COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE

Australia's agreement with Malaysia in relation to asylum seekers

FRIDAY, 23 SEPTEMBER 2011

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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE

Friday, 23 September 2011

Senators in attendance: Senators Cash, Crossin, Gallacher, Hanson-Young, Humphries and Joyce

Terms of reference for the inquiry:

To inquire into and report on:

Australia's agreement with Malaysia in relation to asylum seekers, with particular reference to:

(a) the consistency of the agreement to transfer asylum seekers to Malaysia with Australia's international obligations;

(b) the extent to which the above agreement complies with Australian human rights standards, as defined by law;

(c) the practical implementation of the agreement, including:

  (i) oversight and monitoring,

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

  (iii) mechanisms for appeal of removal decisions,

  (iv) access to independent legal advice and advocacy,

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

  (vi) 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;

(d) the costs associated with the agreement;

(e) the potential liability of parties with respect to breaches of terms of the agreement or future litigation;

(f) 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;

(g) mechanisms to enable the consideration of claims for protection from Malaysia and compliance of these mechanisms with non-refoulement principles;

(h) a comparison of this agreement with other policy alternatives for processing irregular maritime arrivals; and

(i) any other related matters.

WITNESSES

ANDERSON, Mr Rohan, Director of Immigration Complaints, Monitoring and Analysis Team, Office of the Commonwealth and Immigration Ombudsman

ASHER, Mr Allan, Office of the Commonwealth and Immigration Ombudsman

POWER, Mr Paul, Chief Executive Officer, Refugee Council of Australia

WALSH, Mr Rodney Lee, Senior Assistant Ombudsman, Office of the Commonwealth and Immigration Ombudsman

Evidence from Mr Power was taken via teleconference—

Committee met at 09:32

CHAIR (Senator Humphries): I declare open the committee's inquiry into Australia's agreement with Malaysia in relation to asylum seekers. The reference was referred by the Senate to the committee on 17 August 2011 for inquiry and report by 11 October 2011. The full terms of reference for the inquiry are available on the committee's website. The committee has received 35 submissions for this inquiry, all of which have been published and are available on the committee's website. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee. Such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee.

The committee prefers all evidence to be given in public but, under the Senate resolutions, witnesses have the right to be heard in private session. It is important for witnesses to give the committee notice if they intend to ask to give evidence in camera. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may of course also be made at any other time. This public hearing is being televised within Parliament House and is also being broadcast live via the web. We have submission No. 29 from the Commonwealth Ombudsman and submission 17 from the Refugee Council. Thank you very much for both of those comprehensive submissions. I invite each of those two organisations now to make a short opening statement and then we will proceed to questions afterwards. Mr Asher, do you wish to make the opening statement for the Ombudsman?

Mr Asher: Yes, thank you. I appear today both as the Commonwealth Ombudsman and, importantly, also as the Immigration Ombudsman. As Immigration Ombudsman, my office oversights immigration administration, including oversight of immigration detention and refugee assessment and review processing of irregular maritime arrivals. This role is somewhat unique, and it has a broader function than many other areas of government administration over which my office has jurisdiction, which are primarily focused on the investigation of complaints. Importantly, the jurisdiction of my office is not geographically limited; it extends to actions by Australian officials overseas as well as contracted service providers who act for and on behalf of the government. I believe my office is also well placed to provide independent advice and oversight on immigration matters including, importantly, issues relating to the treatment of irregular maritime arrivals.

I would like to emphasise that it is not my role to comment on the propriety or otherwise of specific government legislative or broad policy settings. This is, quite rightly, a matter for government and parliament. Instead, the focus of my work is on matters of administration that go to the operation and implementation of legislation and policies. That includes things like quality assurance and internal review mechanisms in administrative processes; training and support in and for agencies for their decision makers and officers; clarity of communications by agencies and officials; maintenance of internal service standards; and management of client expectations. In the discharge of this role, my office works very closely with the Department of Immigration and Citizenship, with the various contractors to them and with key stakeholders, and we seek to provide impact which aims to improve administration and provide assurances to the parliament that the executive is acting within the law and fairly. We also seek to provide assurance to the public that the executive and its agencies are acting fairly, openly and within the law. To provide such assurances, my office independently reviews and oversights government administrative action and develops policies and principles for accountability. We seek to ensure good practice with accepted standards and to facilitate proper safeguards and remedies to correct poor administration.

The need for oversight is particularly important in areas of administration where opportunities for judicial review are limited and where there may be some concern within the community about how government policy will be implemented. That is an explanation for why this area of work occupies so much of our time and our resources. It is in this context that I made the submission to this committee. In broad terms, my advice to

government and to parliament is to have regard to broad principles of good administration and ensure appropriate safeguards are in place in implementing the Malaysian agreement. These include ensuring that clear operational guidelines are developed and publicly available; that appropriate safeguards exist for more vulnerable arrivals and transferees; and that appropriate governance and accountability arrangements, including independent oversight, are established.

There is one aspect of my submission that I would like to amend, and it goes to my comments about the cost and utility of the agreement with Malaysia. In my submission I incorrectly indicated that the total cost over four years was $296 million and did not appear to factor in the costs of receiving and settling the 4,000 additional transferees from Malaysia to Australia. I have since become aware through advice from the department that the total is in fact $293.2 million, and it does include an allocation of $216 million to accommodate the increase in Australia's humanitarian intake by an extra 1,000 places per annum over the next four years. I understand that the remaining $75 million has been allocated to the cost of transferring individuals to Malaysia and their care in that country. So I apologise for that error in the submission. I have also lodged a supplementary submission to correct that misstatement.

CHAIR: That has been received; thank you very much. Mr Power, would you like to make an opening statement?

Mr Power: Certainly. Thank you for the opportunity to speak to the committee today. As you would be aware, the Refugee Council of Australia is the national umbrella body for non-government organisations working with asylum seekers and refugees, and we represent more than 150 organisations. We also work closely with counterpart non-government organisations in Asia, particularly through the Asia Pacific Refugee Rights Network, which includes a number of key NGOs in Malaysia.

The Refugee Council's submission makes clear our organisation's opposition to the arrangement with Malaysia, and we have raised a series of questions which would need to be addressed if the arrangement were to go ahead. There is no doubt that there are serious problems to be addressed regarding the treatment of refugees in the Asia-Pacific region. Unfortunately, both the government and the opposition have misdiagnosed the problem, and both are reaching for answers which do not address the core issues. The Minister for Immigration and Citizenship refers regularly to the people smugglers' 'business model'. The people smugglers would have no business model if governments of the region were working together more effectively to address the needs of people in need of refugee protection.

In the South-East Asia and South Asia subregions, 15 of the 19 states are not parties to the refugee convention, and none of those 15 states has consistent and reliable processes to address the needs of refugees. This must change if we are ever to see a change to the situation for refugees and asylum seekers—the situation being, to be honest, little more than a mad scramble to find minimum levels of protection.

Over the past few months there has been more public attention in Australia than ever before paid to what life is like for refugees in South-East Asia. I had the opportunity to visit Malaysia in July. The visit confirmed to me that the concerns of refugees for their safety and security are soundly based. Refugees in Malaysia are living in deep poverty with no legal status and are forced to break the law in order to earn money to feed themselves. Harassment and violence are part of the refugee community's daily experience, and the threat of arrest is constant.

Things have improved slightly—or, to be more precise, things have become slightly less bad. It is now less likely than it was two years ago that UN recognised refugees will get caned, and the vigilante group RELA has had some of its more outrageous activities in rounding up so-called 'illegal immigrants' curbed. But that is hardly sufficient grounds for suggesting that now is the time to send asylum seekers who have transited through Malaysia back there.

The eminent refugee law academic Professor James Hathaway of the University of Michigan addressed this issue in an in interview on ABC Radio National on Tuesday. He said: 'The fact that things are getting better isn't enough. If I said to you, 'Go in and have surgery by this doctor. She's been terrible; she's lost every patient on the table for the last three years. But she's taken a follow-up course and she's getting better. I'm confident that she is not as likely to engage in malpractice as she was a month ago,' would you go for that surgery? No. But, if and when she is fully trained and requalified we can have this discussion.' We certainly agree with Professor Hathaway.

In the long run it might be possible to return asylum seekers to Malaysia if they have transited through that country. Where an asylum seeker has moved on from one refugee convention signatory state to another it is common practice for the second state to return that person to the first state, particularly where the second state is confident that the asylum seeker's needs will be addressed properly on their return. In fact, I look forward to the

day when such a return of asylum seekers to Malaysia is possible, because that will mean that things will have changed significantly for refugees in the region. But there is much to be done before we can even consider such a prospect.

When the Bali Process Regional Ministerial Conference in March resulted in a communique which recognised the need for greater refugee protection in the Asia-Pacific region, we were greatly encouraged. We congratulated the Australian government and UNHCR on their work in bringing about what was a significant step forward. It was the first time that a number of governments in Asia, including Malaysia, Thailand and Indonesia, formally agreed to a statement that recognised refugee protection needs in the region and also recognised the need for them to assist in developing in-country solutions.

Traditionally these countries have seen themselves as transit countries, as countries that have little to do with the needs of the refugees within their borders. Under this view, the refugees are seen as foreign nationals who are in the country because of another country's actions while trying to get themselves to somewhere else. We can see plenty of examples in our region of countries leaving their responsibility for refugees to UNHCR and to international NGOs, never addressing the factors within their countries that make life for refugees unbearable. The Bali process provided the first glimmer of hope that this may be beginning to change.

Clearly it is not going to be possible for every refugee in Asia to be resettled somewhere. Resettlement is vital to any effective regional response, but it cannot be the answer for all. Countries in Asia, particularly countries such as Thailand and Malaysia, which are net importers of labour, must play their role in providing long-term safety and opportunities for some of the recognised refugees within their borders. But Asian states are unlikely to take unilateral steps to improve their treatment of refugees in a vacuum. They will only do so if they believe that other states are prepared to do the same and if they believe that states outside Asia, including Australia and other resettlement states, will back them up with logistical support, funding in some circumstances, government-to-government cooperation and, most importantly, increased resettlement.

Given that Australia was the main international sponsor of the change of focus within the Bali process, the message our country sends to the region is of critical importance. Unfortunately the message we are sending to the region with the current focus on arrangements in Malaysia, Papua New Guinea and Nauru is that we want to push our part of the regional responsibility for asylum seekers to other nations. This we believe undermines the good work done through the Bali process over the past two years.

We have proposed in our submission to this inquiry, in our main annual submission to the Australian government earlier this year and in numerous public statements that Australia should put every effort into working step by step towards a genuine regional agreement which addresses the need to protect people with well-founded cases for refugee protection. Of course this work will be incremental and it probably will not suit people whose main focus is on the Australian electoral cycle, but in the long run it is the only approach which offers real hope of reducing risky journeys by boat and of undermining a people-smuggling trade built on the fears of the most vulnerable.

