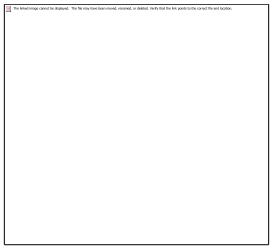

Australia's agreement with Malaysia in relation to asylum seekers

Senate Legal and Constitutional Affairs References Committee

15 September 2011

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

Acknowledgment

The Law Council acknowledges the assistance of the Law Society of South Australia and the Queensland Law Society in the preparation of this submission.

Introduction

1. The Law Council notes that the Senate referred Australia's agreement with Malaysia in relation to asylum seekers (the agreement) to the Legal and Constitutional Affairs References Committee (the committee) on 17 August 2011. The agreement provides for the transfer of 800 offshore entry asylum seekers to Malaysia for refugee status determination and the transfer of 4000 refugees from Malaysia to Australia for resettlement. The date for submissions to the inquiry was set as 2 September 2011. The Law Council commenced preparation of a submission.

2. On 31 August 2011, following the High Court decision in *Plaintiff M70/Plaintiff M106 v Minister for Immigration*[1](the M70/M 106 case), the committee advised submitters, including the Law Council that it would no longer be actively seeking submissions. The Law Council ceased work on its submission.

3. On 8 September 2011, the committee advised submitters, including the Law Council that it had decided to continue the inquiry and revised the submission closing date to 14 September 2011. In the time available for the preparation of this submission, the Law Council has been unable to address all the terms of reference for the inquiry. However, the Law Council makes a number of comments below in relation to particular terms of reference.

4. These comments specifically focus on access to independent legal advice and advocacy and the obligations of the Minister for Immigration and Citizenship (the Minister) as the legal guardian of unaccompanied minors arriving in Australia. The Law Council has addressed these specific matters in previous submissions to the committee and other parliamentary committees.[2]

5. The Law Council notes that the High Court referred to the agreement in the M70/M106 case. However, that case was decided on the basis of the validity of a declaration by the Minister under the *Migration Act 1958* that Malaysia was a country to which offshore entry persons could be taken under s 198A. That declaration was made after the agreement was signed.

6. In determining that the declaration was invalid, the judges in the majority examined whether a number of conditions for making the declaration had been established as either jurisdictional facts or whether the Minister had asked the right questions in relation to the existence of those conditions. In examining these conditions, the judges in the majority referred to the agreement but did not analyse the agreement systematically. Due to the High Court's decision that the declaration is invalid, the

[1] [2011] HCA 70
[2] See *Submission on Australia's Immigration Detention Network*, 17 August 2011 at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=1826B8D9-FDC6-28F3-E64A-1149FD4E31A4&siteName=lca; See *Submission on Commonwealth Commissioner for Children and Young People Bill 2010,* 6 January 2011 at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=6CF4F4CD-9C94-C6B9-B951-410BA849B76C&siteName=lca

Government is currently unable to transfer persons to Malaysia under the agreement.

7. The Law Council notes that the Government has announced that it will introduce legislation in response to the High Court decision which it hopes will enable it to make a valid declaration in relation to Malaysia and then pursue transfers under the agreement.[3]

8. For the reasons outlined below, the Law Council considers that there are serious human rights concerns in relation to the agreement and that it should not be pursued. The Law Council agrees with a number of other groups that the resettlement of 4000 refugees from Malaysia should proceed and notes that clause 7 of the agreement provides that this resettlement can occur even if the total 800 asylum seekers are not transferred to Malaysia.[4]

9. The Law Council is particularly concerned that transferees to Malaysia will have fewer rights than other offshore entry asylum seekers, who have fewer rights than those asylum seekers who arrive by plane.

Background

10. In 2010, the Commonwealth Government announced changes to its asylum seeker policies, including the possible establishment of a regional protection framework and a regional processing centre in East Timor.

11. The Law Council welcomed the public commitment to developing and implementing a regional approach to irregular migration and the protection of refugees. However it cautioned that any proposed regional protection framework would need to focus on the rights and needs of refugees and not deflect Australia's responsibilities to neighbouring countries.

