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Liberty Victoria Submission

Inquiry into the Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement.

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty is actively involved in the development and revision of Australia's laws and systems of government. Further information on our activities may be found at www.libertyvictoria.org.au

Liberty Victoria has been concerned with the welfare of asylum seekers for many years, and welcomes the opportunity to submit to the Senate Standing Committee on Legal and Constitutional Affairs on the inquiry into the agreement between Australia and Malaysia on the transfer of asylum seekers to Malaysia

Re the Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement.

We note that the Terms of Reference refer to the Agreement. The document itself is titled "Arrangement Between The Government of Australia and the Government of Malaysia on Transfer and Resettlement". As a matter of law, it is not an agreement because it is not, according to its own terms, binding on the parties. For the sake of accuracy, we will refer to it as "the Arrangement" because that is the language of the document itself.

Term of Reference a & b - The degree to which the proposed Transfer and Resettlement Arrangement (the Arrangement) is consistent with Australia's international obligations.

1. Australia's International Obligations

- 1.1 The proposed "transferees" who are to be sent from Australia to Malaysia are people who seek to exercise their right of asylum in Australia. That is, they claim to be refugees within the meaning of that term in the International Convention relating to the Status of Refugees, 1951. Australia's international obligations to refugees are defined in the international agreements to which Australia is a party. They include:
 - a. The Convention relating to the Status of Refugees.
 - b. The Convention on the Rights of the Child;
 - c. The International Covenant on Civil and Political Rights.

- 1.2 In that the Arrangement sidesteps all international responsibility by removing the “transferees” to a jurisdiction over which the Commonwealth Government has no control, the Arrangement is inconsistent with Australia’s international obligations. It is further inconsistent with Australia’s international obligations in that the protections afforded to claimants for refugee status under the International Refugee Convention cannot presently, or in the foreseeable future, be guaranteed by the Government of Malaysia.

2. The Convention relating to the Status of Refugees.¹

- 2.1 The Convention on the Status of Refugees (the Refugee Convention) is the primary source of Australia’s obligations in relation to people who seek asylum on our shores. The Refugee Convention was originally limited to protecting people who were escaping the totalitarian regimes of Europe in the middle of the 20th century. In 1967 the *Protocol relating to the Status of Refugees* was adopted. Since 1967 the Refugee Convention has applied to all people who meet the Refugee Convention criteria for refugee regardless of their origin.

What obligations does Australia owe under the Refugee Convention?

- 2.2 The Refugee Convention applies to people who are found to be genuine refugees. The Refugee Convention also applies, in a more limited capacity, to people who have entered Australia’s borders without authorisation and who seek to be determined as genuine refugees.² Australia has obligations to receive and assess claims of refugee status. The relevant provisions of the International Refugee Convention read as follows:

Article 16(1) A refugee shall have free access to the courts of law on the territory of all Contracting States

Article 31(1) “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened, in the sense of Article 1, enter or are present in the territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

31(2) The Contracting states shall not apply to the movement of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized...”

Article 32(1) The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order. 32(2) The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law...”

Article 33 (1) No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

- 2.3 It follows from these provisions that under the Refugee Convention, Australia must not, therefore:

¹ *Convention relating to the Status of Refugees* 189 U.N.T.S. 2545, entered into force on April 22, 1954.

² *Ibid*, Art 1; *Minister for Immigration v Khawar* (2002) 210 CLR 1.

- a. refuse to process refugee claims where people seeking asylum present themselves to governmental authorities without delay in order to have their claim for refugee status heard and determined by the courts;
- b. punish asylum seekers within Australia's territory because they have arrived without authorisation; or
- c. return people to a country where their "life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion."³

2.4 Further, expulsion from Australia is prohibited unless:

- a. circumstances of national security or public order justify the expulsion; or
- b. a decision has been reached in accordance with due process of law; and
- c. an appeal can be made from that decision to a competent authority.⁴

The Arrangement and the Refugee Convention

2.5 The Arrangement seeks to remove asylum seekers (transferees) from Australian territory completely. Removal is to be made without considering claims of refugee status. The scheme is to be executed in such a way that review of any action on the part of the Executive Government is effectively barred. Once removed from Australia the Commonwealth Executive will have no control over the fate of the transferees. In that the Arrangement precludes consideration of refugee claims whilst transferees are in Australian territory, it is inconsistent with Australia's international obligations under the Refugee Convention.

2.6 More particularly the following rights under the Refugee Convention are refused under the terms of the administrative arrangement made between Australia and Malaysia.

2.7 The entitlement of an applicant for refugee status to have their claim for refugee status determined by the courts of a Contracting Party, in this case, Australia, is denied. A transferee, in the terms of the Convention, is also refused the opportunity to 'show good caused for their illegal entry and presence'.