Among the recommendations we make in our submission is that Australia put resources into the establishment of a support office for the regional cooperation framework being proposed under the Bali process. This office would become the focus for working on the next steps which need to happen, country by country and across the region, to address the needs of refugees. No-one expects countries such Malaysia, Thailand and Bangladesh to sign the refugee convention overnight, but things will start to change for refugees and asylum seekers when they receive legal permission to remain in those countries while their long-term status is determined and when they can work legally to support themselves. NGOs in Malaysia believe that lack of legal status and lack of the right to work result in perhaps 80 per cent of the problems faced daily by refugees in that country.

The next step then would be to address basic needs such health services and schooling. The schooling which is offered to refugee children in Malaysia is totally inadequate and a source of great frustration and worry for many refugee families. Those families want their children to have access to Malaysian schools. Given the number of refugees as a proportion of the total population of Malaysia, that could be achieved if there was political will to do so.

Over time, nations should be working towards the development of domestic legislation to process asylum claims and to offer security to asylum seekers and long-term protection to refugees. Eventually, some states may be prepared to take the step of signing the refugee convention. By that stage, signing the convention would be a much smaller step than it is now. We acknowledge that none of this is easy and none of it will happen quickly, but to believe that no regional cooperation is possible is to accept that nothing can be done to protect the lives of refugees now being wrongfully detained, harassed in countries where they are seeking protection and risking their lives on the seas.

CHAIR: Thank you very much, Mr Power, for that statement. I will start by asking you a couple of questions. You mentioned that harassment and violence are a daily occurrence in Malaysia for asylum seekers. Who principally is responsible for this harassment and violence?

Mr Power: I suppose it happens on a number of levels. There are police and officials who believe that they are illegal immigrants and have no right to be within the country. Unfortunately, up to this point the general view of many officials who are working at the local level is that there are categories of people in the country—those who are citizens and, of the non-citizens, those who have a legal right to be there and those who do not. From that very black-and-white perspective, refugees are seen as people who do not have a legal right to be within the country. The threat is greater for asylum seekers than it is for refugees because asylum seekers do not have the UN card; the documentation that asylum seekers have is widely disregarded by police and by other government officials.

The other form of harassment that people face comes from people who know that refugees have no legal protection. It is common for people who work to get paid on a monthly basis. There are many people within refugee communities who have worked for an entire month, have sought their pay at the end of that month and have been told by their employer that they will not be paid. They have no legal recourse because they actually have no legal right to work. There are women in refugee communities who are attacked and experience rape who believe that they have no legal protections and no real options to actually seek protection when they are attacked.

The harassment happens on a whole lot of different levels. To be fair the level of protection offered to refugees and asylum seekers is patchy; there are some examples of the police and authorities doing the right thing by refugees and asylum seekers in some circumstances, but there are many other circumstances where that just does not occur. The fact that their legal status is so unclear is at the core of that problem or is one of the causes of that problem.

Senator CASH: Mr Power, I have a follow up question in relation to the harassment that Senator Humphries was asking you about. One of the comments you made in your statement to the committee was in relation to RELA and that some of its more outrageous activities have been curtailed. Can you confirm that the role of the almost half a million RELA in Malaysia is still to seek out what they would call illegal immigrants in Malaysia?

Mr Power: I would defer to others, in particular my counterparts in Malaysia who know the day-to-day details much better than I do, but my understanding is that RELA now cannot act on its own. It is involved in operations with immigration, police and others. In the past as I understand it there was a bounty of 80 Malaysian ringgit for any illegal immigrant that a RELA member found and arrested. My understanding is that that no longer occurs and that the RELA volunteers are only involved as people who assist immigration and police operations. They are still involved but not in the same way. That is my understanding.

Senator CASH: Do you have written advice to that effect in relation to the activities of the RELA?

Mr Power: No, I do not but certainly we could potentially seek some advice. Because of the difficulties under which NGOs operate in Malaysia, I cannot guarantee that those I am contact with would feel comfortable to do that, but I could certainly seek further information.

Senator CASH: Would you make a suggestion to government because certainly that is a huge concern in relation to the wide powers of RELA in particular, based on their activities in the past? Do you believe that it would be prudent for the government, whilst it is assuring Australians that the protection of these people are actually upheld in Malaysia, to actually seek written confirmation from the Malaysian government in relation to the current powers of RELA and that they have been changed?

Mr Power: We would certainly welcome that. I think a formal clarification of the role of RELA would be really useful.

Senator HANSON-YOUNG: I have a couple of questions. I want to go to one of the points you, Mr Power, made in relation to the overall policy response. In your submission, at 8.2, in relation to offshore processing in general you refer to it not being the appropriate response, whether it be Malaysia or anywhere else in the region. Of course this is a considerable issue that has been debated in the parliament. We cannot not deal with this in this context, because it is very much a part of how we deal with the needs of asylum seekers. Could you go to why it is you think it does nothing, as you have outlined in your submission:

… offshore processing does nothing to address the root cause of irregular movement in the region …

Mr Power: There are a number of ways you can look at it. You can look at it in terms of what Australia has committed itself to do under the refugee convention, and I suppose there are some slightly different interpretations of what that means. But we look to the spirit of the convention and whether or not that is being upheld. They are fundamentally important considerations. But even leaving those to the side I think that, in

relation to sending people on to a country through which they have not transited, the minister for immigration is correct in saying that in the current environment, because the dynamics within the region have changed over the past decade, sending people to Nauru or to Papua New Guinea—although the minister does not say to Papua New Guinea, but he should to be consistent—will not have the deterrent effect it may have been perceived to have had in the past.

The people who are coming to Australia by boat to seek asylum overwhelmingly are people with either very strong or quite contestable claims for protection. For very sound reasons they do not believe they are getting the protection they need within South-East Asia and they are looking elsewhere for a country that may provide that. If that is provided through a period of time being detained in Nauru and Papua New Guinea and it results in some sort of long-term protection I think people will continue to take journeys to Australia in the hope that they may, either through Australia or through one of the offshore processing arrangements, get the protection they need. So I do not think that offshore processing to a Pacific country is going to have an impact on the flow of people towards Australia.

In relation to Malaysia we do not really know exactly what the impact is going to be. If you are ignoring the human rights needs of asylum seekers and you are looking purely at trying to find a solution to stop people bothering Australia with asylum claims, it is possible that the arrangement with Malaysia may result in a reduction in the number of people coming here. But it is also possible that it may not. It is possible that people may still cling to the hope that their particular needs may be addressed in a way that others' are not—that their particular need for protection from persecution may be addressed. Many refugees believe that a country such as Australia, with a long-term commitment to justice, democracy and human rights, will actually give them a fair go. It may well be that people will continue to come or it may well be that a belief develops in Malaysia that some of the small concessions within the Malaysia arrangement put them in a stronger position than they might otherwise have been if they were to remain in Malaysia and not attempt to get to Australia.

In that situation we are back to where we started from, which is, really needing to address the core problem of why it is that people do not feel safe to remain in Thailand, Malaysia and Indonesia and also in countries such as Bangladesh and India, even though they are not much part of the national discussion at the moment. The very inconsistent treatment of refugees in India is greatly problematic. The very poor treatment of refugees in Bangladesh in many ways exceeds their harsh treatment in some other countries in Asia. Basically, it comes back to the fact that we have got to address those core issues in the region. Various offshore processing models will probably only have limited impact, if any impact at all.

Senator HANSON-YOUNG: Thank you, Mr Power. Mr Asher, your officers had considerable dealings with the needs of asylum seekers in immigration detention centres in Australia. If we have problems here in detention facilities and in processing the claims of asylum seekers in a timely manner, dealing with the needs relating to their post traumatic stress, the trauma that they have suffered because of persecution, torture in the past, how on earth do we manage the needs of people if we send them off to another country and ensure that the monitoring can happen? If we cannot even get it right here and need it monitored on a frequent basis, how on earth do we make sure we do not put people into harm's way in Malaysia or anywhere else?

Mr Asher: That is the basis of our concerns on the procedural level, as within Australia with all the openness and access that we have as immigration ombudsmen, we make very frequent visits to Christmas Island and other detention centres and we have the capacity to receive and deal with complaints from individual asylum seekers as well. Even with that, we find from time to time that there are considerable shortfalls in good, fair, open administration in Australia. We urge on the government in implementation of an offshore agreement that proportionate degrees of supervision be provided there so that we can at least have the assurances that we have for the same people here in Australia. That applies where there are special obligations for unaccompanied minors, for victims of torture and people who have come to Australia with pre-existing metal illnesses. Those are all exceptional vulnerable individuals and it is in those areas in particular that we feel procedures need to be much more clearly elaborated and published.

Senator HANSON-YOUNG: Does it concern you that in the arrangement as signed between Australia and Malaysia those issues of how to deal with the needs of vulnerable people, unaccompanied minors, pre-transfer arrangements are not included in that signed document? It actually clearly says, 'This is yet to be decided.'

Mr Asher: Yes, there are a number of areas where we pointed to gaps. Partly, the problem for us was that despite several requests to see all of the documents they have not even now been provided to us. It might be on looking through those documents that we might be able to find some greater measures of assurance. But for the purposes of the committee we have looked at everything that we have had up to date and those sort of questions remain.

Senator HANSON-YOUNG: Yes, and that was one of the major concerns of the UNHCR. The final question I have, because I know we have to move on, is in relation to unaccompanied minors. It strikes me that one of the glaring gaps is who remains the legal guardian for unaccompanied children if they are sent to Malaysia. There is nothing in Malaysian law that says any minister, anyone under the state in Malaysia has any role for looking after unaccompanied children. Those that we send there or those that are there already. It is just not part of their domestic legal system. For those children that we send to Malaysia, has the Commonwealth Ombudsman's office looked at that? Where is the legal standing on that?

Mr Asher: We do know that for unaccompanied minors who arrive in the Australian jurisdiction that the minister has a special guardianship responsibility. Simply putting people out of Australia does not change that.

Senator HANSON-YOUNG: So, even if they are sent to Malaysia, you are arguing that the minister of the day would still be the legal guardian of those children?

Mr Asher: I am not saying that. I am saying, though, that once the minister has that responsibility I think it is incumbent on the government to properly discharge all of the obligations under the law, and those laws are there precisely to ensure that the interests of those individuals are fully protected.

Senator HANSON-YOUNG: It is hard to do that when they are in another country.

Mr Asher: I think even the post-transfer committee process does not seem to address that.

Senator HANSON-YOUNG: Thank you.

CHAIR: Did you have follow-up questions, Senator Cash?

Senator CASH: I have two follow-up questions. They are both for you at this stage, Mr Asher. In relation to the ability to ensure that human rights protections are upheld in Malaysia, I refer you to clause 16 of the Malaysia-Australia transfer agreement, which specifically states:

This Arrangement represents a record of the Participants' intentions and political commitments but is not legally binding on the Participants.

What are the implications of the transfer arrangement not being legally binding on Malaysia for guaranteeing that the human rights of asylum seekers transferred under the agreement are actually protected?

Mr Asher: With a similar arrangement within Australia—and there are many of that character—we would then seek to see if, in an administrative way, the intent of that agreement had been lived up to. We frequently undertake inspections and monitoring. We frequently invite people, not just from the immigration area but across our whole jurisdiction, to comment on arrangements so that we can form a view as to whether such commitments are being lived up to. I would expect that the joint advisory committees that are proposed under this arrangement should, at the very least, provide for a level of supervision, a level of scrutiny, that is no less than would apply in Australia. In our submission we note that scrutiny agencies, integrity agencies, should be—as the agreement allows—appointed to the joint advisory committees.

