration reaffirming their commitment to the 1951 Convention and the 1967 Protocol, and recognized that the principle of *non-refoulement* is part of the customary international law. Its customary law status has been further reinforced by the fact that the *Refugee Convention* does not permit derogation or reservation of this principle.

Although not a signatory to the Refugee Convention, Malaysia has signed the Bangkok Principles on the Status and Treatment of Refugees and is bound by the norms of customary international law. It is therefore a cause of even greater concern that despite having acknowledged its support in principle, Malaysia has been known to breach the non-refoulement principle. Recently, for example, Malaysia, it been reported, breached the principle in relation to the return of Uighurs to China, presumably under political pressure from the Chinese government, a group who will face certain persecution in China[9]

Refugees not to be penalized for their unlawful arrival

Article 31 of the *Refugee Convention* prohibits the penalization of refugees for arriving unlawfully from a territory where their life or freedom was threatened and where they have presented themselves without delay and shown good cause for their illegal entry or presence.

The ICJA submits that Australia's actions in mandatorily detaining 'irregular maritime arrivals' seeking asylum, refusing to process their applications for protection in Australia and seeking to remove them to Malaysia for processing and long-term residence or another off-shoring country in potentially insecure and unstable conditions less favourable than the conditions afforded to applicants processed onshore, constitute forms of penalizing asylum seekers for the manner of their arrival, in contravention of the Convention.

The ICJA submits that Malaysia would also be likely to penalise asylum seekers for their unlawful arrival based on how Malaysia has previously acted toward asylum seekers. Asylum-seekers in Malaysia are subject to arbitrary raids and can be arrested and detained and subjected to whipping and deportation for their irregular or undocumented immigration status. This very issue arose in the case of *Plaintiff M70/2011 v The Minister for Immigration and Citizenship and Plaintiff M106/2011 v The Minister for Immigration and Citizenship* [2011] HCA 32, which recently came before the High Court of Australia. In this case, both Plaintiffs passed through Malaysia illegally before arriving in Australia to seek protection, and could therefore face criminal sanctions there should they be deported to Malaysia. As FIDH has stated[10],

> "Malaysia has not ratified the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (ICPMW), the main international instrument for the protection of migrant workers and their families. Having entered into force on 1 July 2003, this Convention covers the protection of most aspects of the situation of both irregular and legal migrant workers including the protection of human rights (Part III)."

January 2002. The Declaration was welcomed by the UN General Assembly in resolution A/RES/57/187, para. 4, adopted on 18 December 2001.

[9] HRW, 22 August 2011 "Malaysia/China: Prevent Forced Return of Uighurs", available at http://www.hrw.org/news/2011/08/22/malaysiachina-prevent-forced-return-uighurs [accessed 30 August 2011]

[10] FIDH and SUARAM, "Undocumented migrants and refugees in Malaysia: Raids, Detention and Discrimination", March 2008, No 489/2, at p7, available at http://www.fidh.org/Undocumented-migrants-and-refugees-in-Malaysia, [accessed 29 August 2011]

Minimum standards for the treatment of refugees enshrined in the Refugee Convention and other international human rights instruments

The *Refugee Convention* lays down basic minimum standards for the treatment of refugees and asylum-seekers, without prejudice to States granting more favorable treatment. Such rights include access to the courts[11], to primary education[12], to work[13], housing[14], freedom of religion[15], non-discrimination as to race, religion or country of origin in the application of the *Refugee Convention*,[16] freedom of association and movement[17] and the provision for identity documentation[18], including a refugee travel document in passport form[19]. These standards apply not only to persons who have been declared refugees, but necessarily extend to asylum-seekers undergoing assessment of their protection claims.

It can be deduced from the provisions of the *Refugee Convention* that a State party is obliged not only to afford protection but also to afford refugees and, by implication, asylum-seekers, and due process.

Malaysia is not a signatory to the *Refugee Convention,* the *Convention Against Torture (CAT), the ICCPR* or *ICESCR.* Reports by UNHCR, Amnesty International and other NGOs indicate that the Malaysian authorities' treatment of asylum-seekers and refugees falls below the standards set by both *CAT* and the *Refugee Convention.* The proposed Malaysian Arrangement (which is not an agreement in the legal sense) does not entrench any of these protections in either domestic or international law. A non-binding statement of intent to provide proper treatment, as is sought to be provided through the Malaysian Arrangement and deemed sufficient by the Minister for Immigration and Citizenship, is in the ICJA's view, not adequate for the Commonwealth to have discharged its own obligations under the *Migration Act*, the *Refugee Convention*, and international human rights law.

This Arrangement is at the whim of political processes, including that of a separate sovereign nation, not at all subject to Australia's jurisdiction or control, and is not entrenched in law. The ICJA submits that the removed person therefore, will not enjoy due process and access to the courts, as required under Australian law. In such circumstances, and *a fortiori*, where some of the persons are claiming a fear of persecution or ill treatment in Malaysia, it must be incompatible with Australia's obligations under the *Refugee Convention* to deport the asylum seekers to Malaysia at least until there has been due process afforded to them in Australia to contradict such a claim because there is no basis in law in Malaysia either to accord due process or the minimum required standards of protection, as set out in s198A(3) of the *Migration Act 1958* and as discussed above in relation to Australia's obligations under the Refugee Convention.

