Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into Australia's agreement with Malaysia in relation to asylum seekers

1. Introduction

Oxfam Australia welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into Australia's agreement with Malaysia in relation to asylum seekers.

Oxfam Australia is an independent, not-for-profit, secular international development agency. We are a member of Oxfam International, a global confederation of 15 Oxfam entities that work with others to overcome poverty and injustice in almost 100 countries around the world. Oxfam Australia provides emergency humanitarian response during disasters and conflicts, supports more than 400 long-term development projects across Asia, the Pacific, Africa and Australia, and undertakes research, advocacy and campaigning for policy and practice changes which promote human rights and justice.

Oxfam Australia has a strong interest in the Australian Government's policies and practices with regard to refugees, asylum seekers and other vulnerable displaced persons, both within Australia and elsewhere. We have undertaken, participated in and supported research and advocacy relating to the costs of the 'Pacific Solution', alternatives to detention for asylum seekers, the impacts on asylum seekers and refugees of Australia's border control arrangements with neighbouring countries, and frameworks for strengthening regional refugee protection. We participate on the steering committees of the Asia Pacific Refugee Rights Network (APRRN) and the International Detention Coalition (IDC). And we regularly engage with the Australian Government, the United Nations High Commissioner for Refugees (UNHCR) and other inter-governmental and non-government organisations, at domestic, regional and international levels, regarding the policies and practices required to protect vulnerable people.

2. Focus of submission

We note that circumstances pertaining to this Inquiry have changed considerably since its establishment on 17 August 2011. Key developments are summarised below.

In the absence of the support of the Parliament for legislative changes to permit the lawful establishment of extraterritorial processing arrangements, it appears that the Australian Government will shortly be compelled to relinquish (or indefinitely defer) its plan to deport up to 800 asylum seekers who arrive to Australia by boat under the *Arrangement between the*

Government of Australia and the Government of Malaysia on Transfer and Resettlement of 25 July 2011.[1]

As such, rather than addressing specific elements of the arrangement between the Australian and Malaysian Governments (which we note have been amply discussed in submissions already posted to the Inquiry's website), our brief submission addresses Term of Reference (h) *a comparison of this agreement with other policy alternatives for processing irregular maritime arrivals;* by considering policy alternatives for the processing of claims made by asylum seekers who have come to Australia by boat. In doing so, we question the legitimacy and effectiveness of deterrence as the leading conceptual driver of Australia's response in this area.

3. Recent developments

On 31 August 2011, the High Court of Australia delivered its judgment in the matters of *M70/2011 and M106/2011 v Minister for Immigration and Citizenship & Anor* [2011] HCA 32. It held by a 6:1 majority that the declaration by the Minister for Immigration and Citizenship of Malaysia as a country to which asylum seekers could be sent for the processing of their claims was invalid. It held that a valid declaration under s198A of the *Migration Act 1958* (Cth) required: that the declared country be bound by international or domestic law to fulfill the criteria stipulated under s198A(3)(a)[2]; that it do so as a matter of objective fact; and that the protections provided be understood as 'a reflex of Australia's obligations'. It further determined that an unaccompanied child asylum seeker could not be transferred to another country without the express written permission of the Minister, as legal guardian, and that such a decision is subject to judicial review.

The Government has published an opinion from the Solicitor-General, echoed by other legal experts, that the High Court's reasoning casts into doubt the prospect of extraterritorial processing of asylum seekers' claims per se, given the current geopolitical profile of our region. In light of this advice the Government announced its intention to pursue legislative amendments to enable implementation of its arrangement with the Malaysian Government and accommodation of extraterritorial processing arrangements more broadly.

On 21 September 2011, the Australian Government introduced the *Migration Legislation Amendment (Offshore Processing and Other Measures) Bill* 2011 into the House of Representatives. Its specified impetus is 'the need to address the major regional problem of people smuggling and its undesirable consequences including loss of life at sea'.[3] The amendments contained are designed to mitigate the prospect of successful legal challenges being mounted against any Government measures to transfer asylum seekers to another country. Among the core elements of the Bill are stipulations that: the sole condition for designation of an 'offshore processing country' is that the Minister thinks that such a designation is 'in the national interest'; this exercise of Ministerial power is not subject to laws of natural justice; and the provisions of the *Immigration (Guardianship of Children) Act*

[1] http://www.minister.immi.gov.au/media/media-releases/_pdf/20110725-arrangement-malaysia-aust.pdf