12. The Law Council agreed with the Refugee Council of Australia that a sustainable regional protection framework can be developed only with genuine dialogue and participation from countries affected by significant flows of asylum seekers, current and potential countries of resettlement, the United Nations High Commissioner for Refugees (UNHCR) and other relevant non-government organisations.

13. Like many other non-government organisations, [5] the Law Council supported the adoption of a regional protection framework, provided it:

- was developed in cooperation with countries in the region and the UNHCR. This would involve:
  - engagement with other governments for both design and implementation, with regard to these partner governments' particular national interests and constraints.
  - consulting broadly with other relevant stakeholders such as countries within the region affected by significant flows of asylum seekers, current

[3] See http://www.minister.immi.gov.au/media/cb/2011/cb171747.htm
[4] See submissions by Amnesty International and the United Nations Association of Australia
[5] See for example, the Joint Statement by Australian NGOs, 1 August 2010, available at http://www.refugeecouncil.org.au/docs/releases/2010/100801_Regional_Protection_Framework.pdf

and potential countries of resettlement, the UNHCR and civil society organisations.

- complied with all international human rights standards including obligations under the *Convention relating to the Status of Refugees* (the Refugee Convention) , the *International Covenant on Civil and Political Rights* (ICCPR*),* the *Convention Against Torture* (CAT) and the *Convention on the Rights of the Child* (CROC) and their relevant protocols.

- promoted and protected the principle of equality - there must be no discrimination or difference in treatment based on the country of origin or manner of arrival;

- included a range of approaches, flexible enough to respond to changing international conditions;

- included a focus on and commitment to adequate accommodation and service provision for any persons detained under the framework, including the provision of free, timely legal advice; and

- included strategies for timely resettlement programs.

The Bali Process Ministerial Conference, March 2011

14. The Bali Process is a grouping of over 50 countries and international organisations which works together to combat people smuggling, people trafficking and related crimes in the Asia Pacific region. It was initiated at a Ministerial conference on these issues held in Bali in 2002. It is co-chaired by the Governments of Australia and Indonesia. These countries also participate in its Steering Group together with New Zealand, Thailand, the UNHCR and the International Office for Migration (IOM).

15. The 4th Ministerial Conference of the Bali Process was held on 29 and 30 March 2011 and agreed to an inclusive but non-binding regional co-operation framework (the framework) underpinned by the following principles:

(a) Irregular movement facilitated by people smuggling syndicates should be eliminated and States should promote and support opportunities for orderly migration.

(b) Where appropriate and possible, asylum seekers should have access to consistent assessment processes, whether through a set of harmonised arrangements or through the possible establishment of regional assessment arrangements, which might include a centre or centres, taking into account any existing sub-regional arrangements.

(c) Persons found to be refugees under those assessment processes should be provided with a durable solution, including voluntary repatriation, resettlement within and outside the region and, where appropriate, possible “in country” solutions.

(d) Persons found not to be in need of protection should be returned, preferably on a voluntary basis, to their countries of origin, in safety and dignity. Returns should be sustainable and States should look to maximise opportunities for greater cooperation.

(e) People smuggling enterprises should be targeted through border security arrangements, law enforcement activities and disincentives for human trafficking and smuggling.

16. The framework could be 'operationalised' through bilateral or other sub-regional arrangements, which could include arrangements for a possible regional processing centre or centres.

17. When developing and implementing practical arrangements participating States should be guided by the following considerations:

(a) Arrangements should promote human life and dignity.

(b) Arrangements should seek to build capacity in the region to process mixed flows and where appropriate utilise available resources, such as those provided by international organisations.

(c) Arrangements should reflect the principles of burden-sharing and collective responsibility, while respecting sovereignty and the national security of concerned States.

(d) Arrangements should seek to address root causes of irregular movement and promote population stabilisation wherever possible.