2.8 A penalty is imposed upon a refugee claimant who has arrived on Australian territory irregularly. That penalty is constituted first by their mandatory detention in a government detention facility, secondly by their expulsion from Australia at the earliest possible opportunity and thirdly by their removal to a country, in this case Malaysia, in which their personal safety and well-being cannot be guaranteed.

2.9 Restrictions upon the movement of a refugee claimant are immediately imposed beyond that which is necessary. It may be necessary to detain a refugee claimant pending appropriate health, identity and security checks, but beyond that the mandatory detention of refugee claimants pending their expulsion is contrary to the terms of the Convention's prohibition on unnecessary restrictions upon movement.

³ *Convention relating to the Status of Refugees* 189 U.N.T.S. 2545, entered into force on 22 April 1954, Art 31.

⁴ *ibid*, Art 32.

- 2.10 The removal of transferees from Australia to Malaysia, without consideration of their claims for refugee status, constitutes their expulsion within the terms of the Convention. Such expulsion is permitted under the Convention only on grounds of national security or public order. Neither national security nor public order is threatened by a refugee claimant's approach to the Courts of the land to vindicate their refugee claim.
- 2.11 In relation in particular to the expulsion of refugees from Burma, the removal of such a person to Malaysia, which borders upon Burma, would constitute a breach of Australia's international obligation not to expel a refugee to the frontiers of a territory where his or her life or freedom would be threatened.

3. The Convention on the Rights of the Child⁵

- 3.1 The Convention on the Rights of the Child (CRC) requires that Australia protect all children within its jurisdiction without discrimination of any kind, including on the basis of the child's status or activities.⁶ The CRC requires that the State party must put the child's best interests as the foremost consideration,⁷ subject only to economic capacity.⁸ The CRC defines the rights owed to children in recognition of their vulnerability. CRC rights include:
- a. the right not to be separated from his or her parents;⁹
 - b. the right to reunification with family, dealt with humanely and expeditiously;¹⁰
 - c. the right to be free from mental and physical abuse, neglect, negligent treatment, maltreatment and exploitation;¹¹
 - d. the right to special treatment, including alternative care, from the State when deprived of his or her family environment;¹²
 - e. the right to appropriate protection and humanitarian assistance in relation to claiming refugee status regardless of whether they are accompanied by an adult or not;¹³
 - f. the right to an adequate standard of living;¹⁴
 - g. the right to education;¹⁵
 - h. the right to live free from cruel, inhumane or degrading treatment.¹⁶

The Malaysia Solution and the CRC

- 3.2 The Arrangement contemplates transferring children to Malaysia as though they were adults. It does not take into account the special needs of children in recognition of their inherent vulnerability. It does not guarantee the security of the child transferees and, given

⁵ *Convention on the Rights of the Child*, open for signature 20 November 1989, 1577 U.N.T.S. 3 (entered into force 16 January 1991).

⁶ *Ibid*, Art 2.

⁷ *Ibid*, Art 3.

⁸ *Ibid*, Art 4.

⁹ *Ibid*, Art 9.

¹⁰ *Ibid*, Art 10.

¹¹ *Ibid*, Art 19

¹² *Ibid*, Art 20

¹³ *Ibid*, Art 22.

¹⁴ *Ibid*, Art 27.

¹⁵ *Ibid*, Art 28.

¹⁶ *Ibid*, Art 37.

that Malaysia is a country in which corporal punishment on minors is sanctioned by law,¹⁷ the Arrangement poses a real threat to the welfare of child transferees. The Arrangement seeks to avoid all of Australia's obligations under the CRC to transferees who are children in the same way that it seeks to avoid all obligations to adults under the Refugee Convention. In this respect it is inconsistent with Australia's international obligations. In particular the following rights under the CRC are endangered by the transfer of children pursuant to the administrative arrangement between Australia and Malaysia.

- 3.3 The right of a child to be free from mental and physical abuse, maltreatment or exploitation is not guaranteed as no such guarantee appears anywhere in Malaysian law and in so far as Malaysian law permits the corporal punishment of children, it is entirely inconsistent with the protection afforded under the CRC.
- 3.4 It follows similarly that a child's right to be free from cruel, inhuman or degrading treatment is not guaranteed.
- 3.5 A child's right to family reunion may be prejudiced by their transfer to Malaysia because Malaysian law presently provides no guarantee that family reunion for children seeking asylum will be pursued expeditiously and humanely.
- 3.6 A child's right to appropriate protection and humanitarian assistance in relation to claiming refugee status, regardless of whether they are accompanied by an adult or not, is plainly not guaranteed under the terms of the administrative arrangement because Malaysia, being a country that is not a party to the International Refugee Convention, has no law in place under which claims for children's asylum and refugee status can be heard and determined.

