
# WRITTEN SUBMISSIONS AND VIEWS OFAUSTRALIAN LAWYERS FOR HUMAN RIGHTS TO THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

**Inquiry into the agreement between Australia and Malaysia on the transfer of asylum seekers to Malaysia**
**Submission by Australian Lawyers for Human Rights**

**September 2011**

## ABOUT ALHR

1. ALHR is a voluntary human rights organisation established in 1993. It comprises a network of Australian lawyers active in the practice and promotion of international human rights law standards in Australia.

2. ALHR has over 2,000 members and has active National, State and Territory committees.

3. ALHR is a member of the Australian Forum of Human Rights Organisations and bi-annually attends the Commonwealth Attorney General's Non-Governmental Organisations (***NGOs***) Forum of Human Rights and Department of Foreign Affairs and Trade Human Rights NGO Consultations. ALHR also attends the annual United Nations (***UN***) High Commissioner for Refugees NGO dialogue.

4. In addition to making formal submissions to parliamentary and other inquiries, ALHR regularly informally briefs and discusses human rights issues with Australian Parliamentary Service Staff, policy advisors, the media and the general public.

5. ALHR is able to draw on considerable depth of experience both in Australia and internationally in the area of refugee law and the protection of the human rights of refugees and asylum seekers.

## INTRODUCTION

6. This document comprises the written submissions of ALHR to the Senate Standing Committee on Legal and Constitutional Affairs in relation to the Committee's Inquiry into the agreement between Australia and Malaysia on the transfer of asylum seekers to Malaysia (hereafter, 'the Agreement').

7. The submission is necessarily brief given the timeframe within which submissions have been sought by the Committee following its decision to resume the inquiry since the High Court handed down its decision in *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32. In making this submission, ALHR has had the opportunity to review the submission by Professors Jane McAdam, Penelope Mathew, and Michelle Foster and others and wishes to associate itself with the submission.

8. ALHR's concerns about extra-territorial processing of asylum claims and other extra-territorial exclusionary measures against asylum seekers are longstanding. The Agreement represents just one example of such practices.

While ALHR believes a comprehensive inquiry into extra-territorial exclusionary measures is merited, time constraints mean that these written submissions will only address some aspects of the Agreement and its context.

9. In summary, ALHR is opposed not only to the elements of the Agreement that target asylum seekers who have engaged Australia's protection obligations, but also the policy's starting premise that such an approach will, as we are often told, 'break the people smugglers business model'.

10. ALHR believes that targeting asylum seekers who, as a matter of international and/or domestic law have already engaged Australia's protection obligations by virtue of coming under its jurisdiction or effective control, are and remain Australia's legal responsibility. These obligations arise as a result of the operation of the Refugee Convention which provides that a bundle of rights adhere at this point, including inter alia the prohibition on non-refoulement (which requires access to a status determination regime), non-discrimination, access to courts of law, and the right to education. This is a responsibility that can be shared, but cannot be shifted. ALHR also believes that the view that extra-territorial processing will squeeze people smugglers out of the asylum equation are ill-considered and short-sighted as well as being in breach of both the spirit and letter of Australia's international legal obligations.

11. ALHR's objections to the content of the Agreement itself fall into two broad categories. First, ALHR is concerned about the absence of remedies and accountability in the agreement in the event that there is non-compliance of one kind or another with it; an event that ALHR regards as almost inevitable. Second, ALHR is concerned about the human rights implications of implementation of the Agreement, whether in compliance or in its breach.

12. ALHR also regards the Agreement as having serious implications for the international protection regime as a whole. Although the raw figures of Australia's contribution to refugee protection globally make Australia a small player, Australia is nevertheless important in terms of the standards it purports to uphold and the example that it sets to others. The contribution Australia makes to the international protection regime is reflected not only in the number of people who are protected through Australia's refugee resettlement programme (which is often championed by Government) but also through its attitude (as a matter of both law and policy) towards people who spontaneously seek Australia's protection at its borders.