(e) Arrangements should promote orderly, legal migration and provide appropriate opportunities for regular migration.

(f) Any arrangements should avoid creating pull factors to, or within, the region.

(g) Arrangements should seek to undermine the people smuggling model and create disincentives for irregular movement and may include, in appropriate circumstances, transfer and readmission

(h) Arrangements should support and promote increased information exchange, while respecting confidentiality and upholding the privacy of affected persons.

18. The idea of a regional protection framework with these features had the support of the UNHCR and the IOM.

19. The first bilateral agreement proposed under this framework was the agreement in relation to which a statement was issued by the Australian and Malaysian Prime Ministers on 7 May 2011.[6]

Joint Statement by the Australian and Malaysian Prime Ministers on a Bilateral Agreement

20. The statement by the Australian and Malaysian Prime Ministers noted that the agreement would take the form of a co-operative transfer agreement that would see asylum seekers arriving by sea in Australia transferred to Malaysia.

21. In exchange, Australia would expand its humanitarian program and take on a greater burden-sharing responsibility for resettling refugees currently residing in Malaysia.

[6] See http://www.theaustralian.com.au/national-affairs/prime-minister-gillard-announces-australia-malaysia-working-on-deal-to-trade-asylum-seekers/story-fn59niix-1226051659951

22. Core elements of the agreement would include:

(a) 800 irregular maritime arrivals who arrived after the date of the agreement would be transferred to Malaysia for refugee status determination;

(b) Over 4 years, Australia would resettle 4000 refugees currently residing in Malaysia

(c) Transferees would not receive preferential treatment over asylum seekers in Malaysia

(d) Transferees in need of international protection would not be refouled (ie returned to a country where the asylum seeker would face persecution on the grounds under the Refugee Convention)

(e) Transferees would be treated with dignity and respect in accordance with human rights standards

(f) Australia would fully fund the agreement

23. The Australian and Malaysian Governments asked senior officials to finalise a Memorandum of Understanding to set out detailed arrangements for the agreement.

The Signing of the Agreement and Key Features

24. On 25 July 2011, the Australian and Malaysian governments signed the agreement following over 2 months of negotiations. The agreement was accompanied by Operational Guidelines (the guidelines). [7]

25. Key features of the agreement are that:

(a) The agreement is subject to Australia's and Malaysia's relevant obligations under international instruments or treaties to which they are parties;

(b) The agreement provides that transferees will be treated with dignity and respect and in accordance with human rights standards;

(c) The agreement provides that the Australian Government will meet costs:

(i) relating to health and welfare, including education of minor children;

(ii) relating to refugee status determination and any appeal;

(iii) relating to voluntary repatriation;

(iv) relating to deportation if a transferee were not found to be in need of protection, including costs of reintegration and relocation;

(d) The agreement provides that Australia will have an appropriate pre-screening assessment mechanism in accordance with international standards before transferring people and that special procedures will be developed to deal with the special needs of vulnerable cases including unaccompanied minors;

(e) The agreement provides that Malaysia will provide transferees with the opportunity to have their asylum claims considered by the UNHCR and will

[7] See http://www.minister.immi.gov.au/media/cb/2011/cb168739.htm

respect non-refoulement except where the transferee is a danger to security or has been convicted of a serious crime (this is consistent with the Refugee Convention);

(f) The agreement provides that Malaysia will facilitate the transferee's lawful presence while being assessed;

(g) The agreement provides that Malaysia will allow Australia to consider any broader protection claims if a transferee is found not to be a refugee;

(h) The agreement provides for the establishment of a joint committee of Australian and Malaysian government officials to oversee the arrangement and an advisory committee which will include at least an UNHCR and an IOM representative;

(i) The agreement provides that transferees will not be given any preferential treatment in processing of claims in Malaysia;

(j) The agreement provides that it is a record of the participants' intentions and political commitments but is not legally binding.