4. The International Covenant on Civil and Political Rights¹⁸

- 4.1 The International Covenant on Civil and Political Rights (ICCPR) contains basic rights relating to political and civil freedom necessary in any functioning democracy. The ICCPR requires Australia to acknowledge and protect the rights therein contained in relation to anyone within the Australian jurisdiction, without discrimination.¹⁹ The ICCPR rights infringed by the Arrangement include:

- a. the right to be free of cruel inhumane or degrading treatment;²⁰
- b. the right to liberty and security of the person;²¹
- c. the right to be treated humanely when deprived of liberty;²²
- d. the right of aliens to stay within a jurisdiction until the decision to have them removed has been reviewed by a competent authority where their interest can be represented;²³

¹⁷ *Child Act 2001* (Malaysia) Act 611, s91, 92.

¹⁸ *International Covenant on Civil and Political Rights* 99 U.N.T.S. 171, entered into force on 23 March 1976

¹⁹ *Ibid*, Art 2.

²⁰ *Ibid*, Art 7.

²¹ *Ibid*, Art 9.

²² *Ibid*, Art 10.

²³ *Ibid*, Art 12.

- e. the right to recognition as a person before the law;²⁴
- f. the right to avoid arbitrary interference with one's family;²⁵
- g. the right of children to have such protection as is required by reference to their vulnerability as children;²⁶
- h. the right to equal protection before the law;²⁷

The Arrangement and the ICCPR

- 4.2 The Commonwealth Government will transfer people seeking asylum in Australia to Malaysia thereby avoiding all of its obligations under the ICCPR. The obligations stated above, particularly those in relation to the expulsion of aliens, fall on the government as soon as the transferees enter the Australian jurisdiction.
- 4.3 Whilst the Commonwealth Government may claim to be satisfied that Malaysia will protect the rights of the transferees, the Arrangement contains no such guarantees. Each and every one of these rights is denied first because Malaysia is not a party to the International Covenant on Civil and Political Rights and secondly because in consequence it has no laws presently in place that protects these rights. Malaysia's commitment to observe the terms of the administrative arrangement is radically insufficient to guarantee the ICCPR's legal requirements. The situation is only made worse by the fact that Malaysia has not signed the Refugee Convention, does not recognise refugee status under its domestic law and condones, in law, the canning of people in the same circumstances as those who will be transferred from Australia to Malaysia under the Arrangement.²⁸ Any action that seeks to avoid the obligations contained in the ICCPR, such as the removal of the transferees, is an action inconsistent with Australia's international obligations.

5. The High Court's Decision in relation to the Malaysian Solution and its Implications

- 5.1 In the recent case of Plaintiff M70/2011 v Minister for Immigration and Citizenship the High Court invalidated the Minister for Immigration's declaration of Malaysia as a country to which people seeking asylum in Australia could be transferred. The Court's reasoning was as follows.
- 5.2 The Court's task was to interpret a provision in the *Migration Act*. That provision, s.198A(3)(a), says that a person arriving irregularly in Australia from offshore may be taken to another country to process their claim for refugee status - if the Immigration Minister declares that the country meets certain conditions. The conditions are that the country must possess effective procedures to determine whether a person needs protection from persecution; it must protect people from harm while their claims are being assessed; it must protect people who are found to be refugees pending their resettlement elsewhere; and the protection given must comply with relevant human rights standards.

²⁴ Ibid, Art 16.

²⁵ Ibid, Art 17.

²⁶ Ibid, Art 24.

²⁷ Ibid, Art 26.

²⁸ Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship [2011] HCA 32, [28].