13. In making these submissions, ALHR wishes to emphasise that, as an organisation, we support measures that are taken to strengthen protection in countries of asylum and to increase access to protection through resettlement. In other words, while objecting in the strongest possible terms

to the transfer of asylum seekers who have engaged Australia's protection obligations, ALHR supports the elements of the Agreement that serve to strengthen refugee protection in Malaysia as well as the resettlement commitment that has been made under the Agreement.

## TERMS OF REFERENCE

14. To the extent possible, ALHR has followed the Committee's Terms of Reference in these submissions. However, ALHR is concerned about three other issues that arise in this context. First, that there has never been a comprehensive inquiry, parliamentary or otherwise, that focuses on the full implications of extra-territorial processing of asylum claims, whether in Nauru, Papua New Guinea, Malaysia or anywhere. Second, the suggestion that the Malaysia Agreement or any other form of extra-territorial processing will break the people smugglers 'business model'. Third, the portentous suggestions reportedly made by the Secretary of the Immigration Department that 'irregular maritime arrivals' will increase to 600 per month, that detention centres will be full to overflowing, and that the overflow will spill into the community and cause social and civil unrest.

*An inquiry into extra-territorial processing*

15. Given the political context in which extra-territorial processing of asylum seekers has emerged in Australia, it is not surprising that there has never been an independent inquiry into the practice. However, in view of the recent decision of the High Court in *M70*, the prohibitive costs of extra-territorial processing, the human effects that such policies have exacted on those who have been subject to them, and the sobering advice of the Solicitor-General in the wake of the High Court's decision, ALHR considers that the High Court's decision should mark a time to take stock, review and reconsider the price that has already been paid for the extra-territorial processing policies that have characterised migration policy over the last ten years in Australia. ALHR strongly recommends that, before pursuing a policy of extra-territorial processing any further, an independent commission of inquiry be established to investigate comprehensively the legal, policy and cost implications as well as the human effects of such an approach.

*Breaking the people smugglers 'business model'*

16. 'Boat people' have long been the target of a denigrating public and political discourse in Australia, derided for spontaneously seeking asylum instead of waiting in a so-called 'queue' that exists only in the imaginations of those who seek to deny or undermine the right to seek and enjoy asylum. In the 1990s

'boat people' were seen as people who did not have valid claims to refugee status. Often pejoratively described as 'economic migrants' or, worse, 'economic refugees', they were regarded as people abusing the system. At that time, approval rates for 'boat people' were lower than they are now, which made them an easier target for this type of scapegoating. Today, the percentage of those arriving by boat who are recognised as refugees is very high indeed.[1] Although 'boat people' are still sometimes viewed as undeserving because they are perceived as rich and as being able to afford the high fees of a people smuggler, few can challenge the *bona fides* of their claims for protection.[2] This has meant that another scapegoat is required – the people smugglers. Although there is no doubt that many people smugglers operate within syndicates overseen by international organised criminals, and that this requires a complex mix of international cooperation by law enforcement officials, this is no basis on which to criminalise and punish those who, for good reason, seek their assistance.

17. For better or worse, the people smugglers' 'business model' operates on the basis of a simple supply and demand equation. Conflict and human rights abuses supply the asylum seekers and the demand is created by a combination of the need for protection and inaccessibility of 'asylum space' as a result of highly restrictive visa requirements. For as long as there is conflict and human rights abuses forcing people out of their countries and for as long as there are highly restrictive visa requirements, the people smugglers 'business model' will remain in tact. Moreover, the marginal increase in access to protection that resettlement provides (even with the 4,000 increase under the Malaysia Agreement) is light years away from extinguishing demand for the services of people smugglers. The Agreement under consideration in this inquiry seeks to obstruct access by asylum seekers to the demand side of the equation, that is it persists in denying them access to protection and maintains (indeed heightens) the restrictive character of visa requirements and protection entitlements. As such, the Agreement does nothing more than create a different kind of blockage in the system; one which sacrifices people who are entitled to it as a matter of international law by effectively denying them access to a durable solution. It must be said that the only fate worse than being sent to the back of a protection queue is to be sent to the back of an imaginary one. Whatever measures are taken to address the issue of people smuggling, it is unconscionable to sacrifice the human rights of asylum seekers in the process.

