

## SUBMISSION OF THE WA EQUAL OPPORTUNITY COMMISSION (THE COMMISSION) TO THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS INQUIRY INTO AUSTRALIA'S AGREEMENT WITH MALAYSIA IN RELATION TO ASYLUM SEEKERS

Given the short period of time within which to make submissions, this submission will only address the first point of the Inquiry's terms of reference.

As the Commission understands it, the agreement between the Australian and Malaysian governments arose out of a regional co-operative framework developed at the '4<sup>th</sup> Ministerial Conference of the Bali Process', held in March this year. The framework, amongst other things, permits participating nations to enter into bi-lateral or other arrangements for the setting up of regional asylum seeker and refugee processing facilities.

The Australian and Malaysian governments entered into one such bi-lateral agreement, and on 25 July, the *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement* was announced. The arrangement provides for the co-operative transfer of asylum seekers arriving by sea in Australia to Malaysia. In return, Australia would accept a certain number of already processed refugees from Malaysia. The Minister for Immigration and Citizenship then issued a 'Instrument of Declaration', declaring Malaysia as a country that 'offshore entry persons' could be removed to, pursuant to s 198A(3) of the *Migration Act 1958*. It was this declaration that the High Court found to be invalid – *Plaintiff M70/Plaintiff M106 v Minister for Immigration and Citizenship* (31 August 2011). The Court's reasons have been the subject of much commentary and analysis, and do not need to be repeated here in detail for the Committee's benefit.

The Commission agrees with the widely expressed view that the agreement is inconsistent with Australia's international obligations under the *Convention relating to the Status of Refugees* (Refugee Convention), particularly in relation to the principle of non-refoulement. Malaysia has not signed the Refugee Convention, so has not committed in international law to extending the kind of protections to asylum seekers that can be expected in Australia, regardless of whatever may be agreed between the two countries. The Commission also notes the High Court's finding that removing an unaccompanied 'non-citizen child' to another country pursuant to the *Immigration (Guardianship of Children) Act 1946* cannot be lawfully done without the written consent of the Minister, the child's legal guardian. This consent cannot be implied merely by reference to the agreement.

For these reasons, the Commission opposes the revival by the government of this or any other agreement under the co-operative framework that does not comply with, or attempts in some way to circumvent, Australia's obligations under international law in respect to asylum seekers, especially children. These obligations are clearly codified and well understood. That the government might seek to do by amending the *Migration Act* is of concern.