- 5.3 By a 6:1 majority, the High Court found that the Minister could not properly make a declaration in relation to Malaysia. This was because when determining that Malaysia was a country that met these conditions the Minister had misinterpreted what the statutory conditions required. He had decided that Malaysia met the relevant conditions because it had given positive undertakings about how people transferred from Australia would be treated in Malaysia. These undertakings had been written into the administrative arrangement concluded jointly by Australia and Malaysia. The written undertakings amounted to a political assurance given by Malaysia that it would institute new procedures to ensure that people sent to Malaysia under the arrangement would be treated fairly and protected properly.
- 5.4 At the risk of over-simplifying, the Minister had accepted that the statutory conditions would be met because Malaysia had undertaken that they would be.
- 5.5 The High Court decided that in making a declaration that Malaysia was a suitable country to which to send people seeking asylum, the Minister could not validly rely on Malaysia's promise alone. In the Court's view, s.198A(3)(a) required the Minister to be certain that the required protections were in place at the time he made the declaration. In this instance he could not be so satisfied. This was because Malaysia's undertakings related to what it might do in the future rather than to any commitment to preserve and strengthen protections in effect in the present.
- 5.6 The Minister had asked the wrong question. He had asked whether the political undertakings provided by Malaysia as to its future conduct were sufficient to satisfy him that the statutory preconditions for a declaration were met. He should have asked instead whether Malaysia's existing laws and procedures were adequate to provide him with the certainty that was required. Not to do so constituted a jurisdictional error.
- 5.7 The Court observed that Malaysia was not presently a signatory to the International Refugee Convention. It had no legal obligation to implement the Convention's protections. It had no domestic laws defining its assessment and protection obligations. It had no effective procedures in place to evaluate refugee claims. Its commitments under the arrangement with Australia were not legally enforceable.
- 5.8 The recognition and protection of refugees by a country is guaranteed by its laws. The complete absence of an existing system of legal and procedural protective guarantees in Malaysia, therefore, rendered the Minister's declaration ineffective. He had misapplied the statutory criteria.
- 5.9 The High Court's decision would appear to have the following implications for off shore processing in Malaysia.
1. Given that Malaysia is not presently a signatory to the International Refugee Convention; that it has no domestic laws defining its assessment and protection obligations; it has no effective procedures in place to evaluate refugee claims; and that its arrangement with Australia is not legally enforceable or indeed binding in any way, there is no reasonable likelihood that the Minister will be able to declare Malaysia as a country to which refugee claimants can be sent from Australia in the foreseeable future within the terms of s.198A(3)(a). This is because such laws and procedures must be in place at the time the Minister's declaration is made. It is

highly unlikely that Malaysia will agree either to sign the Refugee Convention or to implement such laws and procedures just to put the administrative arrangement between Australia and Malaysia into effect. Even if it did, to meet the legal requirements contained in the conditions would necessitate extensive legislative activity and take a considerable period of time. Even then, the Minister would have to be satisfied that the legislation was appropriate and that the procedures were workable, fair and sufficiently protective of transferees' human rights.

2. The only way, therefore, that the Malaysia solution could be revived is for the Parliament to pass an amendment to s.198A(3)(a). Such an amendment would make it easier for the Minister to declare that Malaysia was a suitable country for processing transferees. The amendment may seek to overcome the High Court decision by providing that the Minister could make a declaration as to the suitability of a country for off shore processing in his or her absolute discretion. That is, the Minister's decision as to whether a country met the conditions set down in s.198A(3)(a) would be one to be exercised by him or her alone. In our view, it would be highly unlikely that such a sweeping discretion would find favour with the High Court, particularly if it purported to remove the possibility of judicial review. In any case, the conferral of such a broad discretion upon a Minister of the Executive Government would clearly run foul of Australia's international legal obligations as previously outlined.
3. Alternatively, an amendment might take the form of removing the conditions attached to the Minister's issue of a declaration. In other words, the Minister could simply be given the power to make a declaration as to a country's suitability, without reference to the protective conditions presently contained in the subparagraph. The protective conditions would simply be deleted. In the absence of criteria against which the appropriateness of the Minister's decision could be assessed, judicial review would be rendered nugatory. The problem with any such amendment would be that it would by implication represent Australia's complete withdrawal from its international legal obligations to assess and protect refugee claimants under the International Refugee Convention in so far as these applied to the Malaysian arrangement. This would be a morally repugnant solution to highly questionable problem. On any account, Australia's problem with asylum seekers arriving by boat is minuscule compared with that experienced by every other South East Asian neighbouring country, including Malaysia. To pass off Australia's problem onto countries far less able to manage refugee flows than our own, in return for extensive monetary support, is ethically reprehensible.
4. For these legal reasons, the Malaysia solution should be abandoned in its entirety. It should also be abandoned for financial reasons, as the succeeding section of this submission demonstrates clearly.

6. Term of reference c - The practical implementation of the agreement, including:

(i) oversight and monitoring

6.1 There is insufficient oversight and monitoring contained in the arrangement. The fact that the proposed 'care' of asylum seekers would be at the hands of the Malaysian government would tend to indicate that Australia will have no oversight and monitoring role whatsoever. It would be surprising indeed if Australia - playing the role of arbiter of fairness and proper treatment of asylum seekers – were welcomed into Malaysia to provide feedback and critique the care of asylum seekers at the hands of that sovereign nation.

6.2 Periodic review mechanisms contained in the agreement are deficient and meaningless:

“Clause 20: The operation of this Arrangement will be reviewed by the Participants, as and when necessary, to identify any concerns or variations that may need to be made to the Arrangement.”