Senator CASH: But, if the agreement is not legally binding on Malaysia, what do these committees do if something does actually go wrong?

Mr Asher: From our point of view, there would be no steps that we could take to bring about a resolution. At most, we could draw it to the attention of the parliament and the government that there do appear to be administrative shortfalls in the agreement.

Senator CASH: Which does not necessarily help the person whose human rights we are trying to protect.

Mr Asher: That is right.

Senator CASH: I have one other follow-up question. You referred to the post-transfer processes. In clause 3.3 of your submission, entitled 'Transfer processes', you state:

Where transferees do not disembark voluntarily, Australian authorities will hand control of the transferees to Malaysian authorities who will then effect their disembarkation.

Based on the information that you have to date—and I do note the additional information you have provided today to the committee—are you able to guarantee to the committee that Malaysian authorities will use only proportionate and necessary levels of force and only as a last resort; if not, why not; and what are the implications of this? I have one other question: is there an operational guide or a procedure guide setting out what the Malaysian authorities are able to do?

Mr Asher: We have seen, in a recent communication from the department, an assertion that the use of force would be a very last resort. 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.

Senator CASH: In any event, at clause 3.4 of your submission, you state that, once we have transferred them out of Australia, 'its effect is to place them outside of Australian jurisdiction'. In the disembarkation process, if they are handed over to Malaysian authorities and the agreement is not legally binding, we can only hope that the Malaysian authorities will not use excessive force to get these people off a plane, at this stage.

Mr Asher: I think that is correct.

Senator CASH: And you have not yet received the operational or procedure guide that you asked for on 25 August 2011?

Mr Asher: That is correct.

Senator CASH: Thank you.

CHAIR: Senator Crossin.

Senator CROSSIN: Mr Asher, did you consult with anyone in the Department of Immigration and Citizenship in putting together this submission?

Mr Asher: We certainly did. We had meetings on 8 August with a group of officials there, and we sought both on that occasion and on a subsequent occasion some documents to fill out our understanding of this. Unfortunately the department took the view that they would prefer to wait till after the High Court decision before handing over some of those documents to us, and sadly that has not occurred. That has led to us not giving the committee the fullest picture that we would have liked to.

Senator CROSSIN: What about conversing with experts on Malaysian law or human rights? Have you done that?

Mr Asher: No, we have not. We do not purport to have any knowledge of administration in Malaysia. Our jurisdiction is quite strictly in relation to the activities of Australian government officials or contractors on behalf of Australia. So, to that extent, we would apply the same standards that we would apply in Australia. We do that in relation to the armed forces and police in the Solomon Islands on the RAMSI project; in Timor-Leste; and on Christmas Island.

Senator CROSSIN: But you make a number of claims in your submission about their treatment of asylum seekers and refugees in Malaysia, though. You have not spoken to the UNHCR? On what basis have then come to the conclusion about those claims?

Mr Asher: I can tell you that we speak frequently to the UNHCR and to various groups. What I am saying is that we have no specific technical or legal knowledge of procedures in Malaysia, and it is not our intention in this submission to suggest otherwise. The illustration in there made the point about the risk of somebody being re-exported, as it were, and that is a general concern based on the policy documents and the absence of any legal commitment by Malaysia against that.

Senator CROSSIN: So it is an assumption?

Mr Asher: No, it is not an assumption. There is no treaty, so there is no obligation.

Senator CROSSIN: You are telling me you have not consulted with experts on Malaysia or on human rights. Have you had a specific discussion with the UNHCR about what happens in Malaysia?

Mr Asher: No, I have not.

Senator CROSSIN: Then how can you possibly make the claims that you do in your submission?

Mr Asher: Which claims in particular?

Senator CROSSIN: You make a number of claims throughout your submission about the treatment of asylum seekers and refugees in Malaysia, and I am asking you: on what evidence or discussion is that based?

Mr Asher: One example I gave you was the risk that a proselytising Shiah Muslim is not subject to prosecution amounting to persecution. That is a category of human rights that does not refer to a specific law in Malaysia. We are just giving an example of how a Muslim person sent from Australia to Malaysia could be confronted with a human rights challenge. That is not about the law of Malaysia; it is about a possibility.

Senator CROSSIN: I see. Did you consult any MPs or senators in the development of your submission?

Mr Asher: No, we did not.

Senator CROSSIN: Did you consult Customs, the AFP or any part of Border Protection Command to discuss matters arising in relation to this inquiry?

Mr Asher: We are discussing with the AFP and the Department of Immigration and Citizenship aspects of this. I do not know if we have spoken to them specifically about arrangements in Malaysia, because we have not been able to see all of the documents. But we work very closely with the AFP in its international work as well.

Senator CROSSIN: In section 3.2 in your submission, you say:

… it is not clear … that transferees' human rights will not be impugned by cruel and degrading treatment such as the judicial imposition of the death penalty …

In clause 8(1) of the agreement, though, it actually spells out:

Transferees … will be treated with dignity and respect and in accordance with human rights standards.

So how precisely does the agreement lack clarity in this regard in your view?

Mr Asher: I might invite Mr Anderson to respond to that question.

Mr Anderson: The agreement, as we understand it, is not legally binding in the sense that it is an executive agreement; it does not confer rights under domestic or Australian law. The issue of whether an agreement can interfere with, say, a Malaysian judiciary's imposition of a penalty is not something that we are certain of.

Senator CROSSIN: But you say that people transferred to Malaysia under the bilateral agreement are likely to be promptly arrested—and infer even executed.

Mr Anderson: No, we do not say it is likely.

Senator CROSSIN: Would you say it is likely?

Mr Anderson: I would not express a view on whether it is likely or not. We just pointed to the fact that the agreement, in our view, would not necessarily be able to interfere with the judicial exercise of discretion in Malaysia.

Senator CROSSIN: You do not say that. You say:

… degrading treatment such as the judicial imposition of the death penalty …

Mr Anderson: We say that it is not clear whether the agreement would prevent a Malaysian judicial officer from exercising a Malaysian judicial discretion.

Senator CROSSIN: How is that different from an Australian tourist arriving in Malaysia?

Mr Anderson: Indeed. The point is that we do not necessarily see a bilateral agreement between two countries as putting any constraints on the exercise of judicial discretion by a judicial officer.

Senator CROSSIN: It is no different to someone travelling to the United States or being transferred to the United States even.

Mr Anderson: Indeed; I would not think an international agreement between Australia and the United States would necessarily interfere with the exercise of a judicial discretion by a US judge.

Senator CROSSIN: So what experts did you speak to come to these conclusions or to make those statements?

Mr Anderson: I did not speak to any expert to come to that conclusion. The paragraph says that it is not clear whether the safeguards or the provisions of this agreement will have the capacity to interfere with Malaysian judicial processes.

Senator CROSSIN: But you could say that if the agreement were with the USA as well, couldn't you, given that they have the death penalty?

Mr Anderson: Yes you could.

Senator CROSSIN: Can I take you to section 3.3. You say:

Commentators have claimed that the Agreement amounts to little more than Australia outsourcing its international obligations …

Which commentators are you referring to?

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.

Senator CROSSIN: What is the value of that statement, apart from a pejorative finding by way of stating a conclusion, essentially?

Mr Asher: The very point was the next sentence, where we said that, regardless of whether that is true or not, it is not an adequate answer to point to the fact that we are providing 4,000 extra places for assessed refugees from Malaysia. That does not affect the specific interests of those sent to Malaysia; that was the point.

Senator CROSSIN: And the point I am making is that in your submission you do not source your commentators, and you have just said to me in your answer 'regardless of whether that is true or not'. I am looking for some well-researched evidence upon which you have based this submission.

Mr Asher: It is not a contention of a fact. It is saying that, if Australia is not processing the refugees in Australia but they are being sent somewhere else to be processed, that is hardly a controversial notion. It is a matter of observation. If indeed a regional processing arrangement was set up, that would be a form of outsourcing the process to another place. Of itself it is not a pejorative point at all.

Senator CROSSIN: And you make those comments without having a discussion with the UNHCR about this?

Mr Asher: That would not change the fact. It is not to say that, if it done elsewhere, that determines the character of how it is done. It could be done well or it could be done poorly.

Senator CROSSIN: You also go on to say:

… in our view it is no answer to say to those who have sought our protection that Australia will discharge those obligations by accepting another different group of refugees.

Do you accept that that is not a particularly balanced statement?

Mr Asher: It relates to whether the interests of the individuals who are sent to Malaysia are superior or inferior to the interests of those who might come in exchange from Malaysia, pointing out that the rights of those individuals from Australia and the way in which they are processed and dealt with are our primary concern. They are the ones over which we have the mandate of the parliament to express views about the fair administration and their treatment.

Senator CROSSIN: Yes, but, Mr Asher, isn't that a policy matter over which you have no jurisdiction to comment?

Mr Asher: It is certainly the case that it is not up to the Ombudsman even to have view as to whether or not the Malaysian arrangement is good policy, and we do not. What our role is, though, is to look at the interests of those who are in the hands of Australian officials and ensure that the immigration values adopted by the government and in pursuance of both Australian law and international obligations are fully respected. That is the point at which we do have every right to make these comments, and the parliament and successive ministers have asked and required us to. Indeed, in the case of asylum seekers in Australia, every six months we are required to prepare a report on the status of that person and to table such a report in parliament after two years.

Senator CROSSIN: Yes, but I did not ask you whether you thought this was good or bad policy. Similarly, when you table that status report every six months, you are not asked to make a comment about the government's position on mandatory detention. What I am putting to you is that I believe that that statement that I read out actually takes your view about this matter beyond your jurisdiction. You are making a comment about the government's policy. What is your response to that?

Mr Asher: My response is that the aspect of the policy that we addressing there is the extent to which it can be administered in a fair, open and just way. We say that the rights of individuals, having arrived in Australia or at Christmas Island, are subject to Australian law and are subject expressly to the immigration values adopted by the government just a couple of years ago?

Senator CROSSIN: In section 3.5 of your submission, you say:

There seems no real assurance that transferees will be readily able to access 'complementary protection' …

How do you make that claim if you have read clause 11.2 of the arrangement document?

Mr Anderson: Again, that is a reflection of the fact that the agreement is almost aspirational. It talks of commitments, not binding obligations. There is also some evidence that Malaysia has been criticised for returning or refouling asylum seekers from its territory to the territories of a place where they might be at risk. In around 1999 or 2000, Human Rights Watch did a report that was critical of Malaysia. Since then there have been other reports that Uygurs might well have been refouled from Malaysia to China. It is also, as we understand it, a fact that Malaysia is not a signatory to a number of international conventions to which Australia is a signatory. The saving grace in that instance would be the customary international law prohibition on refoulement. But, coming to

the exercise of that obligation, we do not think necessarily that the agreement provides a guarantee that it will be exercised in a particular way at a particular time in a particular manner.