The ICJA submits that it is impossible to see how the Minister for Immigration and Citizenship, or officers of the Commonwealth assessing individual cases for removal, could be satisfied as to these requirements being met in Malaysia anyway when the well-documented situation of the 94,000 refugees and asylum-seekers (excluding approximately 10,000 unregistered asylum-seekers) already in Malaysia clearly indicate otherwise. The Minister has claimed that the terms of the proposed Malaysian Arrangement provide him with sufficient assurances as to satisfy him that

[11] Art 16 of the *Refugee Convention*
[12] Art 22 of the *Refugee Convention*
[13] Art 17 of the *Refugee Convention*
[14] Art 21 of the *Refugee Convention*
[15] Art 4 of the *Refugee Convention*
[16] Art 3 of the *Refugee Convention*
[17] Arts 15 and 26 of the *Refugee Convention respectively*
[18] Art 27 of the *Refugee Convention*
[19] Art 28 of the *Refugee Convention*

minimum human rights standards will be met. The wording of the proposed Arrangement however falls far short of providing any safeguards or guarantees as to the fulfillment of these obligations and provides little if any details of the arrangements to be put in place.

The ICJA submits that the *Migration Act 1958* should be interpreted consistently with Australia's obligation under international law and the ICJA therefore submits that:

(1) The Minister is not permitted to exercise his power under section 198A of the *Migration Act* in these circumstances because, in the absence of provision in Malaysian law for asylum-seekers' enforceable rights, that State is not a country which affords the requisite protection or standards referred to in the section; and/or

(2) The power to remove a person to a declared country should be seen as discretionary and only exercisable if such an action does not breach Australia's obligations under the *Migration Act* or at international law. The removal of asylum-seekers from Australia to Malaysia, before they have had an opportunity to be heard in accordance with their right to due process, will breach those obligations.

The ICJA believes that because the entire operation is to be funded by the Australian Government, and in turn by Australian taxpayers, there ought to be thorough scrutiny of the quality assurance processes and auditing of the expenditure, with mechanisms to deal with inadequate service delivery and audit trails.

The recent decision of the High Court of Australia in *Plaintiff N70/2011 v Minister for Immigration and Citizenship and Plaintiff N106 v Minister for Immigration and Citizenship* [2011] HCA 32

This case was brought by two asylum seekers of Afghani origin, who arrived in Australia at Christmas Island (an excised offshore place) by boat on 4 August 2011, after the signing of the Malaysian Arrangement on 26 July 2011 and were assessed by an immigration officer as being suitable for transfer to Malaysia under the terms of the Arrangement. The legality of the Malaysian Arrangement was challenged through this action brought under the original jurisdiction of the High Court. The nature of the legal challenge was essentially one concerning the proper statutory interpretation of the *Migration Act 1958*, in particular s198A(3)(a)(i)-(iv).

The Plaintiffs argued that the Minister's declaration of Malaysia as a suitable country under s198A was invalid as the criteria set out in the above subsections were jurisdictional facts which required that Malaysia be bound by domestic or international legal obligations and that the protections foreshadowed be enshrined in law. As this could not be established because there were no such legal protections in place in Malaysia, the plaintiffs argued that the Minister had misconstrued the meaning of the section, and committed jurisdictional error. The Plaintiff M106 also made specific arguments in relation to unaccompanied minors, which are discussed later in this submission.

In finding for the Plaintiffs in a 6:1 majority, the judges of the High Court held that the language of s198A(3)(a)(i)-(iv) meant that the "access and protections to which those sub-paragraphs refer must be provided as a matter of legal obligation" and furthermore that those references must be understood as referring to access and protections of the kinds that Australia undertook to provide by signing the Refugees Convention and the Refugees Protocol". (Per Gummow, Hayne, Crennan and Bell JJ, in the joint majority judgment at 47-49).

In finding that the s198A(3)(a) criteria were jurisdictional facts, the Court went on further to say that the section also required an assessment to be made by the Minister of the declared country's state practice in implementing and carrying out their legal obligations. The mere existence of the

legal obligations and the processing of refugee claims by UNHCR would not be sufficient to accord with the requirement under s198A(3)(a)(i) that the declared country provides access to effective procedures for the determination of the Plaintiffs' refugee status.

(b) The extent to which the above agreement complies with Australian human rights standards, as defined by law;

Clause 12(1) of the proposed Arrangement stated "Operations under this Arrangement will be carried out in accordance with the domestic laws, rules, regulations and national policies from time to time in force in each country and in accordance with the Participant's respective obligations under international law."

The ICJA notes that in proposing this clause and Arrangement no comparison or reference has made to human rights standards *as they apply in Australia*. In the absence of any reference to human rights one cannot expect that such standards would be applied. The ICJA submits that even if the Malaysian Arrangement did provide human rights standards, such standards would not be enforceable by Australia, because the proposed Arrangement is only a political statement of intentions and is actually non-binding.

As we have stated above, Malaysia is not a signatory to a number of key human rights instruments to which Australia has signed and implemented into domestic law. Moreover, human rights standards as defined under Malaysian law, are significantly lower than the standards required in Australian law. In order to illustrate these statements we have set out a non-exhaustive list of substantive and procedural rights that are **not guaranteed** under the proposed Arrangement, but which would apply under Australian law.

- The right to procedural fairness and natural justice – due process rights – and particularly the rights to independent merits review and judicial review of decision-making in refugee cases and access to legal advice and advocacy
- Principles of non-discrimination enshrined in domestic Australian law such as in the *Race Discrimination Act*, The right to freedom in relation to the belief and practice of religion, arising from some constitutional protection which creates a system of governance based on a secular society so no religion is advantaged or disadvantaged,
- The best interests of the child – enshrined in domestic law in various legal instruments covering decision- making in relation to children, including most pertinently the immigration guardianship act – not adequately protected or canvassed – and clearly breached as discussed below by the decision to send minors to Malaysia.
- Right to housing, healthcare and education – ICESCR – no guarantee of standards in the Arrangement.