6.3 There is no scope for transparency, accountability or independent review of the arrangement.

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

6.4 The arrangement does not provide for any consistent pre-transfer assessment regarding a person's particular vulnerability. Clause 4 of the agreement sets out the categories of persons to be transferred, and those who should not be transferred, but those categories do not make allowances for people who are particularly vulnerable or at risk; they simply cap the number of removals at 800 and prevent the transfer of any person whose transfer would mean that the maximum number of transferees as agreed in Clause 7(1) would be exceeded.

6.5 There is brief mention of unaccompanied minors in Clause 8, which stipulates that

“2. Special procedures will be developed and agreed to by the Participants to deal with the special needs of vulnerable cases including unaccompanied minors”.

6.6 This is unlikely to be sufficient to satisfy the whole of the Minister's guardianship obligations.

(iii) mechanisms for appeal of removal decisions

6.7 There is no mechanism for appeal of removal decisions outlined in the agreement. This is clearly unacceptable.

(iv) access to independent legal advice and advocacy

6.8 It is the respectful submission of Liberty Victoria that neither party to this agreement has any genuine intention of allowing asylum seekers to avail themselves of access to independent legal advice and advocacy. This is plain from the nature of the agreement itself which seeks to evade Australia's international responsibilities under the International Refugee Convention.

6.9 It goes without saying that this is unacceptable.

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

6.10 As well established by *M70*, there are no safeguards or guarantees in place with respect to the treatment of unaccompanied minors under the Malaysia agreement in its extant form.

“...By reason of the prohibition contained in [s 6A](#) of the [Immigration \(Guardianship of Children\) Act 1946](#) (Cth) against a "non-citizen child" leaving Australia without the consent of his or her guardian, any removal of him from Australia without that consent would be unlawful. The Minister is Plaintiff M106's guardian under that Act and has not given such consent. I agree that Plaintiff M106's removal from Australia absent that consent would be unlawful, for the reasons given in the joint judgment”.²⁹

6.11 There is room in this ruling to allow for the transfer of unaccompanied minors where the Minister grants consent on an individual basis for each of them to be transferred from Australia.

6.12 This notwithstanding, Liberty has grave concerns about the role of the Minister for Immigration as the legal guardian of unaccompanied refugee minors. There is a clear conflict of interest between the guardian (nurturer & protector of the child's best interests) on one hand, and the Minister (detainer, immigration decision maker, deporter) on the other.

(vi) the obligations of the Minister for Immigration and Citizenship

6.13 Liberty Victoria is concerned at the re-opening of this submission following the decision of the High Court of Australia in *M70*³⁰. Liberty believes that the Malaysian arrangement is bad policy and raises serious issues under international and domestic law. Further, we have great difficulty with the unpredictable, irrational and reactive character of policy around this issue.

6.14 The High Court's decision in *M70* found *inter alia* that the Minister had misunderstood what was required of him in making a declaration under s 198A(3)(a) *Migration Act 1958*. “The facts necessary for the making of a declaration under [s 198A\(3\)\(a\)](#) did not exist. There was no power to make the declaration. It is invalid”.³¹

6.15 This issue – and the various shortcomings in the Minister's performance of his obligations – were discussed in detail in the judgment of the High Court in *M70*.

6.16 As that decision so copiously demonstrated, the Malaysian arrangement does not comply with Australian law. Liberty Victoria vigorously discourages any legislative amendment that would seek to tweak the edges of law so as to allow such a flawed, illegal policy to squeeze into the legislative framework.

²⁹ *M70* at [257].

³⁰ *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011)

³¹ *Plaintiff M70/2011* at [255].

- 6.17 It is the position of Liberty Victoria that fundamental rights – such as the right to seek asylum – must not be written out of law.

7. Term of reference d - The costs associated with the agreement

- 7.1 By Clause 9.1 the Arrangement provides as follows:

“The Government of Australia will meet all costs that arise under this Arrangement in relation to the following:

- a) Any interdiction and Transferee management costs involved in the actual transfer from Australia to Malaysia and any Australian detention cost;
- b) Transportation costs incurred to transfer Transferees to Malaysia including the costs of any escorts and interpreters;
- c) Costs related to the health and welfare (including education of minor children) of Transferees in accordance with UNHCR’s model of assistance in Malaysia;
- d) Additional “safety net” costs related to meeting any special welfare needs of Transferees (especially vulnerable cases) drawing also on the services of IOM as necessary;
- e) Costs for registration of Transferees and for their refugee status determination (and any appeal in relation to that determination) and assessment of any other protection obligations;
- f) Costs related to the resettlement in a third country of those Transferees determined to be in need of international protection, that are not met by the third country;
- g) Costs relating to increased referrals by UNHCR of refugees to Australia;
- h) Costs relating to the resettlement of persons from Malaysia to Australia that Australia has approved for resettlement;
- i) Costs associated with the voluntary repatriation of a Transferee;
- j) Costs related to the deportation from Malaysia of a Transferee found not to be in need of international protection, to their country of origin (or elsewhere if appropriate) which includes the cost of reintegration or relocation assistance where appropriate;
- k) Such other costs that may be agreed in writing between the Participants from time to time.”