[2] http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118/s198a.html

[3] http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r4683_first-reps/toc_word/11210b01.docx;fileType=application%2Fvnd.openxmlformats-officedocument.wordprocessingml.document

1946 (Cth) in no way curtail the capacity of the Minister to remove a non-citizen child from Australia under the relevant provisions of the *Migration Act 1958.*

Separate amendments to the Bill have been tabled by the Hon. Scott Morrison MP and the Hon. Robert Oakeshott MP. The former stipulates that a designated 'offshore processing country' must be a party to the Refugees Convention or Protocol. The latter requires that the Minister report to Parliament on an annual basis on the steps taken and progress made under the Regional Cooperation Framework[4] agreed to at the March 2011 Ministerial Conference of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (the Bali Process).

Given that both the Coalition and the Greens have expressed emphatic opposition to the Bill, and the Government has likewise indicated that it will not agree to the amendments proposed by the Coalition, it is widely anticipated that the Bill (as is or amended) will not pass through the Parliament.

4. Summary of Recommendations

Oxfam Australia recommends that the Australian Government:

Recommendation 1: Work to strengthen protection within our region through sustained and well-targeted aid, bolstered by diplomatic efforts and an enhanced resettlement commitment.

Recommendation 2: Support the establishment of a well-resourced policy and resource unit within the Bali Process Secretariat, to work with regional governments, civil society and other key stakeholders to develop and support the implementation of the core elements of a regional cooperation framework that protects asylum seekers and refugees.

Recommendation 3: Resume mainland processing of the claims of all asylum seekers that reach Australia's territory or otherwise invoke our jurisdiction, under a uniform statutory procedure, irrespective of their mode of arrival.

Recommendation 4: Pursue all necessary measures to ensure that the legal and policy infrastructure and operations of Australia's immigration detention system are fully aligned with our international obligations and recognised human rights standards. This should include increased investment in the refinement, expansion and modeling of community-based alternatives to detention.

Recommendation 5: Honour its arrangement to resettle an additional 4 000 refugees out of Malaysia over the coming four years, as a clear indication of its ongoing commitment to responsibility-sharing commitment within the region.

[4] See Co-Chairs' Statement at http://www.baliprocess.net/index.asp?pageID=2145831461

Recommendation 6: Progressively increase its refugee resettlement commitment to an annual quota of 20 000 places, de-link its allocation of protection visas from its offshore resettlement program, and utilise its current role as Chair of the UNHCR Working Group on Resettlement to encourage strengthened resettlement commitments from other countries.

Recommendation 7: Ensure its rescue at sea capabilities are robust and conform to relevant international laws and UNHCR guidance relating to maritime interception and asylum.

5. Policy alternatives for the processing of claims made by asylum seekers arriving to Australia by boat

Oxfam Australia is greatly concerned by the lack of due regard shown for Australia's international obligations in the text of the Bill currently before Parliament. We are also dismayed by the increasingly corrosive nature of the political debate regarding Australia's response to asylum seekers who arrive in Australia by boat.

We have long advocated that Australia promote and support the development of a framework for regional cooperation on refugee protection.[5] While important steps have been taken in this regard, we fear that, in combination with the significant damage wrought upon asylum seekers and Australia's reputation by successive Government's long-standing policy of indefinite mandatory immigration detention and other harmful practices, recent developments threaten to seriously undermine Australia's capacity to exercise genuine leadership in this area.

In our view, Australia's current policy settings relating to asylum seekers arriving by boat must be reformed, and the corresponding political narratives reframed. Deterrence is an inappropriate and ineffectual conceptual driver of Australia's response to the complex regional and global challenges of forced displacement.

In addition to complying with legal obligations and being humane, sound public policy should reflect a clear understanding of the problems to be addressed, and respond to the strengths and failures of previous approaches.

Reframing the problem

Oxfam Australia recognises the serious risk to lives and safety posed by asylum seekers undertaking hazardous sea journeys. Tragically, many asylum seekers have drowned during desperate attempts to reach Australia on unseaworthy boats and the death toll is likely higher than official records suggest.

As many others have noted, however, even in peak years the number of asylum seekers reaching Australia by boat has represented an extremely modest proportion of the global asylum seeker figure, of Australia's overall migration program, of the number of forcibly

[5] See for instance Oxfam Australia, 'Asylum Seekers: the way forward', 14 September 2010

displaced peoples worldwide and of the number of refugees within our region.[6] Australia does not, by any relative measure, face a crisis in boat arrivals.