Following the High Court decision in M70 and M106 discussed above, it is now abundantly clear in any case that the Malaysian Arrangement does not comply with Australian human rights standards as defined by law.

(c) The practical implementation of the agreement, including:

(i) Oversight and monitoring

The ICJA submits that there needs to be some level of parliamentary, Ministerial or standing committee scrutiny, that can effectively monitor compliance with proposed off-shoring arrangements.

ICJA submits that if any off-shoring arrangement is to proceed, an independent or external complaints-handling mechanism ought be established to oversee the entire arrangement. The ICJA submits that an external body should oversee and monitor any proposed transfers, transits, applications, assessments of applications and living conditions. The external body should also consider any potential threat of reprisals for irregular arrival and residency pending resettlement through to departure. The ICJA submits that complaints procedures should also be made widely known to asylum seekers. The ICJA submits that an Australian-appointed and funded representative could be tasked with such a responsibility, with reporting obligations to this Honourable Committee.

(ii) Pre-transfer arrangements, in particular, processes for assessing the vulnerability of asylum seekers

The ICJA notes that the proposed Agreement stated that special procedures would be formulated in relation to vulnerable persons and minors. The ICJA is gravely concerned as to how this proposed initial assessment and processing would have necessarily occurred especially since at the time of seeking approval for the proposed Agreement no special procedures had actually been developed.

The ICJA submits that where any arrangement involving off-shoring processing is approved, that asylum-seekers be given access to medical practitioners, psychologists and lawyers who are independent of the decision-making process. The ICJA further submits due to the vulnerabilities of asylum-seekers, advocates representing asylum-seekers are a necessity, not an option.

(iii) Mechanisms for appeal of removal decisions

It is an essential tenet of our legal system and of our framework for executive decision-making that a decision-maker has a duty to afford procedural fairness where a particular right or interest is at stake. This tent has recently been confirmed by the High Court in *Plaintiff M61/2010E v Commonwealth of Australia.*[20] In this case the High Court held that protection decisions made by the executive arm of government in relation to offshore asylum seekers (ie those who were deemed to have arrived in 'excised offshore places', outside the migration zone) were entitled to be accorded procedural fairness and could therefore avail themselves of judicial review where an adverse decision was affected by such jurisdictional error. This was a unanimous decision of the High Court, deciding partly in its original jurisdiction capacity under s75(v) of the Constitution.

The assertion that decisions should be made subject to judicial review is further supported by the statement of the majority judgment in the High Court decision in M70 and M106, that Australia has an obligation to ensure that refugees have free access to the courts of law of the Contracting State. This is a fundamental due process right that the proposed Malaysian Arrangement sought to circumvent.

In the light of the High Court's decision, the ICJA submits that any decision by the Minister in relation to the declaration of another country under section 198A of the *Migration Act* and the assessment of an individual's circumstances as to removal must be subject to judicial review in Australia before the deportation can take effect. It is of manifest concern to the ICJA that such a provision has not been incorporated into the proposed Arrangement or foreshadowed

[20] *Plaintiff M61/2010E v Commonwealth of Australia, Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41

by the Minister for Immigration and Citizenship in any pronouncements in the proposed Arrangement and decision to send the first group of transferees.

(iv) Access to independent legal advice and advocacy

The ICJA is particularly concerned that asylum seekers identified for removal to Malaysia will not be afforded access to legal advice or advocacy. The ICJA is concerned that without such access to legal advice or advocacy we cannot be sure that pertinent issues relating to each application by an asylum seeker will be brought to the attention of the Minister when he makes his decision in relation to offshore processing.

The ICJA notes that no mention is made in the proposed Agreement as to the availability of legal advice or advocacy in Malaysia once persons are transferred there. The ICJA notes that under the proposed Arrangement, clause 2.3.1(e) stated that transferees would not receive preferential treatment in the order or processing of their claims. The ICJA does not support this statement and would not support any such similar statement in other arrangements.

The ICJA submits that this is an untenable situation as some asylum seekers may require advice or advocacy on a range of issue including, for example, their legal status, work rights, access to health care, accommodation and education.

(v) Implications for unaccompanied minors, in particular, whether there are any guarantees with respect to their treatment

The ICJA submits that the implications of the proposed Malaysian Arrangement for unaccompanied minors seeking asylum are dire and is pleased that the High Court held the proposed arrangement to be invalid.

As the ICJA has already submitted above, Malaysia is not a signatory to the *Refugee Convention* and, therefore, any unaccompanied minors who are transferred to Malaysia will not be entitled to the protections they would be entitled to if their claims were processed in Australia. Minors who have travelled via Malaysia to come to Australia are liable to a legal penalty of whipping in Malaysia because it is a criminal offence to go through Malaysia as an asylum-seeker to another country without an entry permit or pass.

The ICJA submits that Malaysia has a long history of human rights abuses and does not uphold human rights to the same extent as Australia does. As already noted in this submission, Malaysian law does not provide access to legal procedures for assessing the claims of asylum seekers for protection. In Malaysia, this means that there will effectively be no judicial review against adverse decisions regarding claims for asylum by unaccompanied minors.