*What will happen if we return to onshore processing?*

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[1] Primary recognition rates are currently at about 70 per cent. See evidence of Mr Garry Fleming, First Assistant Secretary, Border Security, Refugee and International Policy Division, Department of Immigration and Citizenship, to the Joint Select Committee on Australia's Immigration Detention Network (16 August 2011), *Official Committee Hansard* at 8.

[2] It is self-evident that wealth or poverty are not in and of themselves indicators of the *bona fides* of a refugee's claim for protection.

18. ALHR is particularly concerned that new justifications for the Malaysia Agreement have emerged since the High Court handed down its decision and the Government has been confronted by the potential for complete collapse of its extra-territorial processing strategy. In this regard, ALHR is also concerned to address the claims reportedly made by the Secretary of the Immigration Department that arrivals are likely to number 600 per month, that detention centres will be full to overflowing as a result, and that those released into the community will be a cause of social and civil unrest.

19. In global terms, the figure of 600 arrivals per month is underwhelming and is certainly likely to elicit little sympathy from the international community. In the financial year 2009-10, DIAC reports that roughly 4,500 onshore protection visas were granted in Australia, including boat arrivals.[3] Figures in most comparable countries far exceed these numbers.[4]

20. The reported suggestion of the Secretary of the Immigration Department that the increased numbers will fill detention centres to overflowing and cause social unrest to spill over into the community is shocking. First, it is a truism that there is nothing mandatory *for the legislature* about mandatory detention. The Parliament chose it, so any problems that arise as a result of it are of its own making. Although current jurisprudence supports the view that mandatory detention is permissible under the 'aliens power' in the *Commonwealth Constitution,* it is not constitutionally required. Opponents of mandatory detention (including ALHR) have long called for a detention regime that is subject to judicial scrutiny, as all other forms of administrative detention are in Australia. This means no more and no less than that any need to detain a person is individually assessed. The Menadue Report, co-authored by former Secretary of the Immigration Department, John Menadue, and a recently retired First Assistant Secretary of the Immigration Department, Arja Keski-Nummi, is one of the latest to propose this; it does so in clear, careful and considered terms.[5]

21. The detention centre unrest that we have witnessed in recent months, shocking though it of course is, must be seen for what it is - a symptom of anger and frustration at the injustice of mandatory detention and the inordinate delays in processing applications and security clearances for

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[3] DIAC, *Fact Sheet 61 - Seeking Asylum within Australia*.

[4] See UNHCR, *Asylum Levels and Trends in Industrialized Countries 2010: Statistical Overview of Asylum Applications Lodged in Europe and Selected Non-European Countries* (2011) available at http://www.unhcr.org/4d8c5b109.html. The report notes that even with increases in Australia over the past 6 years, 'asylum levels in Australia remain not only below those observed in 2000 (13,100 claims) and 2001 (12,400 claims) but also below those recorded by many other industrialized and non-industrialized countries.'

[5] John Menadue, Arja Keski-Nummi and Kate Gauthier, *A New Approach: Breaking the Stalemate on Refugees & Asylum Seekers*, Centre for Policy Development, August 2011.

recognised refugees. The implication that this kind of unrest and distress would spill over into the community if detainees were released is, we believe, mischievous and unsubstantiated, ignoring the fact that there have never been any incidents that could be properly characterised as social unrest of this kind among the asylum seeker population in the community. Moreover and in any event, if there were any evidence that a person were a security risk, this would be something that should be individually assessed and would inform the decision whether to release a particular individual or not.

**SUBMISSIONS**

*Compliance with international law*

22. Concerns about the compliance with international law of mechanisms for extra-territorial processing of asylum claims have been addressed on a number of occasions in a number of fora. Although the current leader of the Opposition claims that the Coalition 'invented' extra-territorial processing, there are other examples of extra-territorial processing which have attracted international criticism that pre-date the 2001 'Pacific Solution'. See, for example, the extra-territorial processing of asylum claims by the United States at Guantanamo Bay.