26. Key features of the guidelines are that:

(a) The guidelines provide that transferees will be 'counseled' in Australia and during the flight to Malaysia on the transfer process and what to expect in Malaysia;

(b) The guidelines provide that Malaysian authorities will ensure exemption orders under the Malaysian *Immigration Act 1959/63* and the *Passport Act 1966* are in place;

(c) The guidelines provide that Transferees will embark aircraft accompanied by escort officers;

(d) The guidelines provide that If a transferee does not disembark voluntarily, he or she will be handed over to Malaysian authorities;

(e) The guidelines provide that transferees will generally only be detained in a transit centre for 45 days and then be released into the community;

(f) The guidelines provide that the UNHCR will undertake refugee status determination and that Australian authorities will consider broader protection claims;

(g) The guidelines provide that if a transferee is found to be a refugee they will not be detained or arrested and will be referred to a resettlement country;

(h) The guidelines provide that transferees will have to find private accommodation subject to IOM assistance for 1month or longer on a case by case basis;

(i) The guidelines provide that transferees will get a support payment for 1 month or longer on a case by case basis;

(j) The guidelines provide that transferees will have access to self reliance opportunities through employment;

(k) The guidelines provide that children will only be 'permitted access to private education arrangements', otherwise will have access to 'informal education arrangements' through IOM.

(l) The guidelines provide that transferees will have access to basic medical care and that the IOM's initial health assessment will identify vulnerable cases and UNHCR and IOM support for such cases.

Law Council Concerns with Key Features of the Agreement and Guidelines

27. While the agreement is subject to Australia's and Malaysia's relevant obligations under international instruments or treaties to which they are parties, Malaysia is not a party to the Refugee Convention, the ICCPR, the International Covenant on Economic, Social and Cultural Rights or the CAT.

28. While the agreement provides that transferees will be treated in accordance with human rights standards, these are not specified.

29. While the agreement provides that the Australian Government will meet costs relating to health and welfare, including education of minor children, the guidelines prescribe a number of limits on health, welfare and educational support, which are noted above.

30. While the agreement provides that Australia will have an appropriate pre-screening procedure and special procedures will be developed to deal with vulnerable cases including unaccompanied minors, these procedures have not been made available for public scrutiny as far as the Law Council is aware, although they appear to have been provided to the High Court in the M70/M106 case.[8]

31. While the agreement provides that the Australian Government will met costs relating to refugee status determination and appeals, the Law Council notes that appeals against refugee status determination by the UNHCR appear to be restricted to internal UNHCR review and that there is no provision in the agreement for access to courts to seek review or to free legal advice and assistance. The Law Council notes that a number of Non-Government Organisations share similar concerns.[9]

32. While the guidelines provides that accommodation and financial support assistance will generally be given for a month, and may be given for longer on a case by case base, the Law Council understands that processing of asylum claims by the UNHCR takes substantially longer than a month.[10]

33. While the agreement provides that Malaysia will facilitate transferees' lawful presence, a number of non-government organizations and the Malaysian Bar have noted the Malaysian Government's poor record in distinguishing asylum seekers and refugees from illegal undocumented migrants.[11]

[8] See note 1 at paragraphs 36 to 38
[9] RSD Watch and the Asia Pacific Refugee Rights Network, see http://rsdwatch.wordpress.com/ and http://refugeerightsasiapacific.org/2011/05/17/aprrn-joint-statement-on-the-australia-%E2%80%93-malaysia-refugee-swap-agreement/
[10] See submission by the Coalition for Asylum Seekers Refugees and Detainees
[11] See Press Release by Malaysian Bar at http://www.malaysianbar.org.my/press_statements/asylum_seekers_and_refugees_are_not_commodities_to_be_traded.html and submissions by Amnesty International and Coalition for Asylum Seekers Refugees and Detainees

34. While the guidelines provide for 'counseling' for transferees on the transfer process, this is not an adequate substitute for legal advice and assistance in relation to their situation, which is afforded to other asylum seekers who are not subject to the agreement. The Law Council has consistently called for all asylum seekers to be treated the same way by Australia regardless of their mode of arrival or in this instance, the time of their arrival.[12]

35. The Law Council is also concerned that the guidelines provided for the handover of transferees who will not disembark voluntarily to Malaysian authorities in view of the concerns expressed by Non-Government organizations in relation to the treatment of asylum seekers in Malaysia as noted above.