The ICJA has reason to believe that children are particularly vulnerable to human rights abuses in Malaysia. UNICEF Malaysia has noted that abuse of children is widespread in Malaysia and corporal punishment in schools, including caning and beating, is still widely practised. In relation to migrant children, UNICEF has reported that because of the precarious status of migrants in Malaysia, migrant children are particularly vulnerable to exploitation in the labour market or in sexual service. Migrant children are frequently trafficked into false adoptions, servile marriages and domestic servitude[21].

[21] UNICEF Malaysia "Promoting Children's Rights through the Law in Malaysia" published 13 July 2008: http://www.unicef.org/malaysia/Unicef-ChildrensRights.pdf

The ICJA further submits that unaccompanied minors will be especially vulnerable in Malaysia because Malaysian law does not require legal guardians to be appointed in respect of unaccompanied minors (Malaysian law permits guardians being appointed but does not require it). Furthermore, there are no provisions in the proposed Malaysian Arrangement, which require the appointment of a guardian when an unaccompanied minor is transferred from Australia to Malaysia. The result of this is that, as soon as unaccompanied minors are handed over to the Malaysian authorities under the Malaysian Arrangement, the Australian Minister for Immigration and Citizenship would no longer be the guardian of any unaccompanied minors and the minors cease to have a guardian.

The *Convention on the Rights of the Child* 1989 (**CRC**) is the key international legal instrument protecting children's rights around the world. It was ratified by Australia on 17 December 1990 and, as such, Australia is obliged to uphold its provisions. Although Malaysia has also ratified the CRC, the ICJA stresses that its ratification in 1995 was made subject to numerous reservations in respect of certain provisions that conflicted with Malaysian law. Malaysia has qualified its obligations under the CRC. Such qualifications include Article 1 (defining children as any person under 18 years of age); Article 2 (non-discrimination); and Article 37 (torture and depravation of liberty of children).

The ICJA submits that the following rights provided for children in the CRC are in grave danger of not being upheld in relation to unaccompanied minors who are transferred to Malaysia:

- Article 2 – children should be protected against all forms of discrimination on the basis of the status, expressed opinions, religion, race, sex, language, religion, ethnic or social origin etc.
- Article 3(1) – All courts of law, administrative authorities, and legislative bodies should have the best interests of the child as a primary consideration.
- Article 19(1) – children should be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse
- Article 20(1) – A child temporarily or permanently deprived of his or her family environment shall be entitled to special protection and assistance provided by the State.
- Article 22 – a child who is seeking refugee status or who is considered a refugee in accordance with international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance
- Article 24(1) – children should enjoy the highest attainable standard of health and should have access to facilities for the treatment of illness and rehabilitation of health.
- Article 28 – children have the right to a primary education which is compulsory and free and States shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity.
- Article 36 – States shall protect the child against all forms of exploitation prejudicial to any aspects of the child's welfare.

The ICJA notes that the rights listed above are not adequately protected under the Malaysian Arrangement in respect of unaccompanied minors transferred to Malaysia. The Operational Guidelines which constitute Annex A to the proposed Malaysian Arrangement similarly did not adequately protect unaccompanied minors:

- Clause 1.3 stated that transferees should be transferred within 72 hours after arriving in Australia. In the ICJA's view this could not give the Minister for Immigration and

Citizenship sufficient time to properly consider the especially vulnerable cases of unaccompanied minors.

- Clause 2.2.2 provided that transferees seeking asylum would have ongoing access to self-reliance opportunities in Malaysia. This is extremely vague and, in relation to unaccompanied minors, is not easily applied because unaccompanied minors are often not in position to be self-reliant but must rely on others, namely their guardian, to support them.
- Clause 3.1 stipulated that, generally, transferees will be allowed to reside in the community and that the IOM will provide accommodation assistance for 1 month, after which transferees will need to find private accommodation. This may not be feasible for unaccompanied minors due to their lack of ability to support themselves and may mean that unaccompanied minors 'fall through the cracks'.
- Clause 3.3 provides that transferees will be permitted to access education and clause 3.4 provides that transferees will be permitted to access medical treatment. There are no effective procedures in place to ensure that such facilities are provided to unaccompanied minors and, as stated above, unaccompanied minors will not be in a position to enforce these clauses where the arrangement is non-binding and the unaccompanied minors have no legal guardians appointed.
- Clause 3.5 says that transferees will have access to existing arrangements, which UNHCR has in place for identifying and supporting vulnerable cases. Whilst this principle is supported by the ICJA in theory, the reality is that there are no legal safeguards in place in Malaysia to ensure this process are put in place for unaccompanied minors.

The ICJA notes that clause 8 of the proposed Malaysian Arrangement provided: "special procedures will be developed and agreed by the Participants to deal with the special needs of vulnerable cases including unaccompanied minors". However, no details as to what such procedures would entail have ever been provided. Even if they were to be provided, the fact that the Arrangement is non-binding will not guarantee that the special procedures will be implemented.

The ICJA submits that even if such protections were specifically included in the Malaysian Arrangement, the fact that the Malaysian Arrangement is non-binding would effectively render any such protections meaningless.

(vi) Obligations of the Minister for Immigration and Citizenship (Mr Bowen) as the legal guardian of any unaccompanied minors arriving in Australia, and his duty of care to protect their best interests;

Under section 6 of the *Immigration (Guardian of Children) Act 1946* (Cth) (IGOC Act), the Minister for Immigration and Citizenship is the guardian of unaccompanied minors.

In Australia, case law has held that the provisions of this Act mean that the Minister has the same rights and responsibilities that a parent of that child would have in relation to looking after the child's wellbeing and having a duty to protect the child from harm. Further, it has been held that the IGOC Act requires the guardian of unaccompanied minors to ensure such minors are afforded their fundamental human rights (*X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524).