Senator CROSSIN: So you do not believe clause 11.2 represents an assurance that transferees will be able to have their claims are assessed under other human rights instruments?

Mr Anderson: We do not necessarily think that it provides any binding assurance. It is not the case that they might not be assessed, but we are not assured that that would be the case. This is a case of an agreement that is not legally binding. It is a reflection of the parties' commitments and aspirations.

Senator CROSSIN: You have had to table a supplementary submission today that corrects some of the figures that you outlined in your original submission. When you put the submission together, where did use source your information about the costs of the arrangement initially?

Mr Asher: From the *Wall Street Journal*.

Mr Anderson: From three sources. The *Wall Street Journal* was one. An interview with—

Senator CROSSIN: The *Wall Street Journal*. You sourced information from the media and from academic articles. Where else?

Mr Anderson: One of the media articles was an interview between the Minister for Home Affairs and the ABC where he referred to the $296 million. We also, in the course of the briefings, had requested further information but that had not yet been forthcoming.

Mr Asher: The one place we did not source information from was the department. Even though we are the Immigration Ombudsman with a statutory responsibility for work in this area, we have not been given the basic information.

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.

Senator CROSSIN: I may put quite a few more questions on notice.

Senator CASH: I have a number of questions as well which I will be placing on notice. Mr Asher, I would like to follow up in relation to some evidence that you gave to Senator Hanson-Young. Can I just confirm that you said that the minister has responsibility for unaccompanied minors even when they are removed from Australia in relation to the particular transfer agreement?

Mr Asher: It was not that the minister retains all of those duties once children are removed. What I was saying is that once the children are here his legal duties are engaged—

Senator CASH: Correct.

Mr Asher: and that that is an issue that must be resolved.

Senator CASH: It is resolved, because if you turn to paragraph 71 of the department's submission it is resolved to the effect that, under the agreement, the government has envisaged that:

… unaccompanied minors entering Malaysia would fall under the provision of the Malaysian Child Act 2001 such that an official of the Malaysian Government 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.

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?

Mr Asher: That would require further consideration, if I might respond to you—

Senator CASH: On notice—I would appreciate that. Do you have an opinion as to whether or not it is right that unaccompanied minors should be placed in Malaysian foster homes?

Mr Asher: I think that is going to raise issues about the nature of arrangements specifically for unaccompanied minors. Our interest will extend to the agreement the government finally makes in detail and I want to reserve a view on that until we see more precisely how that will work.

Senator CASH: When do you expect to see the details of the arrangements in relation to the unaccompanied minors?

Mr Asher: I rather imagine that there is not going to be a lot of progress on that before the parliament disposes one way or another of the legislation.

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?

Mr Anderson: Certainly.

CHAIR: You were asked before whether you consulted with members or senators before making this submission. Would it be the normal practice of the Ombudsman's Office to consult with members of before the making a—

Mr Asher: In relation to making a specific submission usually not. It is a hard question in that we are frequently interacting with members of parliaments and often on issues of this sort. For example, I have had conversations with Senator Hanson-Young on other aspects of this, although nothing in respect of the Malaysian agreement in particular.

CHAIR: Thank you very much gentlemen for giving us evidence today.

McADAM, Professor Jane, Australian Refugee Law Academics, Faculty of Law, University of New South Wales

SAUL, Professor Ben, Australian Refugee Law Academics, Faculty of Law, University of New South Wales

Evidence from Prof. Saul was taken via teleconference—

[10:33]

CHAIR: Welcome. The committee has received your submission, which is No. 25. Do you wish to make any alterations or amendments to your submission?

Prof. McAdam: No, thank you.

CHAIR: Do you wish to make an opening statement?

Prof. McAdam: I thank the committee for the opportunity to provide evidence today, together with Professor Ben Saul. We represent 14 refugee law academics who are co-authors of a submission addressing the international dimensions of the proposed transfer of asylum seekers from Australia to Malaysia. Although Malaysia is the future of his quarry, our comments are pertinent to the lawfulness or otherwise of any transfer agreement the Australian government might seek to enter into with any other country. As a matter of international law, Australia has voluntarily undertaken to respect the principle of nonrefoulement. This principle is reflected in the refugee convention as well as in key human rights treaties, such as the convention against torture and the International Covenant on Civil and Political Rights, which were implemented into Australian law through the passage of the Migration Amendment (Complementary Protection) Bill on Monday of this week. The principle of nonrefoulement is also generally accepted as a principle of customary international law. The principle requires Australia to ensure that people are not sent to any place where there is a real risk that they would face—or risk being sent elsewhere to face—persecution, arbitrary deprivation of life, the death penalty, torture or cruel, inhuman or degrading treatment or punishment.

Under the law on state responsibility, Australia cannot contract out of this obligation by sending asylum seekers to another country for processing. If Australia does do this and those people are either treated inhumanely in that country or sent to another country where they face persecution or ill treatment, then Australia remains liable under international law for breaching the principle of nonrefoulement. Importantly, that principle relates not only to whether or not a person is sent back to the original country in which they fear harm but also to whether there is a risk that Malaysia might return a person to such a place, or whether the standards of treatment within Malaysia could themselves amount to a breach of the principle. For example, if the conditions in which asylum seekers are forced to live in Malaysia are inhuman or degrading, Australia would be in breach of the principle of nonrefoulement by exposing them to such treatment. Malaysia is not a signatory to the refugee convention or to other major human rights treaties, and non-binding political assurances are an insufficient guarantee that international obligations will be respected.

Blanket designations of particular countries as safe are inconsistent with the principle of nonrefoulement, which requires a case-by-case assessment that a particular country is safe for a particular individual. Furthermore, refugee and human rights law requires that people are guaranteed certain rights and a minimum standard of treatment, which includes access to fair and efficient procedures for determining refugee status and to durable solutions. These are not guaranteed in Malaysia.

Finally, a transfer of the kind proposed may violate article 31 of the refugee convention, which prohibits states from imposing penalties on asylum seekers for entering a country without prior authorisation. The stated deterrence value of Malaysia, its application only to those arriving by boat and the lack of basic safeguards relating to assessment of individual protection needs and conditions in Malaysia may constitute such a penalty. Thank you.

Senator CROSSIN: The legal advice has made it clear that the High Court's reasoning would also likely preclude transfers to other third countries, such as Nauru and Papua New Guinea, as well as Malaysia. Is that your understanding?

Prof. McAdam: Yes. I think the Solicitor-General's interpretation of what the High Court has said is accurate in that respect.

Senator CROSSIN: So if we were going to proceed with a regional transfer agreement with any country in this region, we would still need to put legislation through this parliament. Is that correct?

Prof. McAdam: We would need to ensure that Australia respected the principles I have just referred to, which are also reiterated in the High Court's judgment, whether in relation to Papua New Guinea, Nauru or another country.

Senator CROSSIN: But there would need to be an amendment to the Migration Act in order for that to occur. Is that correct?

Prof. McAdam: Do you mean to be consistent with what the High Court has said?

Senator CROSSIN: Correct.

Prof. McAdam: Yes.

Senator CROSSIN: Perhaps I could also ask you, then, about what would happen if the government does not proceed with the transfer arrangements with Malaysia or any other country. What work has the centre done in relation to what we do about stopping people getting on these boats and risking their lives?

Prof. McAdam: I should clarify that we are not a centre. We are group of 14 independent academics employed at different Australian universities.

Senator CROSSIN: Wrong choice of words there perhaps. I was trying to think of whether I would call you a centre or a group of legal eagles.

Prof. McAdam: That is all right. I think it is because it has been submitted under the letterhead of the centre for which I work. I cannot speak collectively about work that has been done, although individual academics have certainly done work in that regard. I should point out that was not the way in which we conceived of our contribution to this inquiry—in terms of coming up with an alternative. Rather we examined whether or not the proposal by the government is lawful in accordance with international legal standards.

Senator CROSSIN: If everyone starts with the premise that we need to do whatever we can to stop people risking their lives by getting here on a boat, have you or your colleagues thought, if a regional transfer agreement is workable and is a way to go, about what is the best way to implement that through domestic legislation here?

Prof. McAdam: The premise there is that a regional agreement is something that we should be pursuing. Speaking for myself, I think that Australia is in a region where we see very low compliance rates with the refugee convention and major human rights treaties. So we are in a vastly different situation from countries such as those in Europe, which have established a common European asylum system. We have seen very great difficulties there, even in a context where all the countries are signatories to the same legal protection frameworks.

I think if Australia is to actually have any bite in terms of trying to establish a regional protection framework in this region, it has to be exemplary in its own performance. It cannot seek to characterise the asylum debate in the way that the government currently is in terms of unwanted people who are threatening Australian sovereignty and coming here without authorisation, even though they are exercising their lawful right, as a matter of international law, to seek asylum, and even though Australia has voluntarily committed to observe the principle of nonrefoulement pursuant to those treaties I mentioned before. With that comes certain obligations with respect to processing and with respect to granting rights to people as asylum seekers and as refugees. So I think Australia needs to show that it is trying to put forward its own model of best practice. Characterising our policies in terms of deterrence really does not send out a terribly positive message to other countries in the region which may be struggling to understand why they should sign up to some form of regional agreement when Australia is implementing many measures to try and deter people from coming here in the first place.

Prof. Saul: I would agree with Professor McAdam's comment that of course Australia is in a very tough region. Few states here have signed the refugee convention. Few states have processing systems which are compatible with international refugee law. So Australia is very much copping, in some ways, a considerable burden for asylum seekers which is not being shared necessarily in all countries in our region.

At the same time, I do not think we should get obsessed by this language of border protection and this belief that somehow people are unduly coming to Australia over anywhere else. Australia's numbers, as we know, are 5,000 or 6,000 a year maximum. A place like Nepal has currently about 90,000 refugees and is the size of Victoria with the same population as Australia. Papua New Guinea has 10,000. Malaysia has 90,000. Thailand has 100,000. If you look at those numbers it is simply not fair to suggest that Australia is facing some kind of special or acute problem which others in the region are not doing their bit about.

My own view is that a regional solution is absolutely essential, but it should not be a regional solution that fails to meet international standards or fails to provide durable solutions for those who are processed through such a solution. It also should not be a solution that trades our refugees for others in the region, as has been proposed under the Malaysian solution. If Australia is seriously concerned about the safety of life at sea and about the exploitative practice of people smuggling then what we should be doing is pursuing a regional solution which stops people getting to Australia at that point but does not penalise those who happen to get here. I say that because, as a signatory to the refugee convention, we have undertaken a legal obligation to process those asylum

seekers who reach here. They come here for good reasons: it is because there is not a functional queue which they can join anywhere else; because they are desperate and need protection; and because they do not get protection anywhere else. So Australia can hardly say, 'We need to smash people smuggling and stop people getting on boats,' but at the same time not provide a solution for those people who are stuck in some other country as a result of our policies.

CHAIR: We might need to move on to some other questions. Do you have more questions, Senator Crossin?

