Senate Legal and Constitutional Affairs Committee Questions on Notice

Questions on Notice arising from hearing on 23 September 2011

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Mr Anderson: In the course of preparing this, in the research that was undertaken, we looked at a number of comments from the broader community. For example, I think Julian Burnside in one of his articles noted that there was an issue; one of the academic articles noted the problems of Australia not conducting asylum procedures in respect of IMAs.
Senator CROSSIN: Who wrote that academic article?
Mr Anderson: I cannot tell you off the top of my head. I could take that on notice and get back to you. I could probably identify and draw those commentators specifically to your attention if necessary. I could take that on notice.

Response

The idea of Australia "outsourcing its international obligations" has been referred to by a number of NGOs, including Amnesty International, the Refugee Action Coalition and the Malaysian human rights organisation Suara Rakyat Malaysia (SUARAM) as well as academic and other commentators. The following are some examples:

- ABC Radio, "Concerns over 'Malaysia Solution' for asylum-seekers",27 May 2011 http://www.radioaustralia.net.au/connectasia/stories/201105/s3228936.htm

- Reuters , "Australia's High Court rejects Malaysian asylum-seeker deal", Ed Davis 31 August 2011 http://uk.reuters.com/article/2011/08/31/uk-australia-malaysia-idUKTRE77U0OD20110831

- Refugee Action Coalition, "High Court a Good Start: Now End All Offshore Processing", Press Release, 31 August 2011 http://refugeeaction.org.au/2011/08/31/high-court-a-good-start-now-end-all-offshore-processing/

- Dr Graham Thom, Amnesty International, Press Release, 31 August 2011 http://www.amnesty.org.au/news/comments/26653/

At the Committee hearing Mr Anderson suggested that Julian Burnside may have used this concept. This is not the case.

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Senator CROSSIN: So in your meetings in August with the department you did not raise the issue of costs or money or ask for those figures?
Mr Anderson: We asked for further information during that meeting.
Senator CROSSIN: Did that go to budget figures, money, expected expenditure or just a broad umbrella of further information?
Mr Anderson: I could answer that on notice. I cannot recall specifically whether we asked for a detailed costing. I think we asked for further information in a more general sense.

Response

On 8 August 2011officials from the Department of Immigration and Citizenship (the Department) provided a briefing for staff from my office on the Malaysian Agreement and associated arrangements. We did not specifically seek a detailed costing of the Malaysian Agreement at that initial meeting with Department.

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Senator CASH: Mr Anderson, I have one question which I would like you to take on notice. In relation to the meetings you had with the department, could you provide to the committee what information you asked the department to provide, what information you have received from the department to date and what information you have not received?

Response

At the 8 August meeting, Departmental officials provided an brief on the outline of the Malaysian Agreement. This brief included information on vulnerabilities assessments, pre-removal assessments, access to relevant services and the legal status of transferees when in Malaysia. Department officials advised that some additional documents would be provided to my office shortly afterwards about the refugee assessment process for transferees to Malaysia.

The Department also responded to a range of queries raised by my staff including details of the pre-transfer process on Christmas Island (including the induction process and information provided to irregular maritime arrivals and how unaccompanied minors and other vulnerable arrivals were going to be treated). My office asked for copies of any guidelines or operational procedures relating to the implementation of the Agreement.

On 25 August 2011 my staff enquired about the availability of the additional information which we had sought. We were advised on 26 August 2011 that the Department would like to wait until the High Court had handed down its decision on the Malaysian MOU on Wednesday 31 August 2011 before providing the requested information. We were invited to discuss our request with Departmental staff.

On 7 September 2011 at my office's regular liaison meeting with the Department my staff sought and were provided information on the impact of the High Court judgement.

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My question to you as the Ombudsman is: based on that submission from the department, do you have concerns about the welfare of these unaccompanied minors under the guardianship of the Malaysian government, or do you have assurances that their welfare will be protected, given that it is the Malaysian government who will be their guardian?

Response

We note that the Agreement provides a number of assurances that the interests and welfare of unaccompanied minors will be protected by the Malaysian government, as outlined in the Department's submission.

We note also that under the Agreement such children would be under the care of the Malaysian government, released into the community and provided with appropriate support and care of the United Nations High Commissioner for Refugees (UNHCR) and the International Organisation for Migration (IOM) with the assistance of Australia.

In the pre-removal assessment phase, we understand that procedures will be developed to deal with vulnerable cases who are unaccompanied minors. They will have a 'best interests of the child' determination that will include an interview and consideration of their particular vulnerabilities.

We note that in undertaking a 'best interests' assessment the Department will have regard to its existing guidance for assessing compliance with Australia's international obligations to ensure that officers' assessments are consistent with Australia's international obligations by treating 'the best interests of the child' as a primary consideration in all cases for the purpose of determining whether it is appropriate to remove the minor for processing in Malaysia. As the Department informed my office on 8 August, the content of Malaysian law and guardianship arrangements as well as any claims in respect of an unaccompanied minor's placement in Malaysia would be taken into account under the pre-removal assessment process.

Currently, the policies, programs and services established by the Government ensure that all minors, including unaccompanied minors of whom the Minister is the guardian, have their care and welfare needs met while in immigration detention. We note that the Department's submission states that the pre-removal assessment process for transfers to a third country will be managed in a way that avoids any conflicts of interest between the Minister's guardianship responsibilities under the *Immigration Guardianship of Children Act* and his broader responsibilities as Minister for Immigration. In addition to these assurances it is important that appropriate safeguards are put in place to review any genuine concerns about the child's placement, especially as the initial assessment process is to be completed within 72 hours of the child's arrival in Australia.