Nor is the integrity of our asylum system compromised by boat arrivals. Again, as widely acknowledged, throughout the history of their arrival in Australia, the vast majority of asylum seekers traveling by this route have been found to be refugees and, as such, in need of international protection. We do not have a problem with bogus claims, and people coming to Australia by means that are domestically defined as unauthorised are nevertheless exercising their legal right to seek asylum.

Nor is there any reason to believe that Australia's national security is threatened by boat arrivals. We have robust systems for managing risks and ample experiencing in doing so through our conduct of routine health, identity and security checks. And while we do have problems of overcrowding across our immigration detention network, with associated unrest and serious harm, in our view these problems are not due to the fact of boat arrivals, but rather to Australia's unnecessary, virtually unique, long-standing policy of mandatory, indefinite, non-judicially reviewable immigration detention. As such, we believe that those problems are best tackled through reform of our approach to the reception of asylum seekers.

People risk their lives by getting on boats in pursuit of lasting safety. These are desperate acts to which people feel driven by intolerable circumstances, when they see no viable alternative. It is rarely noted that people may also risk their lives and safety by *not* taking such journeys – by staying in or moving between refugee camps and urban environments within our region where they may be subject to grave abuses and protracted destitution, or by returning in desperation to their countries of origin where they risk persecution or death.

In order to mitigate the risk of loss of lives at sea, the Australian Government needs to ensure that its rescue at sea capabilities are robust and conform to relevant international laws as well as UNHCR guidance relating to maritime interception and asylum. Renewed collaboration with our neighbours in this regard will be vital.

In order to avert further tragedies at sea Australia must also focus on strengthening opportunities for refugees and others owed international protection to access alternative pathways to lasting safety from elsewhere within our region. This cannot be achieved unilaterally or bilaterally, but will require sustained effort, innovation and collaboration. In devising its policies, the Australian Government must not disregard the fact that people smugglers have a market and a business model as a result of the collective protection failures of the global community. This is where the real work needs to be done.

Recommendation: That the Australian Government ensure that its rescue at sea capabilities are robust and conform to relevant international laws and UNHCR guidance relating to maritime interception and asylum.

[6] While approximately 6 000 asylum seekers arrived to Australia by boat last year and Australia's overall Migration Program was set at around 170 000 people in 2010-11, according to UNHCR, 845 800 people lodged new asylum claims during the 2010 calendar year, and at the end of 2010 there were 43.7million forcibly displaced people worldwide (the highest number in 15 years), and over 4million refugees in the Asia-Pacific region. See UNHCR (June 2011), 'UNHCR: Global Trends 2010', at http://www.unhcr.be/commonFiles/Global_report/UNHCR_GLOBAL_TRENDS_2010.pdf and DIAC,'2011-12 Migration Program', at http://www.immi.gov.au/skilled/_pdf/migplan11-12.pdf

The costs of deterrence

Australia's policies towards asylum seekers arriving by boat have long been guided, and at times explicitly driven by the goal of deterrence. Prominent amongst these have been the raft of measures described as the 'Pacific Solution', and Temporary Protection Visas.

As demonstrated in a report released by Oxfam and A Just Australia in 2007, the Pacific Solution wrought devastating harm on both adult and child asylum seekers, cost more than a billion dollars (to process the claims of fewer than 1 700 asylum seekers offshore), significantly distorted our aid budget, compromised our regional relationships and tarnished our international reputation.[7] The 2008 closure of the detention centre used on Nauru was welcomed by UNHCR as signaling the end of a 'difficult chapter' in Australia's treatment of refugees and asylum seekers.[8]

Temporary Protection Visas, introduced in 1999, imposed punitive sanctions on a specific category of recognised refugees, in contravention of international law. They are regarded by many as having aggravated the risk of loss of lives at sea, as they enforced the separation of refugee families. Under that regime, women and children seeking to reunite with their husbands, fathers and sons who had been recognised as refugees in Australia largely populated boats headed for Australia in the two years following their introduction. The tragic drowning of 353 people aboard the SIEV-X, the majority of whom were women and children, is a harrowing example.

The temporary protection policy was in fact proposed by Pauline Hanson in 1998. At the time, it was reportedly decried by the then Minister for Immigration as being "highly unconscionable in a way that most thinking people would clearly reject".[9] Upon announcing the abolition of Temporary Protection Visas in 2007, the Labor Government explained that it was guided by the principle and conviction that, when people fleeing persecution arrived in Australia, that persecution must end.