- 7.5 Clause 2 defines a number of terms. Relevantly for present purposes it provides:

“Costs means all agreed direct and indirect costs;

Transferee means a person transferred from Australia to Malaysia under this Arrangement.”

- 7.6 Calculating the actual costs associated with the Arrangement necessarily depends on a number of assumptions. The most important assumptions are:

- a. the percentage of transferees who are assessed by UNHCR as being refugees;
- b. the length of time a transferee will spend in Malaysia after being assessed as a refugee.

- 7.7 Most of the irregular arrivals in Australia in recent times are Afghan Hazaras fleeing the Taliban. As a group, they have been persecuted for more than a century; under the Taliban, persecution has escalated to the level of ethnic cleansing. It is highly likely that all Hazaras will be assessed as refugees. While it is obviously impossible to predict the make-up of

asylum seekers who will arrive in Australia in the future and who will be transported to Malaysia, we estimate that approximately 90% of them will be assessed by UNHCR as refugees. To be conservative, we will operate on the assumption that the true figure is 75%.

7.8 Resettlement from a non-convention country such as Malaysia typically takes between 10 and 15 years once a person is assessed by UNHCR as a refugee. If an unwilling host country makes life unbearably difficult for a refugee, then they may leave for another country and arrive irregularly in that country. That is one reason asylum seekers leave Indonesia and seek safety in Australia: the risk of the journey is seen as preferable to a life in the shadows in a non-Convention country. We assume that the Arrangement was struck on the understanding that Malaysia would not try to force transferees out of Malaysia before they can be resettled. Accordingly we estimate that transferees assessed as refugees would likely spend 15 years in Malaysia.

7.9 Accordingly, the obvious direct costs associated with the Arrangement are:

Transportation costs to transfer Transferees to Malaysia:
800 airfares

Transportation costs of any escorts and interpreters (and their salaries): say,
100 airfares + salaries

Costs relating to the resettlement of persons from Malaysia to Australia that Australia has approved for resettlement (where \$pr is the average processing and resettlement cost for each person resettled from Malaysia to Australia):
4000 airfares; $4000 \times \$pr$

Health & welfare costs and “safety net” costs of transferees who are found to be refugees: say $800 \times 75\% \times 15 \times \h (where \$h is the assumed average annual cost associated with health, welfare and “safety net” costs).
 $800 \times 75\% \times 15 \times \h

Costs associated with the voluntary repatriation of a Transferee and costs related to the deportation from Malaysia of a Transferee found not to be in need of international protection including the cost of reintegration or relocation assistance where appropriate, (where \$r is the cost of reintegration or relocation).
 $800 \times 25\% \times \$r$

7.10 It is necessary to make some assumptions about various cost integers. These are impossible to assess, but the following estimates seem reasonable. All include an allowance for administration costs.

\$pr processing and resettlement cost for resettlements to Australia), per person	\$10,000
\$h annual cost of health, welfare and safety net, per person	\$15,000
\$r cost of reintegration or relocation, per person	\$10,000

7.11 Adopting those assumptions about various cost elements, the figures come to this:

800 airfares	\$1,000,000
100 return airfares	\$200,000
100 salaries (escorts, interpreters; estimate: 1 month each)	\$830,000

4000 airfares	\$5,000,000
4000 x \$pr	\$40,000,000
800 x 75% x 15 x \$h	\$135,000,000
800 x 25% x \$r	\$2,000,000

- 7.12 While these estimates are necessarily difficult, the identifiable costs come to approximately \$200 million.
- 7.13 The Arrangement includes a number of elements which are impossible to estimate. Specifically items e, f, g & k in Clause 9.1 might or might not involve substantial cost. The actual outcome will depend in part on whether Malaysia exploits the Arrangement for its own financial advantage. In particular, the fact that costs to be covered by Australia include indirect costs allows substantial scope to load the bill with administrative costs. There is no reason to assume that Malaysia will try to minimise the costs.
- 7.14 The largest item in the calculation above is the continuing costs associated with the continued presence in Malaysia of 75% of the transferees who are assumed to be assessed as refugees. While it may be hoped that many or most of them would find jobs in Malaysia, there will necessarily be significant administrative cost associated with tracking their welfare in the ways contemplated by the Arrangement. This is so because (if the Arrangement works the way it has been presented to the Australian public) transferees will be treated separately from, and better than, the other 90,000 refugees currently living in Malaysia in breach of Malaysian law. The administrative costs associated with ensuring that they are treated as the Arrangement contemplates will inevitably be quite high. The figure also includes an estimate for support which may have to be provided by the Malaysian government to some of the transferees.