We acknowledge as a positive initiative that an independent observer role is to be provided by a service provider. Under that arrangement, the provider will be available to attend interviews with unaccompanied minors and advise the interviewer of any concerns about the emotional and physical state of the child or young person, to provide a reassuring and friendly presence for the child or young person, ensure his or her understanding of the process, and otherwise to look out for his or her interest.

We understand that the Agreement envisages that unaccompanied minors entering Malaysia would fall under the provision of the Malaysian *Child Act 2001* and that a Malaysian government official would become their legal guardian. That official would seek a court order (within 24 hours) for the unaccompanied minors to be placed in suitable care arrangements including supervised group house arrangements for older unaccompanied minors and foster care arrangements as appropriate.

Further Questions on Notice from Senator Cash

1. I refer to clause 16 of the Malaysia –Australia Transfer Arrangement which states: "This Arrangement represents a record of the Participants' intentions and political commitments but it is not legally binding on the Participants".
What are the implications of the Transfer Arrangement not being legally binding on Malaysia in guaranteeing the protection of human rights of the asylum seekers transferred under this agreement?

Response

A bilateral agreement between Australian and a third country is not legally binding unless supported by domestic laws that give effect to the agreement. However we note that broad oversight and governance arrangements, which seek to monitor and enforce the commitments of the parties, are envisaged under the Agreement. These arrangements include the establishment of a Joint Committee and importantly an Advisory Committee which will include representatives from each of the Malaysian and Australian Governments, UNHCR and IOM representatives and any other representatives as agreed by Malaysia and Australia.

2. I refer to clause 3.3 of the Ombudsman's submission entitled "Transfer Processes" in which you state that: "Where transferees do not disembark voluntarily, Australian authorities will hand control of the transferees to Malaysian authorities who will then effect their disembarkation".
Are you able to guarantee that the Malaysian Authorities will only use proportionate and necessary levels of force and only as a last resort? If not, why not? What are the implications of this? Is there an operational guide or a procedure guide setting out what the Malaysian Authorities are able to do?

Response:

My office's jurisdiction relates to the actions of Australian government officials and their contracted service providers. Once a transferee is under the control of Malaysian authorities my office will not have jurisdiction. I see this issue falling within the ambit of the Committee oversight arrangements established under the Agreement.

3. At clause 3.4 of your submission you state that "Even if the Agreement does not of itself breach Australia's human rights obligations to transferees who have come to Australia as Irregular Maritime Arrivals, its effect is to place them outside of Australian jurisdiction and ensure that they will not be subject to Australian human rights standards and laws".
What is the practical effect of this for asylum seekers transferred under the Agreement by Australia to Malaysia in particular in relation to protection of their human rights? What would your advice to the Government be to rectify this situation?

Response

Australian legal and human rights standards apply in a practical sense only to those persons within Australian jurisdiction. Any persons transferred to any third country will be subject to the relevant constitutional, other legal and executive settings applicable in that country. However the Agreement sets out broad governance and accountability arrangements to monitor its implementation. In our submission we suggest ways this monitoring and oversight arrangement can be enhanced.

4. ***You also state that "at a conceptual level the Agreement and the operational guidelines seem to envisage the possibility that Malaysia could refoule people, contrary to the principles of customary international law? How can this occur when the government has stated on many occasions that the Agreement precludes the possibility of non-refoulement?***

Response

I understand the Australian and Malaysian governments have both, as per the Agreement outlined their shared commitment towards ensuring the principle of non-refoulement is observed. The High Court in M70 & M106 v MIC [2011] HCA 32 noted that Malaysia has made no legally binding arrangement with Australia obliging it to accord the protections required by the Refugees Convention and Protocol. The High Court did however note that there are, according to the UNHCR, 'credible indications that forcible deportations of asylum seekers and refugees had ceased in mid-2009'. This situation reinforces the importance of governance and oversight arrangements under the Agreement, including the involvement of UNHCR and IOM representatives.

5. ***Can the Ombudsman confirm that the role of the almost half a million Ikatan Relawan Rakyat (RELA) members in Malaysia is to seek out illegal immigrants and in the past have been bounty hunters, with a payment for each arrest that they make.***

Response

This is not a matter my office has considered or researched, nor is it something upon which I can usefully comment. Consideration should be had to the views of bodies or organisations with relevant knowledge and expertise in this field.

6. Whilst asylum seekers sent to Malaysia will not be illegal entrants and Immigration Minister Mr Bowen has "promised" they can't be caned – isn't it the case that RELA's powers are so wide that if there is a dispute with asylum seekers paperwork, they could be arrested and subjected to caning?

Response

I and my office are unable to authoritatively express an opinion on this matter. However, I note that in this issue was considered in the High Court decision in M70 & M106 v MIC [2011] HCA 32. Again this reinforces the importance of governance and oversight arrangements under the Agreement.

7. You refer to assertions from the government that the use of force by Malaysian authorities would be a "very last resort" with respect to the disembarkation of transferees - "Our point is that such agreements, if they are not scrutinised and if they are not operationalised, should not of themselves give us a great degree of comfort": What do you suggest is an appropriate level of scrutiny and how would the scrutiny be undertaken?

Response

It should be noted that in general terms the question of the form of any bilateral agreement is a matter for the Executive not for my office. However in Australian terms, my office would suggest an appropriate framework for scrutiny would include publicly available operational guidance, with some level of domestic legal status, subject to independent scrutiny and oversight.