Having focused so strongly on the goal of deterrence both in terms of its political narratives and investment priorities, Australia models this approach to other countries within the region and elsewhere. But clearly if deterrence becomes the norm, the system of international protection faces collapse.

The Australia-Malaysia Arrangement and the Regional Cooperation Framework

The High Court has made its judgment in relation to the Australia-Malaysia Arrangement, and there has been extensive commentary by others who have submitted to this Inquiry regarding the arrangement's paucity of enforceable human rights safeguards and various other serious concerns. We note that the UNHCR has reiterated its preference that asylum seekers arriving by boat in Australia have their claims processed onshore in Australia, in

[7] Oxfam Australia and A Just Australia, A Price too High: The Cost of Australia's Approach to Asylum Seekers, August 2007 http://www.oxfam.org.au/resources/filestore/originals/OAus-PriceTooHighAsylumSeekers-0807.pdf

[8] 'UNHCR welcomes close of Australia's Pacific Solution', Briefing notes: 8 February 2008, at http://www.unhcr.org/47ac3f9c14.html

[9] RCOA, 'Refugee Council calls for humane and moral response to unauthorised boat arrivals', 20 April 2009, at http://www.refugeecouncil.org.au/news/releases/090420_Unauthorised_arrivals.pdf

accordance with international norms. And we further note that its assessment of the arrangement as workable was subject to several caveats. These included proper protection and vulnerability safeguards in pre-removal assessment procedures conducted in Australia, with particular sensitivity to the best interest of the child and the principle of family unity, and full respect for human rights standards in the implementation of the arrangement.[10]

While fully sharing these concerns and reservations, Oxfam Australia noted two qualified positive elements to the arrangement. One was that the possibility existed (but was far from guaranteed) for incremental protection gains to be derived by other asylum seekers and refugees in Malaysia over time, through a form of 'osmosis' as a result of the conditions negotiated for transferred asylum seekers. However, the entrenchment of differential standards of treatment across categories of asylum seekers and refugees remained inherently undesirable in our view.

The other was the Australian Government's welcome decision to resettle an additional thousand refugees per annum from within Malaysia over the coming four years as a significant act of responsibility sharing, befitting Australia's status as a wealthy nation and a recognised world leader in the area of resettlement. However, this ought not to be contingent upon an arrangement providing for the forcible removal of asylum seekers from Australian territory to face a precarious and potentially unsafe future elsewhere. Indeed, the symbolic value of Australia's increased resettlement commitment was greatly diminished by the stipulation that removed asylum seekers, if found to be refugees, would not be accepted for resettlement in Australia within the additional allocation made. Any arrangement which potentially frustrates the achievement of durable solutions for recognised refugees is strikingly at odds with the humanitarian foundations of the Refugee Convention.

Recommendation: That the Australian Government honour its arrangement to resettle an additional 4 000 refugees out of Malaysia over the coming four years, as a clear indication of its ongoing commitment to responsibility-sharing within the region.

The Australia-Malaysia Arrangement was framed by the Government as the first initiative to operationalise the Regional Cooperation Framework agreed through the Bali Process in March 2011.

Oxfam Australia welcomed the Framework and regards its inclusion of principles and considerations aimed at protecting vulnerable people as a significant achievement. We also welcome its recognition of the need to tackle complex push factors, harmonise standards for processing and treatment of asylum seekers, and pursue safe and permanent solutions for those both found and not found to be in need of international protection. We acknowledge that extensive and strategic efforts were made over a sustained period by Australian officials, UNHCR and others to secure this important and geographically wide-reaching agreement.

We expressed concern, however, that while affording significant opportunities to strengthen the protection of vulnerable people caught up in 'irregular migration' within the region, the

[10] See Submission 7, UNHCR, '*Aide-mémoire:* UNHCR's Observations on the Final Draft of the Malaysia-Australia Arrangement onTransfer and Resettlement and Annexed Operational Guidance' (dated 8 July 2011) at http://www.aph.gov.au/Senate/committee/legcon_ctte/malaysia_agreement/submissions.htm

text and parameters of the Regional Cooperation Framework might also accommodate arrangements that jeopardised the fundamental rights and safety of those populations. Australia's Arrangement with Malaysia has been a case in point.

Notwithstanding recent developments, the Regional Cooperation Framework provides an immensely important starting point for the development of a new, collaborative, solutions-oriented approach to tackling the complex challenges of forced displacement within our region – affording protection where it is required, while combating organised criminal activity. As such, we strongly support the recommendation recently made by the Centre for Policy Development regarding strengthening of the Framework.[11]

Recommendation: That the Australian Government support the establishment of a well-resourced policy and resource unit within the Bali Process Secretariat, to work with regional governments, civil society and other key stakeholders to develop and support the implementation of the core elements of a regional cooperation framework that protects asylum seekers and refugees.