Senator CROSSIN: I have just one more. In relation to a regional cooperative agreement—if that is where people think we should start to focus our attention—if Nauru is the country, even if it has signed the international convention, at the end of the day people in Nauru ended up coming through Australia. Is it your view as experts that that will actually deter people from getting on a boat in the first place if they know they just have to spend some time in Nauru and they will end up here anyway? In a place like Malaysia or PNG, the clear message is: 'You will be going to a third country and you won't come to Australia, but in the end we will take 4,000 refugees otherwise.' Nauru is not a deterrent either, is it, if you are going to look at the current policy debate?

Prof. McAdam: No, but this whole language of deterrence, as I say, is completely contrary not only to the direct obligations we have undertaken but arguably also to a separate obligation, which is that of good faith. That means that Australia has an obligation to fulfil its responsibilities under the refugee convention and under other human rights instruments in accordance with the object and purpose of those agreements, and if what Australia is effectively trying to do is stop those treaties from ever being triggered in this jurisdiction then we are interrupting the very object and purpose of why we have them in the first place, and we are also failing to fulfil our obligations to other countries to whom we have undertaken to respect those obligations.

Senator CROSSIN: But isn't the basic premise of what we are trying to do to deter people from putting their lives at risk from getting on those boats? We are not backing away from that.

Prof. McAdam: I would argue that that is the current political line of argument, but it is certainly not the one that I would suggest has always underpinned Australia's deterrence measures under the previous government. I would also argue that that is a line that has come up fairly recently with the present government. Certainly it is a laudable aim to prevent people from losing their lives at sea, but that does not require elaborate deterrence mechanisms. Australia could solve that tomorrow, had it the political will to do so, by increasing quite considerably its resettlement intake. Resettlement is a very positive aspect of Australia's—

Senator CROSSIN: The resettlement intake from where? From Indonesia?

Prof. McAdam: Whether it is from the region or more broadly. But I know that is one argument—certainly for this region. Were Australia to more carefully target resettlement from here but at the same time increase the number of resettlement places, that would be one way of stopping people from getting on boats. But I think that what the government has to appreciate is that, whatever it does, it is not going to unilaterally stem the flow of asylum seekers. That is to fundamentally misunderstand the way in which forced migration occurs. I think the Prime Minister herself indicated earlier this week that it is external forces in other countries that have perpetuated these flows, and Australia and other countries can do very little—other than trying to help to address the root causes of those flows—to stop people from, as I say, exercising a legal right to seek protection.

Prof. Saul: Can I simply add that for me I think the key question Australia should be asking is: how does our region provide the maximum number of protection places for people who come to our region? The question should not be about border protection or about deterring people from getting on boats. I think we need to accept, and I think the public needs to be encouraged to accept, that a future of zero unlawful asylum seeker arrivals in Australia is never going to happen.

Our policies, of course, should be orientated to provide forward protection so that people do not have to get on boats to come to Australia and do not have to go through that nasty experience of being exploited by people smugglers, but at the same time the way to deal with it is not to allow people to come here and then ship them off to Nauru or Papua New Guinea or Malaysia; it is instead to do some kind of regional deal which prevents people from reaching Australia in the first place and having to be shipped off to those places. Nauru and Papua New Guinea and Malaysia are not the answer; the answer is a kind of forward place of protection where people can apply for asylum with the guarantee of a resettlement place. That is what does not exist at the moment. At the moment we just have people warehoused for incredibly protracted periods in places like Malaysia, Indonesia and Thailand. A tiny number of people get resettlement. If that is the case, why on earth would a refugee wait in those places to get resettlement in 15 or 20 years time? No one in the federal parliament would do that—to give away your life and your family's life and future for 10, 15 or 20 years just so that at some distant point in the future you have a hope of maybe getting resettled somewhere like Australia or New Zealand.

I think we need to show leadership in our region by doing what Professor McAdam suggests: by very substantially increasing our resettlement places; by working for a regional solution; and also, I think—and this is an important point—by encouraging other states in our region to take responsibility for developing their own refugee and asylum processes. It is not fair to expect that Australia should provide resettlement for everybody in this region. There are other countries which can do a lot more. Japan takes a tiny number of refugees, yet it is one of the richest countries in the region. That is the kind of burden sharing which we should be pursuing.

CHAIR: Okay, let us move on.

Senator HANSON-YOUNG: Thank you. I think you have gone through the various parts in your submission quite well. I just wanted to clarify some points. In the view of the legal academics that have signed on to this submission, is it right to say that the assumption is that both the Malaysia arrangement and the proposed changes to the Migration Act which would circumvent the High Court ruling would result in a breach of our international obligations under the refugee convention? You also talk about the Convention on the Rights of the Child. Am I correct in assuming that from your submission?

Prof. McAdam: Yes, and also under human rights treaties such as the ICCPR; the Convention against Torture and also the ICESCR.

Senator HANSON-YOUNG: So changes to our own domestic law which, in the government's view and the Solicitor-General's view, would do away with the complications set out by the High Court do not actually go to the needs of fulfilling the requirements that the High Court said were needed in terms of basic human rights standards?

Prof. McAdam: No, they do not, by making it wholly discretionary. Certainly it would constitute a violation of international law. That is clear.

Senator HANSON-YOUNG: So, if we changed the domestic law to allow people to be sent to Malaysia or Nauru or anywhere else, it is the fact that Australia is not abiding by our obligations as we are signatories to these various conventions and treaties?

Prof. McAdam: As the situation currently stands in those countries, that would be my view. I know that one of the arguments is that Nauru has ratified the refugee convention and that Papua New Guinea has, although it has significant reservations that undermine its capacity to provide protection. I think it is very important to restate that, notwithstanding a country's having signed up to those instruments, that in and of itself is not sufficient to say it is now a safe place which can provide effective protection to asylum seekers and refugees.

Prof. Saul: Can I just qualify that answer by saying simply that, until a destination country is settled upon and until we know what the arrangements with the country would be, we cannot say at this point whether or not it would be illegal if you simply changed the legislation. It depends on what you do with the legislation as to whether it would be legal or illegal. But for the reasons we have given previously, taking the Malaysia agreement as an example, unless you very substantially improve the degree of protection provided under the model on the table, it certainly would not meet our international obligations. Not only do you ordinarily need to have signed the refugee convention, you need to have effective legal protection and processing in place, and that does not exist in Malaysia.

We do not know necessarily whether that would exist in Nauru, but I think Nauru raises different problems because that section of the Migration Act as it stands requires that, to declare another country, that country must meet relevant human rights standards in providing protection. The previous Nauru processing system arguably involved arbitrary detention, which the UN Human Rights Committee has said in five or more cases against Australia is illegal under article 9 of the International Covenant on Civil and Political Rights. The irony here, of course, is that what that section of the Migration Act was expecting of other countries is higher than what we require of ourselves. Mandatory detention in Australia is plainly contrary to article 9 of the ICCPR. So in that respect it is a good thing that we require this, because it is actually a way for Australia to enhance the standard of protection and thereby comply with international law.

Prof. McAdam: Can I clarify that when I responded to Senator Hanson-Young's question as to illegality under international law, what I meant was that if the conditions identified by the High Court were not met in those other countries then it would be a violation of international law. I wanted to make that clear.

Senator HANSON-YOUNG: If I could go directly to your submission, in your conclusion you were quite clear about believing that Australia should not be putting forward punitive responses to asylum seekers who arrive in Australia. You say:

The Arrangement shows a remarkable level of ignorance about the way forced displacement occurs in practice. It is farcical to assume that Australia can smash the people smugglers' 'business model'.

Prior to that you say:

The argument that the Agreement will save lives at sea is a smokescreen. Asylum seekers will continue to make dangerous journeys because they are desperate, but the Australian government hopes these journeys will not be to Australian shores.

Do you believe that in order to uphold our international obligations under the various conventions and treaties, and doing that in conjunction with the reality of dealing with the needs of individual people, we should simply assess the claims of those who arrive here in Australia, whether it is on our shores or in our airports, onshore while at the same time putting support into the region to give protections elsewhere?

Prof. McAdam: Yes, that would be my view. As I mentioned before, if Australia is serious about trying to establish better protection in the region, which I think is an important objective, that does not come at the expense of Australian providing such protection itself. Australia has to act as a model international citizen in that regard in order to get buy-in from other countries.

Senator HANSON-YOUNG: In relation to unaccompanied minors and children, there is no detail in the signed arrangement between Australia and Malaysia. It is a glaring gap. This is the document that has the signatures of both equivalent ministers and yet it does not go to the detail of how unaccompanied minors will be treated, either here in Australia or if they are sent to Malaysia. The High Court obviously had problems with that and believed that the minister was the legal guardian and had to act in their best interests. What is your view of the proposed changes to the Migration Act and the Guardianship Act in relation to our legal, international and moral obligations to unaccompanied children?

Prof. McAdam: As we explain in the submission, with any decision that affects a child, as a matter of international law, the decision maker must have the child's best interests as a primary consideration in making that decision. We would find it very difficult to see how a person could satisfy themselves that transferring a child to Malaysia under the nature of the agreement that is proposed is in the child's best interests. I note though that the international test is that consideration of the child's best interest is 'a primary consideration', not 'the primary consideration', although recently in the United Kingdom the courts have said it must be 'the primary consideration'. Notwithstanding that, the Committee on the Rights of the Child has pointed to the fact that a country will be breaching the principle of nonrefoulement if it exposes a child to treatment which threatens that child's survival, their life or their development.

Senator HANSON-YOUNG: And that does not necessarily mean in the country of origin.

Prof. McAdam: No, that is right. That means Australia sending that child to any other territory or country where that treatment is of concern.

Senator HANSON-YOUNG: What is your opinion on the removal of judicial review in relation to decisions being made on behalf of children by the minister?

Prof. McAdam: Again, we would have serious concerns with that as a matter of basic procedural fairness and the requirements of human rights law more broadly. The problem too is that you get back to a wholly discretionary kind of operation, which means that once again that Australia cannot be saying with confidence that it is abiding by its international obligations.

Prof. Saul: We also should not believe that children are necessarily well protected in terms of their best interests here in Australia when we are comparing the standard of treatment here. It has been often criticised recently. How can the minister act in the best interests of the child if the minister is also responsible for border protection and detention? There is a fundamental conflict of interest here, which really harms the protection of children. There have been numerous proposals previously for that responsibility of guardianship to be transferred to somebody more appropriate in Australia. For that reason judicial review is also pretty important. You would need to look very closely at the guardianship arrangements in Malaysia to see whether a similar problem exists in the Malaysian system.

Senator CASH: In the interests of time I will place all but one question on notice. I will commence with a comment. It is opportune that we are having this hearing today because the government has just announced the arrival of two boats: one carrying 68 people and one carrying 63 people, so that is another 131 we can add to the queue. Professor McAdam, your submission today both in writing and orally, the Human Rights Commission's submission and the Refugee Council of Australia's submission all raise concerns that Malaysia will in fact refoule people. I am struggling to understand upon what basis these continued claims are made, given that the government and the minister have continually assured the parliament and have continually assured the Australian people that it is just not possible under the agreement that has been entered into. Upon what basis do you make those claims?