The ICJA notes, as previously stated, that affording children fundamental rights importantly involves ensuring that the provisions of the CRC are upheld in the child's favour. Australia's ratification of CRC has been held to be a "positive statement by the executive government of

this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention" (*Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLE 273 at 291). As has been submitted by the ICJA above, children who are transferred under the Malaysian Arrangement will be denied many of the rights they are entitled to under the CRC.

Article 3(1) of the CRC states that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

The ICJA submits that the Minister could not possibly have the best interests of the child as his primary consideration in any decision made to transfer unaccompanied minors to Malaysia. By sending unaccompanied minors to Malaysia, the Minister is abrogating his obligations as the child's legal guardian. Further, as already submitted, Malaysian law does not require unaccompanied minors to have a legal guardian appointed. Nor is there any provision made in the Malaysian Arrangement for a legal guardian to be appointed for unaccompanied minors when they arrive in Malaysia.

Section 6A of the IGOC ACT provides that an unaccompanied minor cannot be removed from Australia without the consent of the Minister in writing. In the decision of *Plaintiff M70*[22], the majority of the High Court held that, a declaration under section 198A(3)(a) of the *Migration Act* would not suffice as "consent in writing" as required by the IGOC Act.

It is submitted by the ICJA that the Minister's multiple roles as legal guardian of unaccompanied minors, visa-decision maker for unaccompanied minors and detaining authority for unaccompanied minors are irreconcilably conflicting. It is imperative, in affording fundamental human rights to children and upholding the provisions of the CRC, that unaccompanied minors have an independent legal guardian appointed. The Minister clearly cannot exercise his responsibilities as independent legal guardian for unaccompanied minors for whom the best interests of the child is his primary consideration in circumstances where the Minister has other responsibilities which inherently conflict with this role.

The ICJA submits that unaccompanied minors seeking asylum in Australia should have an independent guardian appointed to represent their best interests and assist enable the minors in properly providing information in relation to their need for protection under the Refugee Convention. The ICJA submits that all courts, legal and administrative processes in Australia should be guided by CRC's principles of the best interests of the child being a primary consideration and special protection being given to unaccompanied minors.

(d) Costs associated with the agreement

It has been announced by the Prime Minister that almost $300 million has been budgeted for the operational costs of the proposed Malaysian Arrangement and that $76 million of that figure would pay to fly the 800 asylum seekers from Australia to Malaysia.[23]

The ICJA submits that this expenditure is irresponsible and unjustified, particularly in circumstances where fundamental human rights are at stake and there are many low-cost, effective alternatives to transferring asylum seekers to Malaysia.

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[22] *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32

[23] http://www.pm.gov.au/press-office/transcript-joint-press-conference-melbourne

The ICJA refers the Committee to information provided by the Asylum Seeker Resource Centre in relation to the comparison between the costs of the proposed Malaysian Arrangement and the costs of the Asylum Seeker Assistance Scheme through which asylum seekers are paid an income while living in the community. For the 2009-2010 financial year, the Asylum Seeker Assistance Scheme cost the Australian Government $9 million dollars to provide services to 2802 asylum seekers already living in the community. The Asylum Seeker Resource Centre has noted that, at that rate, the $76 million allocated to fly 800 transferees to Malaysia would provide for 23,661 asylum seekers to live in the community for one year in vastly superior conditions to those in Malaysia.

In addition to the costs of the Malaysian Arrangement being unjustifiably expensive, the ICJA submits that the proposed Malaysian Arrangement places the burden of costs too heavily on the Australian Government and leaves much uncertainty as to how funds will be allocated in practice. The ICJA submits that the cost to the Australian Government may in fact be more than the estimated cost of close to $300 million. It is noted that "costs" are defined in clause 2 as including "direct and indirect costs". However, there are no details provided as to what "indirect costs" entail. Particularly in circumstances where the Arrangement is non-binding and merely a statement of intention, this leaves the Australian Government in a vulnerable position in relation to costs exceeding what it anticipates.

The ICJA notes that clause 9(1) sets out those costs, which will be met by Australia. However, in circumstances where there are no provisions made for estimation of costs or maximum amounts, such costs are susceptible to 'blowing out' and there is a real danger that disputes may arise between Australia and Malaysia. Further, there is no guarantee that funds provided by the Australia Government to Malaysia to implement the Arrangement will in fact be spent on those items set out in clause 9(1) such as the health and welfare of transferees including education of minors.

(e) The potential liability of parties with respect to breaches of terms of the agreement or future litigation;

The Agreement has been drafted in such a way as to give it no legal force at all as between Malaysia and Australia. The proposed Agreement is not a contract that is legally binding and does not provide any assurances of minimum standards or guarantees of access to essential health and education services or work rights.

Despite the fact that the Agreement has no legal force, the Minister may be made the subject of civil proceedings in Australia for failing in his duty of care, for instance towards minors, should the protections and 'special procedures' currently being foreshadowed in broad terms be of no avail.

The ICJA submits that this is a potential legal minefield and may render the Australian government vulnerable to costly litigation should the standards expected as a result of the political arrangement not materialise.