23. Following the introduction of the 'Pacific Solution' in 2001, the idea was also explored by a number of countries within the European Union, including the UK, Denmark and the Netherlands. In 2003, at the EU Summit in Thessaloniki, Greece, on 20-21 June 2003, a proposal by the UK was resoundingly shelved. It was a proposal that was strongly opposed by a number of EU states, including France, as well as leading academics[6] and the non-government sector.[7] In addition, a House of Lords Select Committee considered the issues in the European context and identified a number of legal deficiencies in the approach of the UK and, indeed, in the response of UNHCR in seeking a compromise.[8]

24. In relation to the present Agreement, there are a number of issues relating to both process and result that arise in international law and the capacity of extra-territorial processing to comply with Australia's protection obligations. These include compliance with protection obligations (under both international refugee and human rights law) at the time of arrival in Australia, and transfer

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[6] Gregor Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones', 5(3) *European Journal of Migration and Law* (2003), 303.

[7] See, for example, Amnesty International, 'UK/EU/UNHCR Unlawful and Unworkable – Amnesty International's views on proposals for extra- territorial processing of asylum claims', *AI Index: IOR 61/004/2003.*

[8] House of Lords Select Committee on European Union, *Eleventh Report,* 20 April 2004.

and entry into Malaysia. They also relate to the quality of refugee status determination undertaken by UNHCR.

25. In relation to the first, ALHR believes that it is unavoidable that transfer would involve the use of force and deprivation of liberty, both of which raise serious human rights concerns. There are a number of questions that should be asked in this connection, notably:

- What safeguards are in place to ensure that human rights violations do not take place in the course of transfer?
- What remedies are available to asylum seekers in the event of a breach of their human rights in the course of transfer?

26. In relation to the second, although UNHCR is regarded as the 'guardian of the Refugee Convention' and undertakes refugee status determination where states have failed to or are not in a position to do so, ALHR is aware that UNHCR is not adequately resourced to undertake refugee status determination to a standard that would meet those applicable in Australia.[9] Moreover, where Australia's protection obligations have been engaged, it places an improper strain on UNHCR's resources to expect it to do the work of a signatory country manifestly in a position to undertake its own status determination.

27. A close reading of the decision of the High Court in *M70* shows that the only legislative means of circumventing the High Court decision is to pass amendments that deliberately place Australia in breach of minimum standards of protection, whether provided by international or domestic law. As the Court noted, the *Migration Act 1958* is the legislative means by which Australia complies with its obligations under the *1951 Convention relating to the Status of Refugees* (Refugee Convention). Although the extent to which international law forms a part of Australia's domestic legal framework is a contested issue of longstanding, it was open to (indeed incumbent upon) the High Court to interpret s 198A of the *Migration Act* in light of Australia's international obligations. Indeed, the drafting of s 198A clearly purported to ensure that extra-territorial processing did not put Australia in breach of its international obligations. In this regard, it is to be recalled that s 198A was introduced as an *ex post facto* validation of the transfers of the *Tampa* asylum seekers that had already taken place from *HMAS Manoora* to Nauru.

28. A final point in relation to Australia's compliance with international law turns on the role and status of diplomatic assurances in international human rights law. As has been noted in the case of *Saadi,* the European Court of

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[9] See, generally, www.rsdwatch.org , which describes itself as 'an independent source of information about the way the UN refugee agency decides refugee cases'. See also Michael Alexander, 'Refugee Status Determination conducted by UNHCR', 11(2) *International Journal of Refugee Law* (1999), 251-289.

Human Rights has observed that 'the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment' particularly where 'reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of [international law].'[10] As the Court in *Saadi* noted further, diplomatic assurances do not absolve a Court – and by extension a state – of the obligation to look behind those assurances to their practical application.[11] In the case of Malaysia, human rights concerns about the way in which asylum seekers and refugees are treated is widely and well documented.[12] This merely exacerbates concerns that arise as a result of the absence of international or domestic legal obligations to protect the rights of asylum-seekers and provide them with access to fair, independent and reviewable determination procedures. Such diplomatic assurances that run contrary to documented practice and are unsupported by legal obligation should necessarily be regarded with considerable caution.[13]

*Compliance with Australian law*

29. The decision of the High Court in *M70* is clear and unequivocal. It is to be emphasised that the Court's decision is only concerned with the component of the Agreement that involves the transfer of asylum seekers from Australia to another place for processing of their claims. The Court's interpretation of s198A of the *Migration Act* effectively ensures that Australia is required to engage in a 'reflex' assessment of conditions in another country if it is to pursue extra-territorial processing of asylum claims.[14] The Solicitor-General's

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[10] *Saadi v. Italy*, No. 37201/06, [147].