Prof. Saul: The agreement is not legally binding and therefore any politically offered protections cannot be enforced by the asylum seekers themselves. The whole basis of the refugee convention's procedures underlying the assessment of who is a refugee presupposes that protections can be enforced through some legal mechanism. That is why you have a refugee convention that sets up a system of assessment and protection. So I think the international law argument is simply this: unless you have legally binding and enforceable procedures you cannot simply rely upon the good grace of a ministerial promise, which may be well intentioned and may be genuine and so on but is not enforceable in Malaysia.

Prof. McAdam: Once people are in Malaysia they are within the territorial jurisdiction of that country and, notwithstanding any agreement that country has made, they may decide to remove them for whatever reason they wish. The other point I would add to what Professor Saul has just said is that it is not only whether or not Malaysia itself will persecute people or return them to persecution but it is these additional obligations, the complementary protection obligations, that we cannot guarantee. Whereas in Australia one would have recourse to the committee against torture or the human rights committee for violations of those guarantees, Malaysia is not a signatory to either of those instruments and nor to the individual complaints mechanisms, so people do not have recourse.

Prof. Saul: There is also some case law here that I would alert the committee to. In recent years there has been this practice of one state giving a diplomatic assurance to another state that a certain person, if returned to that country, will not be mistreated or treated inhumanely or in a degrading way and so forth. The UN Human Rights Committee, in numerous cases in the last few years, such as Agiza v Sweden and Alzery v Sweden, has said that if these kinds of political agreements or assurances are the basis underlying the return of a person where there is a risk of inhuman or degrading treatment or torture and so on there have to be sufficiently enforceable guarantees and monitoring to uphold those agreements. What the UN Special Rapporteur on human rights and counter-terrorism has said is this in paragraph 60 in one of his reports:

There must be monitoring by independent persons or groups conducting prompt regular visits that include private interviews, and those persons must be trained in identifying possible signs of torture and ill-treatment. There has also got to be access to a lawyer, recording of any interviews that happen in the other country, timely and regular medical examinations …

And so on. He goes on to say, 'Simple occasional consular visits' by Australian officials, for example, 'would not be enough to discharge that monitoring and guarantee obligation if you are relying upon these kinds of political agreements'.

That is the standard. In those UN Human Rights Committee cases and a number of European Court of Human Rights cases, states have been found to be in violation of international law because these assurances have not been accompanied by sufficient binding enforceable safeguards.

Senator CASH: In the interests of time could I ask you to provide to the committee on notice a list of the cases you were referring to and, if you are able to, a very short paragraph summarising the finding in each case in relation to the political assurance that was given.

Prof. Saul: Yes, of course.

Senator GALLACHER: Professors Saul and McAdam, I want to pose a question to you that is put to me at branch meetings and at interactions with the community. Basically, people say to me, 'We are a generous country. We are a country of migrants. People came here by boat 200 years ago, so there is no issue.' But, if we have a generous view on humanitarian intake of migrants, we need to take the community with us. What I have heard you say today is that you believe that, if people are in a refugee camp abiding by the rules of that country and all of the rules that apply to asylum seeking, it is okay that the one who should get in first is the one with the most money and who is prepared to engage a group of criminals and put everybody's life at risk. People just do not accept that in the community.

Prof. McAdam: I think one of the fundamental points here is the lack of accurate information that is circulating in the broader community. People are really ill-informed as to the numbers that we are talking about. Australia—

Senator GALLACHER: Excuse me, I am not talking about the numbers. I am talking about the general principle of paying $20,000 for passage, through a criminal organisation, to get closer to your objective—in front of the 10,000 or 12,000 other people who are doing the right thing.

Prof. McAdam: But I think that, again, misunderstands the way in which forced migration occurs. For many people there is no camp they can directly go to, nor is there an obligation under international law for people to do that. When you are talking about how do you convince the electorate, I think it absolutely comes back to what people appreciate as the real situation. If you look at the fact that Australia has around 2.2 per cent seeking

asylum in the industrialised world, and the fact that in the world fewer than one per cent of refugees will ever be resettled—somebody did a calculation, which was that if there were no more people seeking asylum from tomorrow onwards, it would take 90 years to resettle the current population of refugees in the world—and you put it in those terms, it paints a vastly different picture from the one that we see night after night on television. And I think it is incumbent on the government to take leadership on this issue—

Senator GALLACHER: With respect, though, I have moved a little bit around the world. There are economic refugees all throughout Europe. A lot of those people are not fleeing war-torn areas; they are looking for a better life—

Prof. McAdam: But the concept of 'economic—

Senator GALLACHER: Now, if $20,000 is the going rate to get into Australia then we might move from asylum seekers to a whole different group of people. All they have to do is put a foot on the shore and they are under the jurisdiction of Australia, which is the most generous in the world, I think.

Prof. McAdam: The concept of 'economic refugees' is not a legal concept, so it is actually a blurring of why people are moving. Australia receives few people who Europe might, for example, call illegal migrants. The majority of people who arrive by boat in Australia have been found to be refugees in accordance with international law—and, again, I think that is something that is important to broadcast, rather than suggest people are 'illegals', which is the typical language that is used. If we contrast the number of people who arrive by plane and subsequently seek asylum, the success rate there is a lot lower. So I think this obsession around arrivals by sea is something that is absolutely driven by the media but, more importantly, by a lack of leadership by the government to actually spell out what the situation is. Again, that speaks to how is Australia going to try and forge any kind of regional cooperation when it is, with respect, really overhyping the issue.

Senator GALLACHER: So you agree it is okay to pay $20,000 and get in front of the other 10,000 people.

Prof. McAdam: I think that concept of a 'queue' is completely misplaced.

Prof. Saul: Can I disagree with the assumption underlying that question, which is that you are jumping ahead of somebody else. The fact is there simply is not effective protection available in many countries for many refugees. Australia has an embassy in Nairobi which is responsible for accreditation to 32 African countries. You have buckley's of getting a resettlement solution to Australia if you are from any number of African countries, for example. The case loads are also different. If you are fleeing an emergency, and you will certainly be coming through other countries to get here, if those other countries, like Malaysia, do not give you protection, or give you the remote and fanciful possibility of resettlement in 20 or 25 years time, of course you are going to come onward to another country. I have no problem with somebody paying a people-smuggler to get protection if they cannot get protection any other way. If Anne Frank had paid somebody to get protection, would you be saying that Anne Frank was a criminal because she was somehow contributing to the people-smuggling trade? I mean, come on! You have got to do that to reach protection, given the dramatic—

Senator GALLACHER: With respect, though, we have to take the population with us.

Prof. Saul: failures in the global protection system.

CHAIR: Okay, I think we had better draw the line on this session now. I am sorry, we have run out of time. Can I thank both you, Professor McAdam, and you, by telephone, Professor Saul, for being here today. We appreciate the evidence and the submissions you have given the committee.

Proceedings suspended from 11:14 to 11:22

BARTLETT, Mr Andrew, Research Fellow, Migration Law Program, College of Law, Australian National University

van GALEN-DICKIE, Ms Marianne, Sub Dean, Migration Law Program, College of Law, Australian National University

WATSON, Dr Judyth, Executive Secretary, Coalition for Asylum Seekers, Refugees and Detainees

Evidence was taken from Dr Watson via teleconference—

CHAIR: We will resume the hearing of the Senate Legal and Constitutional Affairs References Committee into Australia's agreement with Malaysia in relation to asylum seekers. Welcome to the inquiry. **W**e have submission number 4 from CARAD. Do you have to have any amendments or alternations to make to that submission, Dr Watson?

Mr Watson: No, except to say this seems an extraordinary time to be giving evidence when the parliament has not quite made up its mind.

CHAIR: Okay. We will come back to an opening statement for you in a moment. Mr Bartlett or Ms van Galen Dickie, do you wish to make an opening statement or amend your submission first of all?

Mr Bartlett: The submission is okay, I think. unless someone has found any typos. I will make a brief opening statement if you like. I know you only have a short time. It is worth making the point that the Migration Law Program at ANU is the largest program in Australia for training migration agents and for providing continual professional development for migration agents. Through the graduates of that course, the people that take up those CPRD opportunities and indeed from many of teachers in that course, we have a lot of people who are involved in a day-to-day basis over many years, with the ever-shifting reality of asylum claims in all sorts of areas, whether it is onshore or offshore entry or the variations of that over the years. I guess you have got other people here—such as the ones you have just heard from—who can give you all the legal arguments. We are not wanting to do the fine print about the legal arguments for and against. We want to emphasise a comparison of what is being proposed in Malaysia with some of the other policy alternatives that are on the table and that have been tried in the past. In that context we both have some relevant other experience, as was made clear in the submission. When I was in the Senate, I visited Nauru four times, and Ms van Galen-Dickie, as the main adviser for us on refugees and asylum seekers, visited Nauru twice. We had very close involvement with Ms Marion Le, who was involved with hundreds of the cases from Nauru over the years and has had ongoing involvement with refugee settlement agencies and with community legal centres. So we bring a breadth of perspectives.

I would like to emphasise—no surprise to you, I am sure—that our preferred option is a consistent single approach of onshore processing. But we recognise the reality of the current situation. We did not want to come here and just lecture you about why you are all wrong and we are all right, but more just to give you the benefit of some of our specific experiences on the ground, the reality of what people have gone through when these various options have been tried. I particularly want to emphasise—and we mentioned this in the submission—the report that this committee did five years ago into a piece of legislation called the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 and submissions to that inquiry by Ms Marion Le which detailed in a lot of specifics the problems that occurred with the assessment process and the flaws that were made in assessing people's claims, and expanding that to Manus Island as well. That committee report was, I think, about the only one in that period of time where all of the senators across all of the parties took a view that the legislation should not pass because of the uncertainty about what would happen.

I think that is appropriate to emphasise in this context. We can all talk about what probably will happen in Malaysia, but we are not certain, because there is no mechanism to ensure that that happens that the parliament can ensure. If people are wanting to go down the path of Manus Island or Nauru or indeed repeat the experiment of towing boats back to Indonesian waters, then again we should think through what capacity the parliament, and indeed the government, has to ensure safety and proper processing for the people, wherever they end up. That is something that we at least need to try and do as much as we can if people are wanting to go down those paths.

CHAIR: Dr Watson, would you like to make an opening statement?

Dr Watson: Not especially, except to say that, as a member of the board of the Refugee Council, I was part of a small delegation that visited Malaysia in July. I think that Paul Power has given evidence this morning. What we observed and discussed there left huge reservations as to whether any appropriate negotiations could be made with Malaysia for the safety of 800 refugees as opposed to 96,000 designated refugees. It was of interest to note—we met with eight or nine refugee communities—that, the longer people had been there, the more their health resembled that of people who had been in detention here, especially their mental health. In a past life, I was a

mental health advocate, and it was quite disturbing to see that, if people do not get information about progress of their claim or any durable solution, it is likely to impact on their mental health status. But we believe at CARAD that, if people ask Australia for asylum, that should be assessed while they are onshore.