(f) The adequacy of services and support provided to asylum seekers transferred to Malaysia, particularly with respect to access to health and education, industrial protections, accommodation and support for special needs and vulnerable groups;

The UNHCR report on the treatment and processing of refugees in Malaysia relevantly provides as follows:

> "Malaysia is not party to the 1951 Refugee Convention or its Protocol. There is currently no legislative or administrative framework for dealing with refugees. This challenging protection environment makes it difficult for UNHCR to fulfil its mandate

> in the country, which has some 3 million migrants, 1.5 million of whom are considered undocumented migrants.
>
> By law, refugees are not differentiated from undocumented migrants. They are therefore vulnerable to arrest for immigration offences and may be subject to detention, prosecution, whipping and deportation. In the absence of a national administrative framework, UNHCR conducts all activities related to the reception, registration, documentation and status determination of asylum-seekers and refugees. Since refugees and asylum-seekers have no access to sustainable livelihoods or formal education, UNHCR runs a limited number of humanitarian support programmes for them, in cooperation with NGO partners."

This is a very strong indication of the scarcity of resources and programs that would be available to transferees sent to Malaysia for processing. There is clearly already a massive shortfall in the institutional capacity required to provide such services for the 94,000 asylum seekers and refugees already in Malaysia. Funding alone, solely directed at the costs of provisions of services for the 800 transferees will not solve that problem in the immediate term. Furthermore, at clause 12(2), the Arrangement specifically states that Transferees not be accorded special privileges as against other asylum seekers in Malaysia, arising from their attempts to reach Australia. Such a provision essentially precludes the proper provision of services that might ensure requisite human rights standards for the transferees.

The High Court decision in M70 and M106 very clearly outlined Australia's obligations towards asylum seekers pending determination of their refugee protection claims and after determination of refugee status, whilst awaiting resettlement. The Court reiterated the specific rights and guarantees afforded to asylum seekers in the Refugee Convention concerning housing, education, non-discrimination, labour rights and a host of other rights (which have already been enumerated in this submission) and stated that Australia is bound by those obligations under the terms of s198A(3).

(g) Mechanisms to enable the consideration of claims for protection from Malaysia and compliance of these mechanisms with non-refoulement principles;

The ICJA notes that the UNHCR and the International Organisation for Migration (IOM) were not a party to the Arrangement, which exists only between Australia and Malaysia. However, it should be noted that clause 3 speculates as to an ongoing role for UNHCR and/or IOM; it is stated that the Arrangement will proceed on the basis that UNHCR and IOM can fulfil the roles and functions envisaged in the Operational Guidelines at Annex A".

UNHCR is currently operating on the ground in Malaysia and is responsible for the approximately 94,000 refugees and asylum-seekers there. In relation to "Fair Protection Processes", the UNHCR report[24] states that its goals in Malaysia are to:

> "Ensure that asylum-seekers and refugees are protected against *refoulement*, unwarranted detention and all forms of violence and abuse, including sexual and gender-based violence, and have access to a fair and efficient registration and refugee status determination (RSD) procedures.
> Foster the development and implementation of a legal and administrative framework, which provides a basic set of rights for asylum-seekers and refugees.

[24] UNHCR, 2011, "UNHCR 2011 Country Operations Profile – Malaysia", available at http://www.unhcr.org/pages/49e4884c6.html, [accessed 29 August 2011]

- *Refugees and asylum-seekers enjoy timely registration and fair and efficient RSD procedures and receive UNHCR identity documentation.*
- *Legal counsel is provided to 500 asylum-seekers and refugees charged with immigration offences in court.*
- *Best Interest Determination (BID) procedures are applied in the case of 2,000 unaccompanied minors."*

It is manifest from these objectives that the situation of refugees and asylum-seekers in Malaysia is extremely precarious, with both their physical safety and ability to receive a fair determination of their protection claims in serious doubt. UNHCR is already stretched beyond its capacity in Malaysia in trying to provide adequate protection and advocate for the 94,000 people currently within its mandate. The ICJA submits, therefore, that the only way to protect Australia's 800 'transferees' from refoulement and ensure the proper assessment of their protection claims in this context is to retain, and augment, onshore processing of them within Australia.

(h) A comparison of this agreement with other policy alternatives for processing irregular maritime arrivals

The ICJA submits that, in order to comply with its obligations under the *Refugee Convention*, Australia must not transfer asylum-seekers to Malaysia, or indeed any other offshore processing country. Instead, it is incumbent on the Australian authorities to process all asylum claims in Australia. The vast majority of asylum-seekers who make claims for protection in Australia are assessed to be genuine refugees. This means that significant costs can be saved by processing asylum claims in Australia, rather than paying for the cost of asylum-seekers to be transferred to Malaysia, or other places of offshore processing. Processing asylum claims in Australia also means that asylum-seekers are afforded basic human rights and are provided with procedural fairness in the processing of their claims.

The ICJA supports a regional solution, which addresses the large flow of refugees in the region and the problem of people smuggling. However, the ICJA submits that the approach taken by the proposed Malaysian Arrangement is not this solution. The Arrangement does not provide adequate safeguards for basic human rights and abrogates Australia's obligations under the Refugee Convention. Malaysia already disproportionately shoulders the burden of hosting refugees in the region and there is evidence to suggest there is overcrowding and poor living conditions in refugee areas in Malaysia. For this reason, sending asylum seekers to Malaysia is not a regional solution to these problems.

The ICJA adopts the recommendations of the Centre for Policy Development outlined in its report "A New Approach: Breaking the Stalemate on Refugees and Asylum Seekers" (August 2011). The Centre for Policy Development recommends regional cooperation in relation to asylum seekers through the establishment of a well-resourced policy unit within the Bali Process Secretariat. Such a unit would work with governments and NGOs in the region to develop and implement a regional cooperation framework to address the issue of human displacement within the region and work towards sustainable and lasting solutions.

