Submission by ACT Refugee Action Committee to Senate Legal and Constitutional Affairs References Committee concerning refugee 'transfer' arrangements between Australia and Malaysia

Part 1 – General considerations

'It is not wrong or illegal to use the asylum system … It was set up precisely for those people who are forced to move across a border.' (Regional UNHCR Representative, Richard Towle, quoted by Mike Steketee in *The Australian*, 13 August 2011)

'The Refugee Convention is premised on the understanding that states will protect refugees in their territories, or cooperate with other states to find durable solutions for them (local integration, voluntary repatriation, and resettlement). Transferring asylum seekers to offshore processing centres was not a durable solution ….' (Assoc. Prof. Jane McAdam & Kate Purcell, 2008, on the Pacific Strategy)[1]

Notes: 1. This submission is made with the benefit of the decision of the High Court in *Plaintiff M70/2011 et al v Minister for Immigration and Citizenship et al* [2011] HCA 32 (*M70/2011*), though comments on the Malaysian deal in Appendices 1 & 2 were largely prepared beforehand.

2. We understand that the inquiry on this matter is likely to be terminated following the declaration by the Court that the scheme is invalid. However, given that the Labor Government has not ruled out attempting to continue with the Australia–Malaysia deal, or continuing the arrangements with Papua New Guinea for use of Manus Island, or even returning to the Nauru option, and may be considering the possibility of legislation (which would require Coalition support to pass) that would 'undo' the effect of the High Court's decision, we wish in Part 1 to let the Committee and the Parliament know our views on the general issues involved in continuing with any kind of offshore processing in the future. In Part 2 we answer the

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[1] See note 7.

Committee's specific questions relating to details of the Australia–Malaysia transfer deal, in case it is attempted again.

RAC's general position

We are a Canberra-based committee with a mailing list of about 1,000 people who strongly believe that Australian governments should end mandatory detention and offshore processing of boat arrivals, and should treat asylum seekers more humanely and in line with all the requirements of the 1951 Refugee Convention and its 1967 Protocol (the Convention).

We believe that the treatment of asylum seekers is a humanitarian and human rights issue rather than a security issue. Australia should accept its fair share of refugees by processing refugee claimants who arrive in Australian territory and resettling those found to be refugees under the Convention, and do so in accordance with internationally accepted standards. This should be done without mandatory detention.

This is also the broad stand taken by Non-Government Organisations (NGOs) like the Refugee Council of Australia (RCOA), Amnesty International, Oxfam, other refugee support and advocacy groups,[2] and by the office of the UN High Commissioner for Refugees (UNHCR), which throughout this matter has stuck to its declared preference for processing refugee claims in Australia.[3]

We welcome that part of the deal with Malaysia aimed at resettling in Australia over the next four years 4,000 refugees recognised as such in Malaysia by the UNHCR, which could indeed be a step towards taking pressure off desperate refugees in Malaysia who are compelled by their circumstances to risk their lives on unseaworthy boats. Clearly, this measure could have been taken without the compulsory transfer to Malaysia of 800 asylum seekers arriving in Australian waters.

Note: Nothing said in the following sections about legal aspects of the Australia–Malaysia scheme for offshore processing, including what is required for a scheme to be valid under international or domestic law, is meant to imply acceptance by RAC and its members of such measures from a policy point of view. As stated, we reject

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[2] See statement of 2 August 2010, note 13.
[3] UNHCR Statement on the Australia–Malaysia Agreement, 25 July 2011 at: www.unrefugees.org.au/news-and-media/press-releases/unhcr-statement-on-the-australia-malaysia-arrangement-250711 .

any need for such schemes, and condemn their adverse effects on those subject to them.

Endorsement in *M70/2011* of broad Refugee Convention and human rights obligations

The principal findings of the *M70/2011* decision of the High Court may be summarised in this way:[4]

- that the Minister's declaration on 25 July 2011 of Malaysia as a country to which asylum seekers could be sent for processing could be reviewed by the court;
- that the provisions in section 198A(3) of the Migration Act concerning access to procedures for assessment of refugee claims, and provision of 'protection' during and after that assessment, were jurisdictional facts that had to be satisfied for there to be a valid declaration;
- that section198A(3) required that those procedures, rights and protections be legally established at the time of a declaration of a country, either by adherence to the Convention or by its own domestic legal system;
- it is probably also the case that the legal regime has to be matched by the country's practices, and that the legal obligations should apply to all refugees and asylum seekers not just to those Australia is seeking to transfer (see opinion of the Commonwealth Solicitor–General and others, 2 September 2011);[5]
- that Malaysia did not satisfy those requirements, and therefore the declaration was invalid;
- that the 'protections' referred to in section 198A(3) are the 'reflex of' the international obligations Australia assumes when asylum seekers in its territory or jurisdiction claim to be refugees under the Convention;

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[4] See also the summary in the opinion of the Solicitor–General, 2 September 2011, available at: www.unrefugees.org.au/news-and-media/press-releases/unhcr-statement-on-the-australia-malaysia-arrangement-250711

[5] Note 4.

- that the content of the protections mandated both by section 198A(3) and Australia's international obligations is wider than merely to avoid *refoulement*, ie return or sending of a refugee or asylum claimant to a place of persecution for a reason set out in the Convention; it also includes the array of rights set out in the Convention (which are graduated according to the degree of attachment to the receiving country of the refugee or asylum seeker)[6] together with relevant human rights standards;
- that the existence of section 198A – containing the conditions that must be met by a country to be declared as providing procedures and protection for assessing and satisfying asylum claims – prevents the application of other unconditional provisions in the Act permitting or requiring removal of 'unlawful non-citizens';
- that the Minister, in his role as guardian of unaccompanied minors as in the case of M106, must consider individually whether to grant consent to the taking of any child to another country; that decision would involve considerations of whether there would be prejudice to the interests of the individual child, and would be subject to judicial review.