36. The Law Council is also concerned that the guidelines are expressed as providing transferees with access to self-reliance opportunities through employment rather than in terms of the right to work as referred to in the Refugee Convention.

37. The Law Council is also concerned that the guidelines restrict access to education to 'private' or 'informal' education rather than public education as required by the Refugee Convention.

The consistency of the agreement with Australia's international law obligations

38. The Law Council agrees with a number of other submissions that the agreement appears to be inconsistent with Australia's obligations under at least the Refugee Convention, the ICCPR, CAT and CROC.[13] The agreement attempts to incorporate the core tenet of the Refugee Convention, which is non-refoulement, but as has been noted by the Australian Human Rights Commission, there are serious concerns that Malaysia may not adhere to this obligation as it is not a party to the Refugee Convention. As the agreement is non-binding, if Malaysia does not adhere to the non-refoulement obligation in relation to transferees, Australia will also be in breach of its non-refoulement obligation under the Refugee Convention.[14]

39. There are also a range of other obligations under the Refugee Convention and other conventions which Australia is a party to that are insufficiently addressed in the agreement, such as the right to freedom of religion, access to courts and legal assistance and the right to public education.

The Practical Implementation of the Agreement

Mechanisms for appeal of removal decisions

40. One of the Law Council's constituent bodies, the Law Society of South Australia (LSSA) has observed that Article 13 of the ICCPR provides that any person prior to being expelled from a country should be able to have their expulsion reviewed and to be represented in such a review. The fact that the agreement makes no reference to any such review process or to access to representation indicates that it

[12] See submission on Australia's Immigration Detention Network, note1
[13] See submissions by Human Rights Watch, Amnesty International, the International Commission of Jurists
[14] See http://www.hreoc.gov.au/about/media/media_releases/2011/61_11.html

is inconsistent with Australia's obligations under the ICCPR. It also appears to be inconsistent with the Refugee Convention.

41. The plaintiffs in the M70/M106 case had to rely on the original jurisdiction of the High Court under s 75 (iii) and (v) of the Constitution and on pro bono and community legal centre assistance to enable them to make the application to the High Court. This option is unlikely to be available to all of the 800 asylum seekers who will be subject to the agreement. The lack of a mechanism for appeal of removal decisions in the agreement is a significant omission.

42. There are also no provisions in the agreement for appeals to the courts or for legal assistance in Malaysia if transferees are found not to be refugees by the UNHCR and are subject to deportation from Malaysia.

Access to independent legal advice and advocacy

43. Another significant omission in the agreement is the lack of provision for independent legal advice and advocacy in Australia or Malaysia. There is no provision for advice and assistance under the Immigration Advice and Application Assistance Scheme (IAAAS) as there is for other asylum seekers in Australia who are not subject to the agreement.[15]

44. The plaintiffs in the M70/M106 case appear to have accessed the assistance of the community legal centre and the pro bono lawyers through a chance call to the ACT Legal Aid Office, which was referred on to the community legal centre.[16]

45. Access to the IAAAS should be a minimum requirement under the agreement or supplementary guidelines. The Law Council has previously raised the limitations of the IAAAS and the need for increased funding for legal aid commissions and community legal centres in migration matters, particularly to assist offshore entry persons to access rights to judicial review following the November 2010 High Court decision in the M61 case,[17]

The obligations of the Immigration Minster as the legal guardian of unaccompanied minors

46. The Law Council has previously raised concerns about the Minister being the guardian of unaccompanied children and young people pursuant to administrative arrangements in relation to the *Immigration (Guardianship of Children) Act 1946* (the Guardianship Act). [18]

47. The Minister also has functions under the *Migration Act 1958* in relation to the detention of certain people, including children and young people, and in relation to determining whether to allow applications for visas and whether to grant visas. The Minister also has the power to declare countries to which offshore entry persons may be taken for the assessment of asylum claims.