As has been widely written about, there are many community-based alternatives to immigration detention and to transferring asylum seekers to third countries. These alternatives are low-cost and ensure that the human rights of asylum seekers are adequately safeguarded whilst their asylum claims are being processed. The ICJA notes, in particular, the Joint Standing Committee on Migration's Second Report of the Inquiry into Immigration Detention published in May 2009, which reports specifically on community-based alternatives to detention. The report examines a number of alternatives to immigration detention centres including: temporary alternative detention

in the community, immigration transit accommodation, immigration residential housing and community detention.

The ICJA supports the findings of the Joint Standing Committee on Migration that open residential accommodation co-located in the community provides asylum seekers with a humane, safe and supportive living environment whilst still being accessible to the Department of Immigration and Citizenship. In addition, community-based detention is far more cost effective than immigration detention as it does not involve the high costs of security and on-site staffing required at immigration detention centres. Community-based detention is also less expensive than transferring asylum seekers to a third country for processing. In this regard, the ICJA notes that the proposed Malaysian Arrangement not only involves Australia bearing the cost of transferring asylum seekers to Malaysia but all the associated costs of processing claims in Malaysia and transporting asylum seekers out of Malaysia once their claims have been assessed.

The ICJA also notes that community-based alternative schemes have been piloted in Australia since 2001, including the Community Care Pilot, and have yielded extremely positive results. The ICJA submits that basic human rights, including access to health care, education, housing and income should be provided to all people regardless of their immigration status. Asylum seekers are a particularly vulnerable group in relation to needing access to legal advice and counselling services, which, it is submitted, are best, provided to them in the community. The ICJA urges the Australian Government to continue to explore and offer community-based alternatives to asylum seekers who arrive as 'irregular maritime arrivals'.

(i) Any other related matters - Alternative offshore processing – Manus Island, Papua New Guinea and Nauru

Following the recent declaration by the High Court in the matter of *M70/2011 v The Minister for Immigration and Citizenship*, discussed above, that the Malaysian Arrangement was made without power and is invalid, both the Government and the Opposition spokespersons on Immigration matters have indicated that all other options are still being considered, including offshore processing of asylum seekers at alternate locations such as the Government's recently re-opened Manus Island detention facility in Papua New Guinea, and the Opposition's preferred facility in Nauru.

The ICJA would direct the Committee's notice to the legal advice of the Solicitor-General, Mr Stephen Gageler SC, following the High Court's decision, in which he opines, based on the presently known facts, that he "does not have reasonable confidence… that the power conferred under s198A of the *Migration Act* could currently be exercised to take asylum seekers from Australia to either Nauru or to PNG for determination of their refugee status". Such declarations would therefore likely be invalid without amendments to the *Migration Act*. The primary reason that these two options are in serious doubt under law is that they most likely do not measure up to the human rights standards required by s198A(3)(a)(i)-(iv), firstly because the requisite legal obligations, domestic or international, do not exist, and secondly, there is the complex issue of actual state practice to be assessed in detail.

The ICJA is opposed to further amendments being made to the *Migration Act* in order to enable the offshore processing of asylum seekers and refugees, in the context where such legislative amendments would be directed towards curtailing the human rights of asylum seekers. To further restrict the human rights of people fleeing persecution, who have most likely suffered gross human rights violations already, seems greatly contradictory to the spirit of the Refugee Convention and indeed to Australia's historical and expressed attitude towards adherence in international human rights standards.

The ICJA is presently opposed to policies that aim to redirect asylum seekers who arrive in Australia elsewhere for processing and eventual resettlement such as those discussed above. Such policies represent a withdrawal by Australia from its primary obligations under the Refugee Convention, which indicates a marked step backwards. Furthermore, such policies set a negative precedent that may be followed by other countries, resulting in the withdrawal and reduction of the protection space for asylum seekers worldwide.

CONCLUDING REMARKS

The current focus of Australia's approach to asylum seekers and refugees - a border protection policy

By its willingness to do business with countries that have not signed the 1951 *Refugee Convention*, the Commonwealth government has committed to 'stop the boats' at whatever human cost. As the new benchmark for regional cooperation, the proposed Malaysian Arrangement is profoundly flawed, and now determined so by the High Court.

Political rhetoric has shifted from demonising boat arrivals to demonising the fishermen that transport them. Consequentially, our people-smuggling laws have become the wedge that threatens Australia's traditional guarantee of the right to be free from persecution. Any transfer of asylum-seekers to another country where their security cannot be guaranteed may indeed violate Australia's international obligations. It should offend our humanity.

We might be cautiously optimistic about more regularised solutions to protracted situations of displacement in Malaysia or Thailand. However, the proposed Malaysian exchange has prejudiced a comprehensive Asia Pacific protection regime that is focused on the particular rights that refugees and asylum-seekers possess because of their particular vulnerabilities.

Until the patchwork of intra-regional protocols and bilateral agreements is incorporated into a regional framework based on broad adherence to the Convention, weakly institutionalised concepts of 'burden sharing' and 'multilateral co-operation' are meaningless.

- Firstly, the 'Malaysian solution' neither recognises nor purports to address that country's **porous borders,** a key entry point for protection-seekers and migrants alike. This is both part of the problem of mixed migration and critical to its solution.
- Secondly, short-term disincentives for people-smugglers do nothing to mitigate the **causes of displacement:** armed conflict and entrenched dictatorship. Discussing 'the boats' in abstraction belies the extra-territorial dimension of conflict forcing people to run for their lives from Sri Lanka, Myanmar, Afghanistan or Iraq. The most significant reason for boat arrivals has always been worsening conditions in countries such as these.