The decision took a broader view than earlier decisions of the Federal Court concerning other 'safe third country' provisions of the Migration Act, but it accords with the weight of opinion as to the international obligations arising under the Convention. The Court was not bound by decisions of the Federal Court, and had never previously considered this specific issue.

The implications of the decision for Australian refugee policy and practice are profound, and represent an opportunity to reverse offshore processing of asylum claims in other countries that was introduced by the Howard Government in 2001 and resurrected as policy by the Gillard Government in 2010.

The major implication for the purposes of this submission is that the belief of the Howard and Gillard Governments that their international obligations were basically confined to avoiding *refoulement*, and that the Minister could not be subject to

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[6] The joint judgment and that of Heydon J miss the point that use of the word 'refugee' in the Convention encompasses asylum seekers claiming to meet the objective criteria in Article 1A of the Convention. The thinking behind it is that refugee status determinations are merely declaratory of the status that began when the person first met the Convention requirements.

judicial review for declarations he or she made under section 198A, was and is wrong. The Pacific Strategy as it existed under the Howard Government probably did not meet the relevant criteria (see Solicitor–General's opinion).

Establishing offshore processing in countries without functioning systems for assessment of refugee claims and full protection of their rights as required by the Convention and other human rights instruments, is no longer possible under the Act as it stands.

If the major parties in the Parliament seek to destroy the outcome of this case by legislative change, it would leave refugee claims to be decided without the protections mandated by the Convention.

Australia would be unable to claim as it has done in the past that its system complies with the Convention, and would be liable for breaches that were committed in another country in processing refugees we had sent there.

The position under international law

'Basically the rules of the game are that state parties to the Refugee Convention can share responsibility to protect refugees between them so long as those arrangements respect all of the refugees' acquired rights. Now that's where we run into difficulties here.' (Professor James Hathaway, on ABC Radio, The World Today, 10 June 2011, 'Refugee expert says Australia/Malaysia swap illegal')

The Court's approach in *M70/2011* accords with much of the commentary on the international refugee obligations of a country arising under the Convention.

As Sydney University's Associate Professor Jane McAdam puts it, 'although transfer of asylum seekers to a third country may be permissible under international refugee law, this will only be the case where appropriate "effective protection" safeguards are met'.[7] In addition, other international obligations that have been incurred continue to apply to the transferring state. Thus any transfer agreement must, at a minimum, ensure that the asylum seeker:[8]

- will be admitted to the receiving country;

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[7] Jane McAdam & Kate Purcell, 'Refugee Protection in the Howard Years: Obstructing the Right top Seek Asylum', (2008) 27 *Australian Year Book of International Law* 87–113, 104.
[8] McAdam & Purcell, 104-5

- 'enjoy(s) effective protection against *refoulement*';
- has 'access to a fair and effective asylum procedure';
- will be 'treated in accordance with international refugee and human rights law and standards'.

This is essentially the same broad approach as that taken by the majority of the High Court in *M70/2011*.[9]

The same is true of the content and quality of 'effective protection' and of relevant international refugee rights and human rights. Professor McAdam states:

> Even if third states are able to provide protection from *refoulement*, 'effective protection' requires more than that alone. … international law presently only permits the removal of refugees and asylum seekers to a third state where that state is able to provide effective guarantees, both substantive and procedural …

Among those guarantees are acceptance of responsibility to determine claims of refugee status, 'treatment of applicants during the determination process in accordance with generally accepted standards', and 'some provision with respect to subsistence and human dignity issues, such as social assistance or access to the labour market in the interim, family unity, education of children, and so forth'.[10]

In addition to fulfilling obligations derived from the Refugee Convention, 'a country's human rights record will also be relevant', including procedural and substantive standards, remedies, non-discriminatory or equivalent treatment with local nationals, and protection of fundamental human rights (ibid).

Again, Professor Pene Mathew points to UNHCR Executive Committee Conclusion, No 85 (1998), which 'requires that any country to which asylum seekers are sent

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[9] See also *The Michigan Guidelines on Protection Elsewhere* (adopted on 3 January 2007 following the Fourth Colloquium on Challenges in International Refugee Law, 10–12 November 2006) (Michigan Guidelines) in relation to international refugee law obligations arising out of the Convention and otherwise. The Colloquium concluded among other things that 'states parties to the Refugee Convention cannot engage in practices that conflict with their Refugee Convention obligations, and that any analysis of state responsibility must be anchored in the Refugee Convention', supplemented by other international obligations. See the detailed explanations in Professor Michelle Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in another State' (2007) 28 *Michigan Journal of International Law* 223–286.

[10] McAdam & Purcell, note 7, 109, referring to Guy Goodwin–Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed, 2007, 394, 396.

should observe their human rights, protect them from *refoulement*, and provide an opportunity for them to seek and enjoy asylum'.[11]

Moreover, in the case of breaches in a receiving country of refugee rights and other international law obligations which Australia assumes on the arrival of asylum seekers in its territory or jurisdiction, Australia remains responsible under state responsibility doctrine.

Comments

Following *M70/2011*, it is clear that different Australian governments' attempts to set up various 'offshore processing' arrangements with only minimal adherence to the Convention rights discussed above, and at the same time to claim that it is adhering to its obligations under the Convention, can no longer be sustained.

This is the inescapable conclusion from reading the Solicitor–General's opinion, subject to some future possibility of eg Nauru satisfying the criteria if it were a party to the Convention, and showed practical compliance with its obligations under the Convention and with human rights standards (see para 37). Papua New Guinea presents even greater difficulties (para 48).