8. Term of reference h - Comparison of this agreement with other policy alternatives for processing

- 8.1. We assume that the Australian government intends to treat the 4000 refugees resettled from Malaysia as part of our offshore resettlement quota. It presently offsets informal boat arrivals against the offshore resettlement quota. Accordingly the Malaysian arrangement is neutral on total refugee arrival rates.
- 8.2. Paradoxically, the Arrangement may constitute a significant pull factor, at least for a time. The reason for this is that Malaysia does not allow refugees to work. The Arrangement notionally allows transferees to work. Refugees currently living in Malaysia waiting for resettlement would have a powerful incentive to try to get to Australia in order to be transferred back to Malaysia and receive work rights. For a person who faces the prospect of waiting up to 15 years before being resettled, the incentive to act this way would be very strong. If that pull factor in fact operated, it is likely that the quota of 800 transferees would be filled quickly, and would have achieved very little for Australia apart from adding significantly to the cost of deterring boat arrivals. If, as a result, Australia and Malaysia increased the quota under the arrangement, then the cost would increase proportionally, but so would the pull factor.
- 8.3. Logically, there are a few alternative approaches:
- a. Leave things as they are, without the Malaysian Arrangement;
 - b. Process asylum claims on the mainland;

- c. Change the mandatory detention regime from indefinite to finite

9. Leave things as they are

- 9.1 At present, Australia has a system of indefinite mandatory detention of boat people. The detention is mandatory, because the Migration Act requires that non-citizens without a visa must be detained and must remain in detention until given a visa or until removed from Australia. While the Minister has a discretion about the mode of detention, detention remains mandatory, and even “community detention” falls far short of actual freedom.
- 9.2 Detention is indefinite because it has no fixed end point: detention continues until the person receives a visa (which may take years) or until they are removed from Australia. Removal from Australia may not happen until after years of processing, and in some cases turns out to be impossible – for example, where a person is stateless. Where a person is refused a visa but cannot be removed from Australia, the High Court decision of *al Kateb*³² says that they may be held in detention for the rest of their life, notwithstanding that they have not committed any offence.
- 9.3 Leaving things as they are assumes that arrival rates are largely a result of push factors rather than pull factors. The long term average arrival rate of boat people since the mid-1980s has been very low: approximately 1000 people per year. There have been peaks from time to time: in 2001 slightly more than 4000 boat people arrived; in 2010 slightly more than 6000 boat people arrived. In the first half of 2011, the arrival rate had already fallen below 50% of 2010 arrivals. In addition, arrival rates in Australia track parallel to arrival rates in other western countries, albeit at a much lower level.
- 9.4 It is significant that the introduction of mandatory detention in 1992 made no difference to the arrival rate of boat people: it remained steady for the next five years.
- 9.5 Changing policy in an attempt to deter boat people from seeking entry to Australia rests on several important assumptions. The first is that the fear of what Australia might do to them exceeds the fear from which they are fleeing. That proposition is quite implausible. In the past 15 years, most boat arrivals have been Afghan Hazaras fleeing the Taliban, Iraqis fleeing Saddam Hussein, Iranians fleeing the theocracy in that country, and Tamils fleeing genocide in Sri Lanka. Not surprisingly, a very high percentage (approximately 80-95%) of boat people ultimately establish an entitlement to protection.
- 9.6 The second assumption is that asylum seekers have the wherewithal to research the treatment they are likely to receive if they seek safety in Australia. There is no evidence to suggest that people desperate enough to take the risks associated with unauthorised arrival in Australia have ever had the time or resources to investigate the many changes in Australia’s policy settings concerning asylum seekers.
- 9.7 The third assumption, which is bound up with the second, is that people smugglers are a reliable source of information for their passengers. It is in the highest degree unlikely that people smugglers reveal candidly to their customers that they face mandatory detention, or removal to Malaysia, or any other hardship which the government of the day seeks to impose as a deterrent.

³² *Al-Kateb v Godwin* [2004] HCA 37; 219 CLR 562

- 9.8 It is therefore difficult to assume that anything done by Australia will make any appreciable difference to the arrival rate of boat people.
- 9.9 If things are left as they are, Australia will continue to face the following problems associated with the present system:
- a. substantial cost
 - b. needless infliction of mental harm on detainees
 - c. damage to Australia's reputation as a nation which cares about human rights.