48. As noted in the M70/M106 case, the Minister's guardianship duties under the Guardianship Act arise because of the administrative arrangements established by

[15] See http://www.immi.gov.au/media/fact-sheets/63advice.htm
[16] See transcript of proceedings in the M70/M016 case, 7 August 2011 at http://www.austlii.edu.au/au/other/HCATrans/2011/195.html
[17] *Plaintiffs M61/M69 v Commonwealth of Australia* [2010] HCA 41; see submission to Immigration Detention Network Inquiry, note 1
[18] See submission on the Commonwealth Commissioner for Children and Young People Bill 2010, note 1

the government. It would be possible for another Minister to exercise the duties under the Guardianship Act if the administrative arrangements were changed.

49. The Law Council considers there may be a conflict of interest between the Minister's role as guardian and his or her role as decision-maker under the Migration Act. The Law Council agreed with submissions to the committee's inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010 to this effect.[19] The Law Council also agrees with the submission of the Coalition for Asylum Seekers Refugees and Detainees to this inquiry in this regard.

50. The Law Council considers that the Minister who exercises responsibilities under the Guardianship Act should act in the best interests of the child. Neither the agreement nor the guidelines refer to this principle, which is well recognised in family law and child protection law in Australia.[20]

51. It appears from the consideration by French CJ in the M70/M106 case of the pre-removal assessment of plaintiff M106, who was an unaccompanied minor, that some other documents required consideration by the Minister's delegate of the vulnerabilities and heightened risks with respect to the transfer of unaccompanied minors. However, the Law Council considers that the omission of the best interests principle from the agreement is significant.

52. It is difficult to see how it could be in the best interests of an unaccompanied minor to be transferred to Malaysia pursuant to the agreement, particularly with the limited forms of support provided under the agreement.

53. The Law Council notes that the majority in the M70/M 106 case decided that the Minister's written consent for the removal of minors from Australia was required and that the Minister could not rely on the declaration under the Migration Act to imply consent or on a provision in the Guardianship Act that effectively allowed an exemption from the consent requirement through the operation of another law, such as the Migration Act. The majority also found that grant of the Minister's consent is reviewable as a decision under the *Administrative Decisions (Judicial Review) Act.*

54. The Law Council notes that the Government has announced that it will introduce legislation in response to this aspect of the High Court decision as well.[21]

55. Even if such legislation were passed and transfers of minors were able to proceed under the agreement, the Law Council considers that decisions about such transfers should be subject to the best interests principle and maintains the view that it is difficult to see how such transfers could be in the best interests of minors, particularly unaccompanied minors.

Conclusion

56. While the Law Council agrees with a number of other organisations that a regional protection framework could be pursued to address irregular migration and refugee protection, it considers that the framework must have the characteristics referred to above. While the agreement has been made under the regional co-operation

[19] For example, submissions by, ChilOut, Refugee Council of Australia, United Nations High Commissioner for Refugees

[20] See *Family Law Act 1975 (Cth)* s 60B and see summary of child protection provisions at http://www.aifs.gov.au/nch/pubs/sheets/rs14/rs14.html

[21] See note 3

framework adopted by the Bali Process, it lacks a number of the characteristics considered by the Law Council and other organisations to be necessary for a proper regional protection framework. It also has significant omissions in relation to necessary human rights protections which would ensure that Australia complies with its international human rights obligations, particularly in relation to access to legal assistance and to the courts and in relation to consideration of the best interests of minors. The Law Council considers that the agreement falls short of the necessary requirements for a proper agreement under the framework and should not be proceeded with.

57. The Law Council is particularly concerned that transferees to Malaysia will have fewer rights than other offshore entry asylum seekers, who have fewer rights than those asylum seekers who arrive by plane. This provides another reason for not pursuing the agreement and instead negotiating appropriate bilateral or multilateral agreements under the framework.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.