If the Parliament decides, in whatever way, to render section 198A(3) inoperative in relation to offshore processing, it will in effect be declaring that it will not bind itself to abide by its international obligations under the Convention and otherwise in relation to the treatment and processing of asylum seekers by boat.

In practice, there would be no legal guarantees to asylum seekers that their processing, their treatment while awaiting and undergoing it, and their protection if successful would accord with the obligations in the Convention to which Australia is a party. We would in effect have repudiated major responsibilities under it.

Although there is no international mechanism to bring Australia to account for such breaches, severe international criticism could be expected, and we would be setting a poor example to the region if we want to encourage improvements in their refugee policies.

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[11] Pene Mathew, 'Australian Refugee Protection in the Wake of the *Tampa*' (2002) 96 *American Journal of International Law* 661–676, 671.

If the Committee is in the future called upon to consider arrangements of this kind, made without the procedures and protections the High Court found section 198A contains, it should have no hesitation in condemning them as leading to breaches of Australia's international obligations and unworthy of a state that prides itself on being a good international citizen.

Need for principles based on the Convention in relation to regional arrangements

The Australia-Malaysia deal emerged in part from the 'Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime', which recently endorsed a 'regional cooperation framework to better address irregular migration'. Australia plays a significant role in this Process. As its title makes clear, the focus is principally on preventing people smuggling and other related crime.

We also note the following of the core principles adopted by the recent meeting of the Bali Process (Fourth Bali Process Conference, 28–29 March 2011): [12]

> i Irregular movement facilitated by people smuggling syndicates should be eliminated and States should promote and support opportunities for orderly migration.
>
> ii 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.
>
> iii 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.

The first principle in this approach tends strongly in the direction of shutting down all 'irregular movement' even (or especially) by those seeking asylum under the Convention, and full implementation would in practice severely undermine the Convention principle that refugees should not be penalised or have their rights affected even if they travel and arrive in an 'irregular' manner (see Article 31 of the Convention). We remain deeply sceptical at the moment that Australia intends to initiate a principled regional approach to protection of refugees that involves adherence to its international responsibilities as discussed above.

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[12] See http://www.baliprocess.net .

As against that approach, organisations like the RCOA and many other NGOs which endorse the need for a regional framework for protection of refugees,[13] have jointly reiterated the fundamental principle that:

- There must be no removal of asylum seekers from Australia territory for processing in a third country. Australia has an obligation to process claims and provide protection for those found to be refugees under the Refugee Convention.[14]

Other principles endorsed by these organisations are vital to any just and fair regional protection framework that accords with the Convention:

- Australia's refugee and humanitarian programs and policies must comply with all international human rights standards.
- There must be no discrimination or difference in treatment based on the country of origin or manner of arrival in Australia.
- Australia must not fund, or in any way be party to, the detention of refugees in other countries.
- Any program that Australia is party to as part of a regional framework must adhere to all human rights obligations and standards.

Those principles would have been set at nought by the deal with Malaysia and by other proposed measures such as resuming processing on Manus Island or establishing a single regional processing centre to which asylum seekers would be forcibly removed by Australian personnel. The RCOA described the Malaysia deal as setting 'a very bad precedent for future regional cooperation on refugee protection'.[15]

The same is true of the Opposition's policy of 'turning back the boats' where practicable (a practice under the Pacific Strategy that clearly involved great dangers both to asylum seekers and Australian personnel, as well as running grave risks of *refoulement* of asylum seekers) and sending all boat arrivals to Nauru for processing.

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[13] RCOA, 'A Regional Protection Framework: A joint statement by Australian non-government organisations', 1 August 2010; the organisations include Oxfam, Amnesty International, the Edmund Rice Centre, the Brotherhood of St Laurence, the Uniting Church and many other organisations providing aid and assistance to refugees: www.refugeecouncil.org.au/docs/releases/2010/100801_Regional_Protection_Framework.pdf

[14] See joint statement, preceding note, and RCOA report to government on the question of regional protection, *Australia's Refugee* and *Humanitarian Program 2011-12: Community views on current challenges and future directions, Executive summary*, March 2011, recommendation 2, and section 1.2, Developing an Asia-Pacific Regional Refugee Protection Framework.

[15] Media release, 'Australia–Malaysia Deal Undermines Regional Push for Refugee Protection', 26 July 2011, at: http://www.refugeecouncil.org.au/news/releases/110726_MalaysiaSigning.pdf

We urge the Committee, if in future it is charged with examining legislation or arrangements for renewed offshore processing, to endorse fulfilment of these five principles as fundamental to any Australian refugee policy and as key criteria in judging any such arrangements.

Part 2 – Answers to Committee's specific questions

Background – Malaysia an inappropriate place to provide protection

We attach at **Appendix 1** the comments we drafted before the decision in *M70/2011* on the present legal and factual situation in Malaysia that makes it an inappropriate place to provide effective protection for asylum seekers and refugees.

In our view, it is bizarre that a place with Malaysia's human rights record and record of mistreating refugees, was ever proposed as a place for processing refugee claimants to whom we have obligation under the Convention that clearly could not be met. It is a good indication that the Government is completely out of touch with the real character of the Convention refugee system. The Minister's hope, that Malaysia was in the process of rethinking its approach to refugees, could not be achieved by subjecting asylum seekers now to the kinds of dangers and lack of rights that currently prevail in Malaysia. There are other ways Australia could help that would be calculated to produce practices and laws in the region that accord with the Convention.

Consistency with Australia's international obligations and legally defined human rights standards (terms of reference (a) & (b))

See above under heading 'The position under international law' for the views of Professor McAdam and others on the general principles concerning this issue. These accord very closely with the views of the High Court in *M70/2011* and do not need further elaboration here.