  The UNHCR's Erika Feller rightly emphasises that "failure to address the humanitarian and protection needs of refugees only destabilises refugee groups, contributes to their onward movement and feeds the growth of a now flourishing people-smuggling industry in the region." That industry in Malaysia is inextricably linked to the persecution of Rohingyas in Myanmar that burdens our region with a mass influx of refugees fleeing forced labour, land confiscation, arbitrary detention and sexual or gender-based violence.

  But financial inducements for the Malaysian government to take additional asylum-seekers will not translate to better conditions in the slums and detention centres that 'house' 94,000 people. At risk of trafficking or arbitrary detention and harassment by local militias, and

without access to health care, education or work, it is natural that some asylum-seekers will look for protection elsewhere.

- Thirdly, European experience suggests that **restrictions on asylum and tougher migration policies** may push more asylum-seekers into the hands of smugglers who offer the only realistic access to international protection.

Even if this proposal makes the immediate prospect of smuggling into Australia harder to sell, persons in fear of their life or 'warehoused' in refugee camps will continue to face a stark choice between indefinite destitution in Malaysia or seeking the protection of the few countries in our region committed to offering it.

A limited approach to regional cooperation among immigration and law enforcement authorities has criminalised what are fundamentally, issues of human security. The Malaysian scheme promises to further stigmatise the movement of peoples across international borders when the real criminality is the commercial exploitation of often vulnerable asylum-seekers.

Australia's conflated approach to refugees and people smuggling has become hopelessly confused and confusing. The solution is to provide avenues for protection for those asylum-seekers internationally that need it. This perfunctory Malaysian 'swap' scheme will not address the insufficient prospects for durable solutions faced by millions of displaced persons in our region, and so will not stop their onward movement through irregular channels. Australia should be focused on improving the quality and effectiveness of protection in countries close to the source of refugee movements. Australia should resettle some of the refugees in Malaysian detention centres, but not at the cost of others seeking asylum. Ultimately, primary responsibility for delivering effective protection rests with States such as Australia, rather than the already resource-stretched UNHCR.

Burden sharing does not equate to burden transfer. It necessitates a clearly defined and binding regional framework built on the Refugee Convention. Part of that solution is a renewed willingness to protect those with nowhere else to go.

The social and economic impact on Australian society of humanitarian settlement

The ICJA would direct the Committee's attention to the recent report of July 2011 by Professor Graeme Hugo to the Department of Immigration and Citizenship, 'Economic, Social and Civil Contributions of First and Second Generation Humanitarian Entrants' (the 'Hugo Report'). The Hugo Report seeks to correct the imbalance of research on the immediate and middle-term settlement difficulties of humanitarian entrants (relating to adjustment to Australian labour and housing markets, and Australian society generally). It is clear that in spite of these difficulties and challenges, humanitarian settlers make an important and substantial contribution to Australian society and the Australian economy.

- Humanitarian settlers make a key contribution to Australian demographics in terms of their relative youth (in comparison to other major immigration streams), their propensity to remain in Australia for the entirety of their working lives, and because of the high proportion of dependent age children within Australia's humanitarian intake, many of those dependent age children go on to spend the entirety of their working lives in Australia;
- A healthy humanitarian intake plays a role in offsetting the full impact of an ageing population in Australia;
- The ability of humanitarian entrants to participate in the workforce improves over time and converges toward the participation rate of Australian-born persons with increased length of residence in Australia;

- Humanitarian settlers tend to fill important niches in the labour market;
- In Australia, as elsewhere, humanitarian settlers often settle in rural and regional areas experiencing labour shortages, and consequently contribute to regional development;
- Humanitarian settlers (like other culturally and linguistically diverse group) are intensively participating in a range of volunteer activities;
- Despite difficulties in having their qualifications recognised in Australia, and although the 'Points Assessment Scheme' does not consider the value of entrepreneurialism), humanitarian settlers are more likely to be owner-operators of a business than other immigrant groups and Australian-born;
- Humanitarian settlers strengthen Australia's international linkages in an increasingly globalised world, and play an important role in reducing poverty and assisting development in their home countries;
- The social roles and connections of humanitarian settlers produce significant community capital in Australia, increasing with the length of their residence, and demonstrate a high level of engagement both with their own ethnic communities and with their neighbourhood community.

Interestingly, the Hugo Report stresses the importance of effective settlement services in facilitating the transitions of humanitarian settlers to independence. In addition, the Report acknowledges the role of governments at every level to encourage acceptance of, and respect for, people from different ethnic, national, religious, cultural and linguistic backgrounds. Promoting notions of inclusiveness and cohesion are naturally vital to the shaping and enhancing of Australian society.

The Hugo Report concludes with an important reminder to the Commonwealth government in considering its obligations under international law to those who seek its protection:

'Australia's contribution to the important global task of resettling refugees in third countries during the last half century has been greater in relation to our national population than any other OECD country. This has been, and continues to be, an important element of Australia's role as a responsible, caring global citizen. However, it is important also to recognise that Australia has experienced a substantial gain from this policy which has rightly been driven by ethical and humanitarian concerns.' (p 262)

The ICJA commends this Report to the Committee, and its core message that Australia's role as a 'responsible, caring global citizen' has traditionally rested on 'an Australian culture of concern for people in distress and for giving people a 'fair go" (p263).

The Hon John Dowd AO QC
President ICJA

6 September 2011