10. Substantial cost

- 10.1. Indefinite mandatory detention is extremely expensive. Figures from Senate Estimates suggest that mandatory detention costs about one billion dollars per year. A substantial part of the cost is caused by the fact that detention in remote places (on Christmas Island, or Curtin, or Scherger) is far more expensive than detention in metropolitan or less remote detention centres.
- 10.2. An additional cost associated with indefinite detention is the psychiatric harm which it inflicts on detainees. This has been the subject of critical comment by many medical practitioners, and is intuitively obvious: a person who has not committed any offence, and who is locked up with no way of knowing when they will be released, is likely to suffer mental harm the longer their detention continues. The harm is likely to be greater if the person is already traumatised by the circumstances which impelled them to flee in the first place. There are costs associated with this. A number of cases have resulted in substantial monetary settlements in favour of detainees whose mental health was seriously damaged by indefinite detention during the years of the Howard government. Even where the harm inflicted does not lead to court proceedings, the fact remains that the community suffers a loss by receiving into it a person who is psychiatrically damaged when they might, but for the effects of indefinite detention, have received a person who was robust and capable of contributing substantially.
- 10.3. An additional, hidden, cost associated with detention in remote places is that community support for detainees is much more difficult in remote places, for obvious reasons. Community support is an important element in mitigating the psychiatric harm associated with indefinite detention.

11. Change the mandatory detention regime from indefinite to finite

- 11.1. It will be plain from this that we see no merit in the idea of detaining a person indefinitely merely because they have arrived in Australia by boat. It is significant that asylum seekers also arrive by air: typically they arrive on short term visas such as business, tourist or student visas. Once in Australia, they apply for asylum. Once their initial visa expires, they are given a bridging visa pending assessment of their claim for asylum. This may take years, but they remain in the community while it happens. Most of these asylum claims fail on the merits (only about 20% succeed). By contrast, about 80-90% of boat arrivals ultimately succeed in their claim for asylum, but they are detained during the entire process.
- 11.2. The arrival rate of asylum seekers who come by air is two or three times greater than the arrival rate of boat people.

- 11.3. A question inevitably arises: what is the justification for detaining boat people indefinitely, at vast expense, when most of them will ultimately succeed in their claim for protection but will be damaged more or less severely by the process? To this question, it seems that the only genuine answer is an appeal to political advantage. Liberty Victoria is not in a position to assess the political advantage of mistreating asylum seekers, but it submits that the indefinite mandatory detention of asylum seekers is incapable of being reconciled with any genuine respect for human rights.
- 11.4. There is one possible benefit to be got from the Malaysian Arrangement. The Appendix to the Arrangement sets out the Operational Guidelines of the Arrangement. Clause 2.3(1)(a) provides:
- “2.3.1 TRANSFEEE FOUND TO BE A REFUGEE
Transferee permitted to remain in Malaysia and will not be liable to being detained and arrested due to their ongoing presence in Malaysia under this Arrangement.”
- Clause 3.0 provides:
“If detained on arrival, Transferees should be held only for the period necessary to confirm identity or undertake security or other checks. This does not exclude detention in the context of criminal prosecution.”
- 11.5. Plainly, Australia has negotiated an arrangement with Malaysia which assumes minimal detention before the transferees are released into the community with work rights. If Australia were to adopt a similar approach here, certain results would certainly follow:
- a. overcrowding in detention would be solved instantly;
 - b. the cost of operating the detention system would reduce dramatically;
 - c. the foreseeable mental harm which is caused by indefinite detention would stop.
- 11.6. It is not clear why the Australian government thinks it necessary or desirable to detain boat people indefinitely when they do not think it necessary or desirable for Malaysia to detain those same boat people (except for preliminary health and security checks), and do not think it necessary or desirable to detain asylum seekers who come to Australia by plane.
- 11.7. A solution which is far preferable to the present approach, and which would make the Malaysian Arrangement unnecessary, would have the following elements:
- a. boat people arriving in Australia are detained for preliminary health and security checks;
 - b. initial detention is capped at one month, unless a court extends that detention in a particular case;
 - c. after initial detention, the person is released into the community on conditions calculated to ensure that they remain available for the balance of their processing and (if necessary) removal if they fail in their protection claim;
 - d. while in the community pending processing, they have work rights, rights to Centrelink and Medicare benefits.
- 11.8. Such an approach would be vastly less expensive than the present system, vastly less expensive than the Malaysian arrangement, and would conform not only to our human rights ideals but also to the practice in other western nations which receive asylum seekers in far greater numbers than Australia does.

- 11.9. Liberty Victoria submits that the Malaysian Arrangement is worse than the present system; the present system is worse than indefinite detention on the mainland in metropolitan detention centres; each of those is worse than adjusting the present system so that detention is capped at one month just as the Malaysian Arrangement contemplates for transferees.