For issues relating to *refoulement*, see answer concerning terms of reference para (g).

Australia cannot guarantee the performance by Malaysia of many of the obligations of the Convention or under other international human rights instruments, or even of

commitments made in the documentation of the Arrangement, which are in any case less than satisfactory.

Among those commitments the following deserve comment:

- In clause 10.2 of the Arrangement Malaysia commits to providing transferees with the opportunity to have their asylum claims considered by UNHCR; this involves no element of legal obligation or state processes, as recognised in the judgements in *M70/2011*. It may also be mentioned that the UNHCR processes are intended for frontline conditions only, such as in Malaysia, but have been criticised as inadequate; state processing was intended to be the norm but the UNHCR steps in where these are absent.[16] (The Australian Government, of course, takes a diametrically opposed view, seeking to prevent 'forum shopping'.) This permission to the UNHCR is not an adequate basis for fulfilling Australia's obligations.
- Clause 10.3(a) in effect provides for exemption of transferees from present Malaysian legislation that treats asylum seekers as illegal and subject to penalties; this would allow 'lawful presence', but the sufficiency of the Exemption Order made on 5 August 2011 under the Malaysian *Immigration Act* 1959 in an attempt to meet criticisms of the Arrangement, may be queried.[17] It is a long way short of conferring legal status as a refugee or refugee claimant.

The adequacy of other commitments are discussed under several headings below.

In addition, the following difficulties should be mentioned:

- Breaches of the fundamental obligation of religious freedom in Article 4 of the Convention appear very likely if not inevitable, for which Australia will bear responsibility; significant numbers of asylum seekers coming to Australia are Shi'a Muslims from Afghanistan and other places, and cannot be guaranteed freedom of religion when Sharia law in Sunni-dominated Malaysia treats Shi'a as heretics.

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[16] Mary Crock & Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia*, Sydney, 2011, 348 at [12.59].
[17] See French CJ at [33] of *M70/2011*.

- The absence in the past of a Malaysian government ID card issued to asylum seekers and refugees has led to much of the maltreatment detailed in **Appendix 1**; Article 27 of the Convention provides for contracting states to 'issue identity papers to any refugee in their territory who does not possess a valid travel document' (this includes asylum seekers, see note 6 above); there is no commitment in the Arrangement that this will occur in fact. The supposed guarantees would be hollow without such a card.

- The Arrangement provides no certainty of obtaining a durable solution for transferees from Australia; they must take their chance among the c90,000 other refugee claimants registered with the UNHCR in Malaysia to obtain UNHCR recognition as refugees, and to obtain resettlement in a country that almost certainly will not be Australia (see clauses 6, 12.2 and 5.1), and certainly won't be Malaysia; as Professor McAdam has written, the lack of a durable solution is a product of the separation of the process of recognising Convention refugees and the actual granting of protection visas in such schemes.[18] It is doubtless the main reason why the Government thinks it will 'break the people smugglers' business model'.

The following comment by Human Rights Watch is highly relevant here:

> With due regard to some improvements that Malaysia has made in the treatment of asylum seekers in recent years, including a reduction in forced repatriation at the Malaysia-Thai border, the gap in asylum standards and procedures and reception conditions between Australia and Malaysia remains enormous: Malaysia has not ratified the … Refugee Convention and has no refugee law or procedure. On this basis alone, the Arrangement should have been rejected outright.[19]

Human Rights Watch also points out that the Arrangement in fact accepts Malaysia's unwillingness to abide by international refugee law, rather than making it the basis of the agreement.

The Arrangement would clearly not be valid as a matter of international law, in the same way the High Court found it fails to meet the criteria in the Migration

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[18] McAdam & Purcell, note 7, 102.
[19] Human Rights Watch, 'Letter to the Prime Ministers of Australia and Malaysia regarding the Malaysia Transfer and Resettlement Arrangement', at: www.hrw.org/print/news/2011/07/26/letter-prime-ministers-australia-and-malaysia-transfer-

Act that reflect the international law standards. It does not meet the requirement for 'a fair and effective refugee procedure'.[20]

Practical implementation of the agreement (terms of reference para (c))

Oversight and monitoring (terms of reference, para (c)(i))

The Arrangement makes provision for a Joint Committee from Australia and Malaysia with responsibilities including 'management of transfer arrangements, oversight of the welfare of Transferees, ensuring funding is expended appropriately', and so forth (clause 13.1 and 13.2).

These provisions clearly do not fulfil the requirement identified by Professor Foster that 'a sending state remains under an obligation to monitor, on an ongoing basis, the extent to which the receiving state respects the requirements of Articles 2–34 of the Refugee Convention in its treatment of transferred refugees'.[21]

Certainly, the predominantly management functions of this committee render it insufficient to provide any kind of external monitoring or review.

There is also provision for an Advisory Committee to provide governments with advice 'on issues arising out of the implementation of this Arrangement' (clause 13.3 and 13.4).

These arrangements clearly do not constitute credible mechanisms for ensuring compliance by the receiving state with its commitments or with international refugee and human rights, as mentioned by Professor Foster.

Nor do these mechanisms offer the kind of external scrutiny which is part of the core administrative law of Australia. The debates that took place over the jurisdiction of the Ombudsman and the Australian Human Rights Commission (AHRC) to investigate and report on the operation of the Pacific Strategy in practice will doubtless be replicated if this scheme goes ahead. Such scrutiny and review should be built into the process, but this could be very difficult in relation to the Malaysian Government.

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[20] McAdam & Purcell, note 7, 105.
[21] Foster, note 9 above, 284.