Senator HANSON-YOUNG: Mr Bartlett, your submission details a whole lot of issues with sending people to both Malaysia and Nauru. Your recommendations are fairly clear. The first is to process all asylum seekers onshore, the second is to increase funding to the UNHCR and the IOM to process refugee claims in Indonesia; and the third is to increase the intake of refugees from countries within our region. How do you marry the concerns you have about the Malaysian arrangement with the government's proposed amendments to the Migration Act that were introduced into parliament this week?

Mr Bartlett: The amendments go to the concern expressed before about a lack of certainty about what is going to happen and relying on a minister's assessment that is not reviewable by the courts, not really enforceable by the parliament down the track and potentially not even enforceable by the government. Even when there were Australian officials doing a lot of the work on the ground in Nauru, much more so than it is likely to happen in Malaysia, there were enormous problems. If the people in Malaysia are going for years in any sort of circumstance then you get all the same negative impacts as what happened with the people in Nauru eventually. The longest detainees were on Nauru for over five years, the same as the ones who ended up on Manus Island towards the end. There are even fewer protections in place, it seems to me, under law. The minister might put in place lots of protections and a future government might put in even more. The parliament is allowing something to happen without much certainty about what is going to happen to the people. To me, the amendments quite clearly are designed to remove any capacity to review that by anybody.

A continual problem with migration law in general is the unintended consequences of making changes to the law with a particular short-term problem to try to fix, whether you are talking about fixing it politically or fixing the problem that is perceived, without necessarily foreseeing the unintended consequences. That has happened with student visas and a whole range of areas. In this area if you have unintended consequences and not enough protections then the consequences can be deadly. It is important to emphasise the evidence provided to that inquiry, as I mentioned, five years ago and we have had further evidence come forward since of what happened to many of the people who were very strongly and repeatedly encouraged week after week to voluntarily return from Nauru and some of them were killed. Evidence from Mary Crock to that inquiry, which was focused on unaccompanied children, stated that 32 children were returned to Afghanistan, some of them while they were still children, from Nauru.

Senator HANSON-YOUNG: Who had been detained on Nauru?

Ms van Galen-Dickie: Yes.

Mr Bartlett: That never happened to detainees in Australia. I am not saying that was premeditated. I am saying that once you set in train these processes that is the sort of thing that can happen.

Senator HANSON-YOUNG: I am not sure you were here when the Commonwealth Ombudsman was giving evidence but I put to him that his role as the Immigration Ombudsman is to monitor conditions, treatment, processing, applications and the length of time it takes in Australian detention centres. He has raised, particularly in the last 12 months, serious concerns about how those processes work and how those conditions are. He said he would be very dubious about being able to have appropriate monitoring anywhere other than in Australia, knowing the conditions and the state of things here. Does that go to your concerns?

Mr Bartlett: Definitely. Obviously he would know better than I, but again we do not want to see things go down the Malaysia path, the Nauru path, the Manus Island path or the towing back to Indonesia path. If those sorts of things are going to be done, though, when people were sent to Nauru the Ombudsman was not able to review or oversee what was happening. The Human Rights Commissioner, who was doing an inquiry into children in detention at that time, was specifically prohibited from reviewing what was happening in Nauru. The Joint Standing Committee on Migration wanted to go and visit there and was given no support from the minister to do so. So, if you are going to be sending people anywhere, at least try to put in place some mechanisms that allow some degree of independent oversight; the Ombudsman is ideal, or the Human Rights Commission. As you know, with Nauru for the first two years nobody was allowed in there. Even after that we were able to get in there but Father Frank Brennan was prohibited from going, Senator Kerry Nettle wanted to visit and was stopped, Julian Burnside—a lot of people. If you are going to send people to these places at least do not block them from having support from people.

Senator HANSON-YOUNG: Isn't that the purpose of isolated processing?

Ms van Galen-Dickie: That is the purpose and that is why the UNHCR have been really clear, in everything they have said, that if there offshore processing for any country, not just Australia, then NGOs should be able to access asylum seekers and assist there. So that it is not just the UNHCR, the IOM and the government, but the NGO community are also able to go in because you need that independence. A culture builds up within a department, within any organisation. We know in the period when people were going to Nauru the culture that inflicted itself upon the immigration department and was reviewed by Senator Vanstone towards the end of that era. That culture was played out at its worst on Nauru and Manus by the treatment of asylum seekers. When people think it is valid to bully people in the manner they did, when their job is on the line, when they are told they have to get so many people back et cetera, that culture just becomes endemic. It was punitive and it was entrenched within the treatment of people there.

The UN has been really clear that it is not just those organisations that are been paid for that have to care for people. The legislation that is being attempted to get through is a disappointment. Even though we are saying it did not work on Nauru, the previous legislation at least paid lip service to human rights obligations and international obligations we have by saying they should have attention paid to them. This legislation just clearly says it is up the minister and if he is satisfied we should all be satisfied.

Senator HANSON-YOUNG: Have either of you had much consultation or discussion with human rights groups in Malaysia who have serious concerns of how asylum seekers are treated there?

Ms van Galen-Dickie: No, I have not.

Dr Watson: We did at the Refugee Council. I am not sure if Paul Power spoke to this this morning.

Senator HANSON-YOUNG: He spoke about the conditions.

Dr Watson: We met with the Human Rights Council in Malaysia. We met with a group called Suaram**.** We met with an NGO called Tenaganita; with ACTS—A Call To Serve—which is health focused; and also the Malaysian Social Research Institute. All of them were concerned. So we met with five or six, including the statutory Human Rights Commission, and all are concerned. The week we were there was the week after there had been demonstrations against the government, so they saw that when citizens' rights cannot be protected, refugee rights certainly will not be. I do not think that is doing them a disservice to say that. We also met with IOM briefly and with UNHCR.

Senator HANSON-YOUNG: Mr Bartlett, one of your recommendations that I read out earlier was to increase funding to the UNHCR and the IOM to assist in the processing of refugee claims in Indonesia. You obviously think it is significant, because it is one of six recommendations you have made.

Mr Bartlett: Given how massively polarised this issue has been for a very long time it is worth trying to highlight the bits where there is some common ground and try to at least get agreement and some focus on those. It is pretty widely agreed that we need to strengthen the regional solution; a regional approach and a consistent approach. There was your previous question about human rights in Malaysia. I have followed groups like Amnesty and Human Rights Watch for a number of years, partly because Malaysia's human rights record is so poor.

I guess also one of the problems even for mainly refugee advocates like myself here in Australia is that we are so focused on the debate here in Australia that we tend to forget about the hundreds of thousands of refugees in our region who are in terrible danger. I think all of us would have the shared view that we need to try do more about that. One thing we can do, and it does build towards a viable regional approach in the long term, is provide more resources for UNHCR and IOM, because they are hugely underresourced. When you are underresourced and overburdened your decision making is poorer and the support you can provide to people is poorer. That is one of the reasons, amongst many, why people are more likely to think they will try their luck on a boat, because everything else is a debacle. We saw that even recently in Malaysia, with an attempt to strengthen the status of people who are acknowledged as refugees. It is one part of that step, if you want to talk about a longer term focus as well is the immediate—if Australia is going to be responsible for putting people in this situation then I think we have an extra obligation to ensure that the support they get, and that includes IOM and UNHCR, is adequate. If we are going to put people in that situation, as was mentioned, having all those other human rights organisations who are somewhat independent there to monitor means at least you have some independent oversight. Our political focus with the best will in the world is going to drift away after a while. You need to have people there. If we are going to be sending people there for years, we have to make sure they are treated well not just in the first six months but three years down the track.

So much of this has been done before in so many different ways. This did not get much attention at the time, but this is part of the suite of measures the Howard government put in place post-*Tampa* as part of an effort to

provide more support to UNHCR and IOM in Indonesia, to assess more people there, and there was an expectation that Australia would then take a large number of people from Indonesia. That never happened—we took 80 or something. If we had taken more people from there and people had thought this was a viable pathway, we will have to wait a while but at least there is some light at the end of the tunnel—

Senator HANSON-YOUNG: So we did not hold up our end of the bargain?

Ms van Galen-Dickie: It was not a bargain; it was an expectation. I am not sure if you are calling the UNHCR, but they will be able to tell you about the processing. They do have restricted staff and they do sweeps through camps to give people their UNHCR refugee card, and if you are sick or asleep or out at the time you might not get your card and they might not come back for three years. It depends on which camp and how long and how often they can service you. It is a random thing to be processed.

Senator HANSON-YOUNG: So it is not an orderly process?

Ms van Galen-Dickie: It is not orderly because they do not have the resources to make it as orderly as they would like. I know typically in the Thai-Burma area people can miss out for two or three years, waiting to get even a little card—it is like a little bus ticket with a hole punched in it that says you are in the camp and you are under their protection but you have not been assessed yet. It is quite a long process. There is that, but also if we are doing anything in the region, it is important to note that resettlement countries across the world are limited. They are Australia, Canada, Czech Republic, Denmark, Finland, the Netherlands, New Zealand, Norway, Sweden, UK and USA. They are not in our region. Australia and New Zealand are the resettlement countries in our region. If you are doing offshore processing, and then you are attempting to send people somewhere, the logical place to send them to is back to here or New Zealand. Since 2005, only 20,000 or 20,500 refugees have been sent from Malaysia by IOM to those 11 settlement countries.

Senator HANSON-YOUNG: Over what period of time?

Ms van Galen-Dickie: Since 2005. This is in the UNHCR database in their resettlement progress reports. I think that is why our intake of the 4,000 is so supported and so welcomed because it lifts the numbers by a huge amount. But in our region, people are not getting processed. Malaysia is one huge country that has an enormous amount of refugees waiting to be resettled. Indonesia is another. The people coming to us are coming from those countries, so that is where they are passing through and getting on the dangerous boat journey. That is where we should focus on processing them and taking them from there.

Senator HANSON-YOUNG: Could I ask, and perhaps it is more a question for Dr Watson, many of the asylum seekers that I meet in immigration detention centres here in Australia have been given their UNHCR card, but never even get their claim assessed.

Ms van Galen-Dickie: That is right.

Senator HANSON-YOUNG: When we talk about an orderly process or some type of list or line, as the Prime Minister would say, there is no line to get in. Is that your experience of talking to and supporting asylum seekers in detention centres as well?

Dr Watson: Absolutely. There is no line, queue or orderly process. The ones we meet here in detention are those who have been able to scrape enough money together to take the risk. CARAD also supports people in the community who are desperate, have made a claim for asylum, and their money has run out. They have arrived here by plane. They know that there is no queue. They make a decision either before they get here, because they have the means, or when they get here and they have been a student or a business person and conditions change in their country. They know that if they go back not only will they not be safe, but they have not got a chance of having their claim assessed in the way it needs to be. Do you know what I mean?

Senator HANSON-YOUNG: Yes, thank you.

Senator GALLACHER: You have articulated the situation succinctly and made it clear that Australia and New Zealand are the only two countries in the region where people can seek asylum. I was watching Amanda Vanstone this morning on TV, she made this great comment that the good thing about being an immigration minister is that there are thousands of people every day telling you how to do your job but there is only one person who actually signs to approve measures. If you were immigration minister for a day, how many people would you let in and what would you do?

Mr Bartlett: As I said I would increase our overall intake. I think we could go up to 20,000 without terribly much difficulty.