[11] *Saadi v. Italy*, No. 37201/06, [148].

[12] See, for instance, Amnesty International, *Abused and Abandoned: Refugees Denied Rights in Malaysia*, ASA 28/010/2010 (16 June 2010). The absence of legal protections and the current threat of refoulement was recognized in the DFAT advice cited in the *M70* at [249] ('As DFAT advised, Malaysia is not a party to the Convention. It does not recognise, or provide for the recognition of, refugees in its domestic law. It therefore does not provide any procedures for the determination of claims to refugee status. DFAT's advice was that Malaysia generally allowed the UNHCR access to persons claiming that status. Malaysia does not bind itself, in its immigration legislation, to non-refoulement. The DFAT advice made mention of forcible deportations of asylum-seekers which had occurred in Malaysia, although it said that there were "credible indications" that they had ceased in mid-2009. It mentioned the prosecution of illegal immigrants, which would include asylum-seekers who had entered Malaysia without any permits (as the plaintiffs had done).'

[13] See further, UNHCR Note on Diplomatic Assurances and International Refugee Protection (August 2006).

[14] A reflex assessment of conditions in a country to which a person is to be transferred or returned has also found support in the European Court of Human Rights. See *Amuur v. France,* ECtHR, 19776/92, at paragraph 48: 'The mere fact that it is possible for asylum- seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty, the right to leave any country, including one's own, being guaranteed, moreover, by Protocol No. 4 to

advice is that this requirement would also apply to Nauru and Papua New Guinea and that those places would be unlikely to comply with the requirements of s 198A.

30. ALHR is concerned that if s198A of the *Migration Act* is amended to provide for third country processing without the protections in the current section, the fundamental premise of the Migration Act as the legislative means by which Australia complies with its international obligations towards refugees, is undermined. Australia can no longer claim to be fulfilling its obligations under the Refugee Convention. Given Australia's history of concern for the plight of refugees and of compliance with the Convention, a concern which it reiterated as recently as December 2001 when it reaffirmed its commitment to fulfill it obligations under the Refugee Convention and its Protocol,[15] it would be a grave policy decision to abandon these obligations through facilitating off-shore processing that clearly does not comply with Australia's Convention obligations.

*Practical implementation of the agreement*

31. ALHR has a number of concerns in relation to practical implementation of the Agreement. Although they cover all areas identified in the Committee's terms of reference (oversight and monitoring; pre-transfer arrangements; appeal processes; access to counsel; unaccompanied minors, and the Minister's obligations as their legal guardian), they can broadly be described as concerns about the absence of enforceable remedies and accountability.

32. At all stages in the processing framework proposed under the Agreement persons subject to it need to have access to enforceable remedies and accountability. The Agreement makes no provision for independent oversight and monitoring. Although UNHCR would have a role in overseeing how the Agreement is implemented on the ground in Malaysia, there are no indications that UNHCR would be overseeing the transfer phase of the process. Even in relation to Malaysia, its position is one that would involve diplomatic engagement rather than anything that approaches access to remedies and other forms of accountability. Indeed, UNHCR has indicated that it would be 'closely monitoring' the agreement from a 'protection perspective' and that they would communicate their concerns to both government. If there were no 'corrective action', UNHCR would reconsider its engagement.[16] However, while understandable, UNHCR's withdrawal in

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the Convention (P4). Furthermore, this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in.'

[15] Declaration of States Parties to the Convention relating to the Status of Refugees, Geneva, December 2001.