Pre-transfer arrangements, in particular, processes for assessing the vulnerability of asylum-seekers, including unaccompanied minors (terms of reference, para (c)(ii))

See comments in **Appendix 2**.

The situation of Shi'a Muslims, who may wish to claim that taking them to Malaysia would place them in danger of persecution for the reason of their religion, and of unaccompanied minors, would need to be able to be advanced at this stage. There is no evidence of provision for assistance in making the case for special vulnerability. In the High Court, the Solicitor–General relied heavily on the existence of this 'individuated' assessment process, but it is hard to accept it will assist the most vulnerable. The Department's guidelines on Identifying International Obligations would throw light on this, but we have not seen them.

In view of all the factors discussed in Appendix 2, we submit that the pre-transfer arrangements are not an adequate fulfilment of Australia's protection responsibilities.

Mechanism for appeal of removal decisions (terms of reference, para (c)(iii))

On this general issue, the Michigan Guidelines state that:

> 12. Any person to be transferred to another state under a protection elsewhere policy must be able to contest the legality of the proposed transfer before it is effected. The sending state … shall consider in good faith any challenge to the legality of transfer under a procedure that meets international standards of procedural fairness. Such procedure must in particular afford an effective remedy, *bearing in mind the nature of the rights alleged to be at risk in the receiving state*. (our emphasis)[22]

The reason for this requirement is broadly the risk that the sending state may breach its international obligation to avoid *refoulement*, and also the general potential for reduction in the Convention rights of an asylum seeker by such removal. Professor Foster refers to the view of Professor Stephen Legomsky, a leading authority on US immigration and refugee law and policy, that 'since the potential consequences of an incorrect decision are as drastic as the determination of the substance of a refugee claim, the same safeguards should be available in both circumstances'.[23]

Neither the Arrangement nor any of the related documents made public contemplate any right of appeal in relation to 'decisions' to take a person for offshore processing.

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[22] At note 9.
[23] Foster, note 9, 282–3, 279.

As the Solicitor–General contended in argument in *M70/2011*, the discretion under section 198A(1) to 'take' an asylum seeker to a declared country could well be exercised by someone other than the person who had carried out the assessment. He also thought it was difficult to locate a 'decision', and review would be difficult to effect.

Legal review at this point would doubtless be seen by government as contrary to the rationale for offshore processing. These are 'quick and dirty' decisions designed to leave the real issues to be decided in the receiving country. They thus run the risk of substantial harm and injustice.

Access to independent legal advice and advocacy (terms of reference, para (c)(iv)

We are not aware of the details regarding this, but clearly M70 and M106 and others had access to legal representation, although it may not be available at the assessment of vulnerability process, where it is vitally needed. The matter should have been addressed in the guidelines and procedures available to the public.

Also of great concern is that there is no provision for legal advice or advocacy during the determination of refugee status in Malaysia or in other circumstances that will confront the transferees. This is yet another major reason why this model of processing the claims of people to whom Australia has protection obligations is deeply flawed. We strongly agree with the comments on this issue made in the submission of the International Commission of Jurists, Australia (Submission No. 4, terms of reference (c)(iv).

Implications for unaccompanied minors, in particular, whether there are any guarantees with respect to their treatment (terms of reference, para (c)(v))

See the decision of the High Court on this issue, to the effect that the Minister in his role as guardian of a minor who is a non-citizen must *consent individually in writing* before that minor can become subject to being taken for offshore processing under section 198A(1). The Minister will need to consider the best interests of the minor, and his decisions would be subject to judicial review.

Without the Court's finding, the situation would be grim. See the comments in **Appendix 2.** The preparedness to subject the majority of an inherently vulnerable group such as unaccompanied minors to such a traumatic and uncertain process is appalling.

See also the point made in **Appendix 2** about the failure of the Minister to exempt unaccompanied minors as a class from transfer to Malaysia.

The work of Professor Mary Crock has shown 'a disturbing and systematic protection deficit at the heart of the immigration systems of [the UK, the US and Australia]' in relation to unaccompanied minors.[24] To compound the present alarming systemic deficit for unaccompanied minors, by subjecting them to a lesser assessment process, as on Nauru,[25] and undoubtedly in Malaysia, defies understanding.

We strongly support the detailed critique of the exposed position of unaccompanied minors under the Malaysia deal in the ICJA's Submission No 4, under the above term of reference.

The obligations of the Minister for Immigration and Citizenship (Mr Bowen) as the legal guardian of any unaccompanied minors arriving in Australia, and his duty of care to protect their best interests (terms of reference, para (c)(vi))

See preceding heading.

The costs associated with the agreement (terms of reference, para (d)

We have no special knowledge about this, but clearly there are far cheaper as well as more humane and Convention-compliant options than offshore processing. Compared to onshore processing the costs are excessive.

The potential liability of parties with respect to breaches of terms of the agreement or future litigation (terms of reference, para (e))

We have no special knowledge on this topic. However, the Commonwealth has already had to pay large sums in compensation to refugees injured under mandatory detention and the Pacific Strategy, and we agree with the ICJA Submission No 4 that this is a 'potential legal minefield'.

As a matter of state responsibility, Australia could expect to receive strong criticism from states and international agencies to the extent that it breaches its responsibilities under the Convention.

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[24] Jacqueline Brabha & Mary Crock et al, *Seeking Asylum Alone: a comparative study*, Sydney, nd, 10; Mary Crock, *Seeking Asylum Alone: Australia*, Sydney, nd.
[25] Crock, note 24, 11.

Significantly, where breaches of the Convention by the receiving state occur, the sending state is obliged to suspend transfers until the breaches are rectified,[26] but there is unlikely to be scope for individual actions against the sender.