Towards a humane, lawful and solutions-oriented approach

It is incumbent upon Australia, as the wealthiest country in the region, to actively promote, model and resource policies and initiatives that strengthen protection for asylum seekers and refugees. Australia should also lead a progressive shift away from a focus upon deterrence towards a greater emphasis upon regional and international responsibility sharing for tackling the root causes of flight, meeting the protection needs of vulnerable displaced persons and affording them timely and lasting solutions.

Along with reforming its own domestic policies to ensure compliance with its international obligations, and robustly expanding its resettlement commitment, Australia should dedicate sustained and well-targeted aid to strengthen protection within the region. This should include initiatives designed to: tackle the root causes of flight (and barriers to durable safe return); tackle the drivers of onward movement; and strengthen access to durable solutions for refugees. Tackling drivers of onward movement should include initiatives designed to improve and harmonise: asylum seekers' access to fair and timely assessment of claims, and humane reception arrangements pending determination of refugee status; and protection for recognised refugees, including access to livelihoods, pending attainment of a durable solution.

This aid commitment should be in addition to existing aid commitments intended to strengthen protection elsewhere and efforts should be made to ensure that benefits flow to local communities. Australian aid should not, under any circumstances, be used to fund the establishment or management of detention centres, nor to develop any form of non-protection-sensitive measures to combat people smuggling or trafficking. Strengthened

[11] Menadue, J., Keski-Nummi, A., and Gautier, K. (August 2011), ' A New Approach. Breaking the Stalemate on Refugees and Asylum Seekers', Centre for Policy Development, at http://cpd.org.au/wp-content/uploads/2011/08/cpd_refugee_report_2nd-run-WEB-VERSION3.pdf

collaboration and dialogue between the Department of Immigration and Citizenship and AusAID will be crucial to the long-term viability of any regional protection arrangements.

Where good faith partnerships exist between states, UNHCR, other intergovernmental organisations and civil society, much can be achieved to build the infrastructure for protection within the region. The integrity of Australia's own domestic response to asylum seekers and refugees is crucial in this context. As noted by UNHCR, the onshore processing of all claims made by asylum seekers reaching Australia's territory would bring us back into line with international norms. And in our view, a return to mainland processing of all asylum seekers' claims under a uniform statutory system is the clearest way of ensuring compliance with our international obligations. We recognise that the transfer of asylum seekers and refugees may occur lawfully under certain limited circumstances. We refer in particular to guidelines on 'protection elsewhere' developed by eminent refugee law scholars in 2007.[12] We also note the expert view of the esteemed refugee law academics who, in theirjoint submission to this Inquiry, argued that s198A(3) as interpreted by the High Court, provides a framework for lawful offshore processing.[13]

Tackling the root causes of flight by forcibly displaced persons, and strengthening opportunities for fair claims assessments and access to lasting safety from elsewhere within the region, will greatly diminish the factors driving people to undertake hazardous sea journeys to reach Australia. They may also, over time, provide for the achievement of the conditions required to effect lawful 'protection elsewhere'.

Recommendation: That the Australian Government work to strengthen protection in our region through sustained and well-targeted aid, bolstered by diplomatic efforts and an enhanced resettlement commitment.

Recommendation: That the Australian Government resume mainland processing of the claims of all asylum seekers that reach Australia's territory or otherwise invoke our jurisdiction, under a uniform statutory procedure, irrespective of their mode of arrival.

Recommendation: That the Australian Government pursue all necessary measures to ensure that the legal and policy infrastructure and operations of Australia's immigration detention system are fully aligned with our international obligations and recognised human rights standards. This should include increased investment in the refinement, expansion and modeling of community-based alternatives to detention.

Recommendation: That the Australian Government progressively increase its refugee resettlement commitment to an annual quota of 20 000 places, de-link its allocation of protection visas from its offshore resettlement program, and utilise its current role as Chair of the UNHCR Working Group on Resettlement to encourage strengthened resettlement commitments from other countries.

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[12] 'The Michigan Guidelines on Protection Elsewhere', adopted January 3, 2007, at http://www.refugee.org.nz/Michigan/guide.html

[13] Submission 25, Australian Refugee Law Academics, at http://www.aph.gov.au/Senate/committee/legcon_ctte/malaysia_agreement/submissions.htm