[16] See Australian Broadcasting Corporation, *UNHCR's Turk joins Lateline*, Transcript, 25 July 2011, http://www.abc.net.au/lateline/content/2011/s3277737.htm.

such circumstances clearly does not equate with any meaningful access to remedies, being indicative only of some measure of political accountability at an international level.

33. Although the decision of the High Court shows that there is scope for judicial review of a decision to transfer a person under the Agreement, apart from the fact that the Government has foreshadowed amendments to enable the Agreement to be implemented, the experience of the plaintiffs in *M70* are indicative of continuing systemic problems in the administration of the *Migration Act* as it relates to detainees. For example, it was reported that the unaccompanied minor plaintiffs were not initially accorded access to lawyers because they had not requested them.[17]

34. ALHR is concerned about the implications of the Agreement for unaccompanied minors. In the course of the proceedings before the High Court, it became clear that there was little in place in Malaysia to respond to the particular needs of unaccompanied minors. Given the onerous responsibilities that the Minister for Immigration holds as legal guardian of unaccompanied minors, any attempt at legislative amendments to relieve him of those responsibilities in order to effect the transfer of unaccompanied minors manifestly not in their best interests would itself conflict with his 'best interests' responsibilities under article 3 of the Convention on the Rights of the Child. In any other event, it would seem inconceivable that transfer could ever be regarded as being in the best interests of a child.

*Costs of the agreement*

35. ALHR considers that any consideration of the costs of establishing and implementing this Agreement should take into account not only the cost to the Australian taxpayer, but also the human costs to those who are subject to such an Agreement. When these costs are considered, ALHR regards the process of extra-territorial processing to be unconscionable at every level.

36. In this regard, any suggestion that the political motivation for the Agreement is being driven by the Christmas Island boat tragedy of late 2010 should be viewed with some caution. There is no doubt that this was a tragedy of immense proportions, and one that ALHR acknowledges to have been deeply felt by many, including the Immigration Minister himself. However, tragedies such as this arise primarily from the inability of refugees who need and are entitled to international protection to access it. As such, purporting to protect refugees from the risk of dangerous sea journeys at the hands of people smugglers by putting those who have taken such risks at the mercy of an

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[17] See s 256 *Migration Act 1958*, in which detainees are only accorded access to lawyers *if they ask for them.* There is no corresponding obligation to advise detainees of their rights under s 256. See s 193.

Agreement which actively compromises their access to meaningful and durable protection is more than a stretch too far.

37. ALHR strongly recommends that Australia return to onshore processing, coupled with a discontinuance of the mandatory detention scheme. In relation to the cost implications of this, ALHR makes the following observations. Although there are unquestionably costs involved in releasing asylum seekers arriving unauthorised and by boat into the community, there is little doubt that they would be considerably less than all the costs (direct and indirect) of mandatory detention in remote locations in Australia. There is even less doubt that the costs would compare even more favourably with the cost of extra-territorial processing on Nauru or Manus Island, and probably anywhere else.

38. In considering the 'alternative' of onshore processing, there is an aspect of the Agreement that should give us all pause for thought. If asylum seekers in Australia were released from detention pending determination of their claims, they would need some basic means of survival. This would mean access to work rights and/or welfare assistance pending the outcome of their application. Like mandatory detention, restrictions on access to work rights and welfare assistance is a political decision not a constitutional imperative; it is a choice that has been made by Government. It is certainly not a justification for keeping people in detention. And in pausing to consider the merits of such an approach – that is, supported release into the community – it might be noted that this is the paradigm proposed under the Agreement with Malaysia; viz. an initial period of detention for health and security screening, release into the community, permission to work, and access to welfare, education and healthcare.

39. The bottom line of extra-territorial processing is that, if it is to comply with the decision of the High Court in M70, it will cost too much. ALHR maintains that there are clear, workable, and lawful alternatives to extra-territorial processing of asylum claims. ALHR takes the position cognizant of the fact that the post Cold War era and recent conflicts have seen significant increases in refugee movements in the past two decades. However, ALHR believes that Australia and the international community more broadly need to take a long term view of refugee movements and attendant protection obligations. Although ALHR is supportive of regional protection initiatives, the Agreement under consideration in this inquiry is not such an initiative. It is an Agreement that serves the self-interest of two states and some, but deliberately not all, of the refugees who it is proposed will be covered by it. Regional protection alternatives are not 'quick fixes'. To be sustainable, they take time and the work is painstaking. Because it is often micro-level, it does not necessarily serve the cut and thrust of political discourse well. This underscores the imperative to remove refugee protection policy-making from the partisan political debate.