The adequacy of services and support provided to asylum seekers transferred to Malaysia, particularly with respect to access to health and education, industrial protections, accommodation and support for special needs and vulnerable groups (terms of reference, para (f))

It is difficult to assess this without further knowledge of the operations in Malaysia of UNHCR and IOM. However, the following brief points may be made:

- Malaysia commits to allowing residence of transferees in the community (OG, clause 3.1(a)) and to allowing employment and 'self-sufficiency'; these do not guarantee rights to work and social support if work is unavailable, and fall a long way short of Convention and other human rights obligations;
- The guidelines provide that transferees of school age will be permitted access to private education arrangements in the community, or at least access to 'informal education' provided by IOM (OG, clause 3.3(a)); this may not be consistent with Article 22 of the Convention (Public education), at least in relation to elementary education; Australia has committed to meeting the costs of education of minors on the UNHCR model (clause 9.1(c)).
- Vulnerable transferees are dealt with in OG, clause 3.5. It contemplates only measures taken by UNHCR and IOM. No state actions by Malaysia are mentioned. Australia is committed to pay the costs of health and welfare, including education of minors, 'in accordance with UNHCR's model of assistance in Malaysia' (Arrangement, clause 9.1(c)). This is totally unsatisfactory.

[26] Foster, note 9, 285.

Mechanisms to enable the consideration of claims for protection from Malaysia and compliance of these principles with non-refoulement principles (terms of reference, para (g))

Schemes such as this, especially if they involve non-reviewable assessments before asylum seekers are 'taken' to a foreign county, are fraught with the danger of inadequate consideration of potential *refoulement* in the receiving country: those dangers are particularly high in the case of Malaysia, which lacks any legal compulsion to avoid *refoulement*, and which has a history of indirect *refoulement* as well as people trafficking of refugees (see **Appendices 1 & 2**).

It may be noted that at the end of the process, an accepted refugee who is not quickly resettled out of Malaysia may not have adequate Convention protection rights under the Arrangement for the indefinite time he or she could be stranded in Malaysia. Moreover, the absence of adherence to the Convention means far less effective supervision by UN agencies like the UNHCR, which has no special standing with the Malaysian government.

While Malaysia has committed to respecting the principle of *non-refoulement* (clause 10.2), that non-binding commitment is not supported by Malaysian law or specific international obligations.

The Minister was satisfied that the provision ruled out *refoulement* as that would require 'state action', but Malaysia's recent history (**Appendix 1)** raises fears that *refoulement* may be brought about by a 'rogue' state actor outside state authority. The recent incident where refugees were 'mistakenly' issued with letters indicating they would be removed from Malaysia, and a number were allegedly beaten by elements of RELA, heighten this concern.[27] Note also the dangers inherent in the exception in clause 10.2(b)(i) of the Arrangement in the light of Malaysia's draconian security laws.

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[27] Kirsty Needham, 'Refugee unrest in Malaysia after deportation bungle', *Sydney Morning Herald*, 26 August 2011.

A comparison of this agreement with other policy alternatives for processing 'irregular maritime arrivals' (terms of reference, para (h))

The High Court's decision in *M70/2011*, reflecting the Convention package of assessment procedures and refugee protections, including the rights stated in the Convention, supplemented by other human rights, demonstrates graphically that the Howard and Gillard Governments conception of offshore processing taking place in a 'rights desert' is not sustainable. The likelihood of being able to overcome this deficit is low, as the Solicitor–General shows.

But to change the legislation so that it no longer the reflects the Convention rights is to leave boat arrivals at the mercy of any offshore policy, no matter how lacking in fundamental protections.

There is no good policy reason, other than political advantage, to persist with the offshore processing approach. The Government's mantras about 'the people smugglers' business model' and preventing maritime tragedies cannot justify denying the rights of asylum seekers to proper processing in Australia that will provide a durable solution if they are found to be refugees under the Convention.

Virtually all Australian NGOs involved in refugee support and advocacy, who know first-hand the price that was paid by refugees sent to Nauru and Manus Island, as well as the UNHCR itself, strongly support the processing of asylum claims on the Australian mainland.

It would be possible for Australia to assist other countries in the region to improve their treatment of refugees, and to move them towards joining the Convention system and processing refugees themselves under the Convention, but in doing so it should adhere to the five principles adopted by the Refugee Council of Australia and other NGOs last year, including onshore processing on the mainland (see above on regional arrangements). It should also extend to other countries experiencing a genuine refugee burden (such as Afghanistan),[28] the offer by Australia to Malaysia to take additional refugees for resettlement. This would be a genuine contribution to providing asylum seekers with alternatives to taking dangerous boat journeys without

[28] See William Maley, 'PMs policies crafted in panic', *Canberra Times*, 6 September 2011.

denying their rights to seek asylum and receive the full measure of protection if found to be Convention refugees.

We urge the Committee to counsel the Parliament not to rush into a continuation of flawed policies when confronted with their legal and humanitarian deficits. The Committee, in one form or another, must examine whatever is finally proposed by the Government.

Any other related matters (terms of reference (i))

Australia should process refugee claimants on the mainland, and grant permanent protection to those found to be refugees. There should be no mandatory detention. We support the thrust of Senator Hanson-Young's Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010.

Ron Fraser for ACT Refugee Action Committee

BA/LLB, Grad Dip in Public Law (ANU), M Litt (Keele), Barrister and Solicitor of the ACT Supreme Court

Clare Conway for ACT Refugee Action Committee

Appendix 1

Malaysia an inappropriate place to provide protection

Malaysia is infamous for its resistance to human rights standards and for breaches of them in many aspects of life. That this was the case right up to the present is evident from reports by Human Rights Watch and Amnesty, and from press reports from Malaysia.

Treatment of refugees and asylum seekers in Malaysia has been and remains appalling, Malaysia being described by a Lawyers for Liberty spokesperson as having

'a horrendous track record' in this area.[29] It is in fact a country of first refuge for a very large number of refugees, but it currently treats them as illegal under Malaysian law, subjects them to appalling treatment, including punishment for immigration offences, and makes no administrative provision to support refugees or to itself assess their claims.

There are between 90,000 and over 170,000 refugees and asylum seekers in Malaysia at present, mostly from Myanmar/Burma, of whom at February 2010 around 82,400 were registered with the UNHCR. Amnesty estimates that there are around 2.2 million 'regular' migrant workers in Malaysia, and a further 2.2 'irregular' migrant workers, of whom an unknown proportion are refugees or asylum seekers not registered with the UNHCR. Instead of state measures for protecting refugees and processing their claims, the Malaysian government since 1975 has 'co-operated with UNHCR on humanitarian grounds, allowing it to be the primary agency for refugees and asylum-seekers' (Amnesty, 2010). It seems fair to say that UNHCR's ability to deal with the caseload and to intervene to protect the huge numbers of refugees and asylum seekers is constrained by its limited resources and a lack of cooperation on the ground.

The Committee will doubtless be aware of many of the details of Malaysia's past and present treatment of refugees and asylum seekers, but the following are perhaps the most disturbing, summarised from Amnesty International's report, *Abused and Abandoned: Refugees Denied Rights in Malaysia* (2010) or in recent reports of Human Rights Watch: [30]

- On the question of human rights in Malaysia generally, in 2011 the Commonwealth Human Rights Initiative is quoted as reporting that pledges made by Malaysia prior to its election in 2006 to the UN Human Rights Council had not been fulfilled, adding that 'While Malaysia claimed in its pledge that it had succeeded in achieving a balance between human rights and security requirements, the continued use of draconian colonial-era legislation suggests otherwise.' On the pledge to 'advance the rights of vulnerable

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[29] Eric Paulsen, 'Refugee deal ignores Malaysia's record', *The Malaysia Insider,* 24 July 2011: www.themalaysianinsider.com/print/sideviews/refugee-deal-ignores-malaysias-record-eric-paulsen/

[30] See Human Rights Watch, *2011 World Report*, 'Malaysia', at: www.hrw.org/

groups, including refugees and asylum seekers … little substantive progress was made …'[31]

- Failure to adopt international human rights standards, in particular failure to become a party to the Refugee Convention and most of the other international human rights conventions including the UN Convention Against Torture, the Racial Discrimination Convention and the 1990 International Convention on the Protection of Migrant Workers etc.. It is a party to the Convention on the Rights of the Child.

- Absence of legal rights for refugees to be in Malaysia and savage penalties for immigration offences, including large fines, imprisonment for up to 5 years, whipping of not more than 6 strokes.

- The risk of legally sanctioned torture and other illegal ill-treatment is strong for 'illegal' refugees. Amnesty reports that severe caning ('it cuts through the skin and leaves scars that are visible months later') is common for immigration offences, even though it is contrary to Malaysia's obligations under international law. Significantly for the present inquiry Amnesty reports that:

> In addition to state-sponsored violations, refugees and asylum-seekers are exposed to serious forms of ill-treatment which, although not officially sanctioned, are nevertheless tolerated. Refugees and asylum-seekers are vulnerable to abuse and violence in their homes, in public and at their places of work. During immigration raids, police and RELA [see below] employ violent tactics to extort money from them or to intimidate and harass them. (2010, p 15)

- The absence of lawful status in the country exposes refugees to robbery, extortion and physical abuse by immigration enforcement agents, including the citizen militia People's Volunteer Corps (RELA) which is given legal authority to examine identification papers and investigate immigration status, often involving raids and beatings, sometimes leading to arrest, detention and other penalties for refugees, and in some cases *refoulement*. (This was still the case at the time of Amnesty's 2010 report, despite government promises in 2009 to end these powers.)

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[31] Shannon Teoh, 'Malaysia broke human rights pledge, says watchdog report', *The Malaysian Insider*, 15 March 2011, at: http://www.themalaysiainsider.com/print/malaysia/malaysia-broke-human-rights-pledges-says-watchdog-report/

- Detention of refugees after arrest in 'filthy and overcrowded conditions', for lengthy periods and sometimes indefinitely, without any rights of appeal or reasonable health care, and with little access by family or NGOs. In 2009 UNHCR states that there were 6800 detainees with UNHCR registration, but compared with previous years the agency obtained the release of a significant number (4600). Despite official assurances, Amnesty reports that 'refugees with UNHCR cards continue to be held in detention' (in 2010). UNHCR has difficulty accessing refugees in detention.
- No legal rights for refugees to work, exposing them 'to abuse and exploitation', often working in the 'informal (illegal) sector' for low wages in poor conditions. (Note Amnesty's statement that 'Legal access to work and the self-reliance that flows from this are important protection tools' (2010, p 16).) The Ministry of Home Affairs has indicated it is considering allowing some refugees to work.
- The lack of government documentation for refugees and asylum seekers, and the need to rely on UNHCR registration cards to protect against RELA and other enforcement agencies. In practice, UNHCR registration cards are often ignored by state agents. The Government announced in February 2010 that government ID cards would be issued to refugees recognised by the UNHCR (but not apparently to those merely registered with UNHCR), enabling the holder to remain temporarily in the country. There was no indication when this measure might come into force.
- There have been instances of indirect *refoulement* or threatened *refoulement* or deportation of refugees in the past, including in 2009 and 2010. Amnesty believes there are other cases where detainees facing *refoulement* have been unable to contact NGOs or UNHCR. There are also examples of refugees being kidnapped and trafficked across borders by rogue state actors or others.[32]

[32] And see the recent incident reported in the Australian press: Kirsty Needham, 'Refugee unrest in Malaysia after deportation bungle', *Sydney Morning Herald*, 26 August 2011.