40. If extra-territorial processing is to continue no matter what the cost, ALHR considers that there are three elements of such a processing arrangement that do not feature in the decision in *M70*, but which ALHR considers would need to be present in order to ensure that rights are safeguarded. They are that:
    1. Asylum seekers should, as a matter of law, have access to enforceable remedies for breaches of minimum standards of protection (including protection against arbitrary detention) in relation both to determination of their refugee status as well as their treatment pending and post determination;
    2. In the absence of enforceable remedies in practice, Australia should be obliged to receive back asylum seekers into its jurisdiction and deliver on its protection obligations in-territory;
    3. Refugees should be guaranteed access to durable solutions, in particular the right to (re)settlement in Australia. To do otherwise, would be an unprincipled and punitive breach of Australia's obligations under Article 31 of the Refugee Convention.

*Regional Cooperation and Refugee Protection*

41. Refugee movements have never been, and never will be, orderly. The history of refugee protection in this region over the last three decades suggests that a multifaceted approach is the best way of ensuring that protection is actually delivered to as many refugees as possible, and that the precarious lives of vulnerable people are not reduced to political pawns. In response to the exodus of Vietnamese following the fall of Saigon, it was a multifaceted approach that maximised the number of people who were able to access the protection to which they were entitled. That approach included onshore protection to those spontaneously arriving in Australia and in other countries, an Orderly Departure Program (ODP) from Vietnam, and the Comprehensive Plan of Action (CPA), which resettled people from many parts of South East Asia. While the ODP and CPA were important programmes that created disincentives for people to expose themselves to the attendant risks of flight (by boat), they were not and should never be regarded as a substitute for the right of an individual spontaneously to seek asylum. Neither programme ever succeeded in delivering protection to all those who needed it and who were entitled to it. Nor, despite the resources employed and countries engaged, did they achieve their own goal of creating sustainable systems of refugee protection in the region.[18] Rather, the ODP and CPA provided alternatives for people needing protection; they certainly did not create queues.

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[18] For an analysis of the CPA and its mechanisms, see W. Courtland Robinson, 'The Comprehensive Plan of Action for Indochinese Refugees, 1989–1997: Sharing the Burden and Passing the Buck' (2004) 17 *Journal of Refugee Studies* 319.

42. As we have indicated earlier in this submission, ALHR is supportive of regional cooperation initiatives to enhance refugee protection as long as they are not used as a means to deny asylum seekers their rights or to circumvent protection obligations that have been engaged. ALHR is well aware of the myriad protection issues facing refugees and asylum seekers in Malaysia and other countries in the region. ALHR is also keenly aware of the protection issues that face refugees and asylum seekers in Australia. Concern for the human rights of asylum seekers and refugees in all these locations in the region should inform regional cooperation initiatives.

43. In this connection, ALHR welcomes the elements of the Agreement that provide for increased resettlement from Malaysia over the next 4 years and commitments that have been made to provide refugees and asylum seekers with access to basic human rights, including rights to work, housing, healthcare, and education. In ALHR's opinion, regional cooperation is vital to addressing refugee protection in a sustainable way, both globally and in the region.

44. Most importantly, any regional approach to refugee protection should not be punitive. It should be protective. As such, there should be no return of asylum seekers under the Agreement.

**CONCLUSION**

45. In conclusion, ALHR considers that the High Court decision should be an opportunity to undertake a comprehensive review of all the implications of extra-territorial processing. ALHR's firm view is that Australia and Malaysia should proceed with the resettlement and protection enhancements components of the agreement with a view to expanding the initiative to other parts of the region. In doing so, Australia needs to proceed to decouple the on- and offshore refugee programmes to ensure that resettlement and onshore refugees cannot be played off against each other politically.