- There is only a small prospect for a durable solution for refugees in Malaysia other than through voluntary repatriation, not an option for most. UNHCR-recognised refugees cannot be resettled in Malaysia. In Amnesty's words:

> … in a country like Malaysia, where there is no formal right to work, no formal legal status, no state assistance and ever present risks of arrest and detention, local integration is currently not an option for the vast number of refugees.

Malaysia sends a comparatively large number of refugees for resettlement elsewhere (5th largest in world), mainly in the US but increasingly in other countries as well, with 5,865 in 2008 and 7,509 in 2009. But it is still a small proportion of those in Malaysia seeking durable refugee protection. Amnesty encourages states to increase their contribution to resettlement.

Amnesty concludes that, despite some 'recent positive developments', especially re detention and increased registration, 'overall, protection for refugees and asylum-seekers remains wholly inadequate'. Many of the inadequacies are likely to impact on asylum seekers transferred from Australia to Malaysia, despite the special arrangements promised under the agreement.

It is apparent that so deeply-rooted a legal and cultural antipathy to refugees will not disappear overnight, and will not do so just because of an arrangement with Australia. Some commentators hope for an eventual improvement in conditions for non-transferred refugees because of the example of the special conditions applying to the transferees, but in the meantime the latter are exposed to deprivation of the refugee and human rights that Australia is obliged to provide.

Appendix 2

Comments on pre-transfer arrangements

The procedures for assessing whether to transfer an individual under the Arrangement are apparently set out in various guidelines for those conducting the assessment (the Solicitor–General in *M70/2011* was reluctant to call this decision making, although he had placed great weight on the fact of a two-stage process involving discretionary 'individuated assessment' of vulnerable cases before removal). The occurrence of this

assessment is not even mentioned in the 'Operational Guidelines', which may show the real weight it is given by DIAC, or that it was inserted late in process. Unfortunately, at this point we haven't sighted the 'Onshore Protection Interim Procedures Advice on Assessing International Obligations' (mentioned in the High Court), or another set of guidelines on how to take account of the best interests of a child, both of which would be key to the Committee forming a view on this term of reference.

The ' individuated assessment' has doubtless been adopted in response to criticisms by legal commentators of the lack of individual consideration of the situations of those being sent to Nauru or Manus Island, and as such is to be welcomed. However, we remain deeply concerned about the Minister's decision not to exclude certain classes of people from the process altogether, and to rely solely on individual assessments, in particular in relation to Shi'a Muslims and unaccompanied minors. In addition, as mentioned above, those potential transferees who claim they have experienced torture, would receive infinitely fairer and quicker processing under the proposed Bill concerning Complementary Protection, and should be excluded from the process.

The reason these classes of people are not excluded from the process is, of course, that to do so would bring with it other major problems, and could be seen to imperil the working of the entire scheme. To put it the other way, the scheme as currently structured is inherently unfair and cannot be claimed to be a 'fair and effective refugee procedure'.[33]

In the case of Shi'a Muslims, what is in issue is a claim that there is a real chance of persecution in Malaysia for reasons of religion, so that a wrong decision on this would amount to *refoulement* (see discussion in High Court Transcript on this issue, especially per Gummow J). This is not a decision which should be made in the course of a brief assessment in the course of an 'accelerated process', possibly by non-experts, without legal assistance to the refugee claimant, and with no appeal or review process of any kind.

It is clear that an assessment that a person is 'vulnerable' at a specific point of time is intended to be 'exceptional' (see Solicitor–General's submissions to the court in

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[33] McAdam & Purcell, note 7, 105..

M70/2011). In that case, it is in our view unlikely that assessors will readily conclude that a person in those classes of people is 'vulnerable' without very strong additional circumstances affecting the individual. In that case the burden of proving that it is not safe to transfer the refugee claimant will be on him or her, which is not consistent with Australia's protection obligations to them.

Further, though the above-mentioned guidelines on assessing international obligations may help an assessor, in view of the Minister's initial decision they are unlikely to encourage large numbers of exceptions to transfer on these grounds. One must doubt also that the large of number of assessors involved in this form of preliminary processing will have great expertise in the area of international obligations and, as Gummow J pointed out in oral hearing in *M70/2011*, the range of people who could be involved is very wide indeed. We have had no assurances on their quality or training.

Also key is the amount of time such people will have for making assessments on these very difficult cases, which destroys the integrity of the process. This applies to all those subject to the process, not just the categories mentioned above. It is clear from various official announcements that once the scheme is established, turnaround from arrival at Christmas Island to transfer to Malaysia is intended to be very rapid, a matter of a few days. Clause 1.3 of the Operational Guidelines states that the aim is to effect transfer within 72 hours of arrival in Australia. This clearly does not give adequate time for the kind of consideration necessary, and should be lengthened if the scheme is ever resurrected.

Moreover, there is no provision for any kind of appeal process, which unfortunately is what one would expect in this kind of scheme. In Professor Foster's view,[34] referring to English experience, fundamental procedural guarantees such as due process, procedural fairness and the right to legal counsel should apply even to this kind of 'accelerated process'. In the Government's present frame of mind, this seems most unlikely to be rectified.

Moreover, it is clear that this assessment process will be crucial in determining the chances of a durable outcome for those who are sent to Malaysia (see above on criticisms of the quality of UNHCR frontline processes), and the 'potential

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[34] Foster, note 9, 280–281.

consequences of an incorrect decision' may have the same result as a determination of refugee status itself.[35]

[35] Foster, note 9, 279.