Senator GALLACHER: And at 20,000, would there still be people not dealt with?

Mr Bartlett: Of course there would, yes.

Senator GALLACHER: So it is just a question of a benchmark or a poll. We would still have the issues and the problems?

Mr Bartlett: Well, I guess this—

Mr Watson: But the whole world has got these problems and we take such a minuscule number compared to the numbers in the rest of the world and the numbers in our region. As Marianne was saying, around the Indian Ocean, being in Western Australia, there are more refugees than anywhere in the world. And we take how many? 13,000, most of them from the Indian Ocean and South-East Asian region. But we could take 20,000. We could take a lot more. I think that more attention should be paid to the agreements made through the Bali process, so that the burden—I cannot think of another word but I do not mean 'burden' in a derogatory way—can be shared between countries.

Senator GALLACHER: Statistically you could probably prove that Australia is punching over its weight given our size relative to the region and relative to the world's population.

Dr Watson: I do not think that that is true.

Senator GALLACHER: The point I am trying to make is that we would only be moving the goalposts; we would not be settling the issue of people engaging criminals to get on dangerous vessels and putting their lives and their children's lives at risk.

Dr Watson: There are always risks. Talk to people who have been coming here since postwar Europe. They took tremendous risks. They all needed a smuggler or an agent to help them do whatever they did to get to being safe. Last night I had a meal with a refugee family I know quite well. The man is crippled with a post-work injury and he said, 'The thing about Australia is that I am safe and my children are safe,' and she struck up and said, 'And so am I, and the water is clean.' They are from Afghanistan. They could have been from anywhere.

Mr Bartlett: I guess one of your points is that we cannot help everybody, and that is true. Until we can get world peace—and I did not add that as a recommendation—we should be doing what we can in that regard. The government is currently making efforts in places like Burma, but these things are slow progress. But the fact that you cannot help everybody does not mean that you can say it is all too hard or use it as a justification for adopting any policy that is going to deliberately inflict harm on people. I really do want to emphasise this: we sent back people who were killed. It was not deliberate, but it was an outcome of not putting in place adequate protections last time with offshore processing. Refouling people is bottom line the worst breach you can imagine of the refugee convention and human rights law. It was not deliberate and perhaps sometimes it is unavoidable, but I think we could have done better in preventing it. At least we want to make sure that does not happen.

I guess it is recognising that these are human beings, not in a bleeding heart sense but recognising that they are making rational decisions. They look at all of their options and, if they are in a country like Malaysia, where they are not safe for a prolonged period of time—that is very clear and, if we send people back there, the least we can do is make those groups safe—then of course they are going to explore other options.

The other part of a viable long-term regional approach to this is us not just taking in more people but also enabling people to exist in other countries at least in safety. They will not get permanent settlement any time soon, I do not think, in places like Malaysia and Indonesia. I do not like this Malaysian approach, obviously, but perhaps there is that little seed within it—of treating people better and giving them security and stability there—that may be able to grow within Malaysia. Obviously the UNHCR's preferred option is not this. It is like that old joke: if you ask someone for directions to get somewhere and they say, 'I wouldn't start from here.' I would not start from here either, but we have got to work from where we are.

The more safe people are where they are, the more likely they are to just sit it out. Let us also not forget—and this is very relevant for the Burmese—that, if things improve, most refugees would rather go home. They are not all just coming here because it is a land of milk and honey. In fact, if they are just coming here because it is a land of milk and honey, they do not get in, because economic refugees are screened out by a process. We should put ourselves in their shoes, think about that long term and recognise that it is going to take 25 years. We should at least take those steps, rather than think we will stop people taking those risks just by treating them more and more harshly. They are always going to keep taking the risks.

Dr Watson: Andrew is saying there that people were not sent back from Nauru with any mal-intent, but they were sent with no care. Our concern about the 800 people to be sent back to Malaysia is that nobody knows really the terms under which that is being negotiated or will be further negotiated. It is punitive—we cannot see it in any other way—and it is contrary to the intent of the convention and the declaration on human rights to be punitive and to be an example for other people.

Senator HANSON-YOUNG: Following up on what both of you have just said, there are no legal protections in the agreement and there are no changes or commitments to change domestic law in Malaysia. It would still be illegal to be an asylum seeker.

Dr Watson: That is right.

Senator HANSON-YOUNG: With no actual legal protections for people who are sent to Malaysia, it seems as though this entire deal is based on a 'trust us; she'll be right' approach. Based on your experience of how these things have happened in the past—Nauru and Manus Island—do you think that idea of 'trust us' is really good enough?

Dr Watson: No.

Ms van Galen-Dickie: On Nauru the treatment by the Nauru government was not at fault. Andrew and I met with them more than once. The president kept changing every time we went so we met with different officials. They were very concerned that things were extending further than the MOU they had put in place. The MOU was pretty clear people would processed and then moved on, but they were not getting moved on. So they were fractious about that issue. Their treatment was not at fault. Part of the reason the High Court did not consider Nauru in detail was because it was not actually doing what the act said. We were still processing; the country was not. So making a declaration about what the country would do was not actually happening because DIAC was doing it.

In the case of Malaysia, nobody knows what they would do. I heard you asking Paul Power about legally binding assurances. There is a lot international law on legally binding assurances and what they call diplomatic assurances, which can be MOUs. The international criminal court of justice and the European Convention on Human Rights all talk about it. The conclusions are that diplomatic assurances are not enough to ensure human rights. They have really looked at it—it has not been with refugees—is when you transfer people to countries with the death penalty. Even Australian courts have considered that and come up with the minister being satisfied the person will not get the death penalty in the USA, for example, is not enough. It has to have more than just the assurance that we are seeing, from my point of view.

Mr Bartlett: The other thing I would want to emphasise is that, there has been understandable and valid criticism of the inadequacies of Malaysia's protections and mechanisms et cetera, but the point with Nauru was that Australia was basically doing it and we did not do it adequately. Even if it is our officials doing it, there is a reason why parliaments put in place all these independent oversights and reviews; it is to ensure it is done properly. I think it human nature that, when you know you are making decisions that are not going to be reviewed, standards can drop much more quickly than when you know you have got somebody looking over your shoulder. Whether it is Australian officials or Malaysian officials, at a minimum you have got to have some sort of independent oversight of what is happening. I hesitate to say it occasionally because it can be used as a positive for Nauru, but IOM were far better at looking after asylum seekers than the people here now.

Ms van Galen-Dickie: It was not their job either. They were pretty clear what they were being made to do on Nauru was not their job, but they were better.

Mr Bartlett: They gave much better care than the prison mob that run the detention centres here. That is not the issue. Obviously conditions in centres are important, but the issue is length of detention, some hope for the future and proper independent oversight of the processes so at least there is some independent scrutiny to see that whatever is being done is being done properly.

Senator HANSON-YOUNG: Surely you need some form of judicial review to make that independent oversight have any teeth?

Mr Bartlett: That is obviously why it is better in Australia. The mechanism is already here; you do not even have to put them into place or construct them artificially.

Senator HANSON-YOUNG: The direct point of the amendments to the bill that have been put forward in parliament this week was to remove the ability for judicial review—remove any access to natural justice.

Ms van Galen-Dickie: For the decision to send people away.

Senator HANSON-YOUNG: We can have as much independent oversight as possible but if we cannot actually challenge anything then—

Mr Bartlett: It is not the first time natural justice has been removed from the migration process.

Ms van Galen-Dickie: It was removed from the decision to send them to Malaysia. The second issue is what is happening there when they are being processed by the UNHCR in assessing their claim for refuge and what happens to them afterwards. Whatever agreement and whatever government comes up with in the resettlement

country, if they are not held in detention—which I doubt they would be for long periods of time, and they are released into the community—they could be sitting there. We have to get this into people head: they could be sitting there for 20 years. If you are sending a minor who is 15 years of age they who might be 35 before a country decides to resettle him. It was pretty clear under the agreement that this committee is considering that Australia was not going to be a country that would resettle those 800 people. New Zealand will not take 800 people. Whoever resettles them, those people will sit there for years and years—not five or six, but up to 20. I deal with pro bono refugees here in Canberra who have come through the process and they are children of refugees who fled from Burma. They were born in the refugee camp. We have accepted them but we have not accepted their parents. It is a long process. These kids are 20, 25 and it took them that long.

Senator HANSON-YOUNG: We would be knowingly putting them in that situation?

Ms van Galen-Dickie: We are knowingly putting those people in that situation and that is probably the most offensive part.

Dr Watson: We met one Rahinga man in Kuala Lumpur who had been assessed as needing protection and I think he has been there for 24 years. We met others from a range of places who had been there for 11 and 12 years. It is untenable, it is unjust and it is punitive.

Senator CASH: The government would clearly dispute that statement and I say this to yourself, to Mr Bartlett and to Ms van Galen-Dickie. As recently as yesterday in the Senate, Senator Carr in answer to a question in relation to the human rights provisions in the agreement said: 'Our position in regards to Malaysia is that the protections are built into the agreement with the Malaysian government and that there is a provision for the UNHCR to be actively engaged in the processes involved to an extent that is beyond anything that ever occurred before this agreement.' Does that not at least give you some level of satisfaction?

Dr Watson: No.

Mr Bartlett: I guess I am trying not to just fall into political rhetoric.

Senator CASH: This is what the Australian government has consistently told the people of Australia. It is a stock standard line: 'The protections are built in to the agreement.'

Ms van Galen-Dickie: Except they are not 20 years of protections.

Mr Bartlett: It might be built into the agreement but how do you make it enforceable? If there are other things in place, such as independent monitoring so people can start waving the flag and start making noise if it is not happening. That would be a start. Again, I could say that in regards to the previous situation. Probably a good parallel would be the ones that were towed back to Indonesia and were in effect—at least those that were found—put under the care of UNHCR in Lombok and basically just sat there in limbo forever. Some of them jumped back on boats eventually, others were returned and others disappeared into who knows where. It was only UNHCR even trying to get attention to it. I am trying not to blame the previous or current government, although obviously if you all agreed with me then it would all be solved—it is more that the scrutiny disappeared. I made the point before that we could have perhaps taken significant large numbers from Indonesia continually from 2001 onwards, but everybody's attention went elsewhere as the boats reduced. It is good thing, I suppose, for those who want to have people not risking their lives on boats, but the attention disappears. I am not saying nothing happened—there were still ongoing efforts to do bits and pieces with the Bali process—but the prioritisation and the imperative was not there, so the attention dissipated. Unless you have mechanisms built in place that keep ensuring that once the political focus drifts elsewhere, then—and that is obviously much more likely to happen to people that—

Senator CASH: And those mechanism are not in the current agreement?

Ms van Galen-Dickie: No.

Mr Bartlett: Well, I—

Senator CASH: Or the legislation.

Mr Bartlett: Not that I can see, and that they are obviously not in the legislation.

Senator CASH: Mr Bartlett, I will put a serious of questions on notice to you, but in your opinion, does the UNHCR convention provide a basic level of protection for people who are subject to it?

Mr Bartlett: Refugee Convention?

Senator CASH: Correct.

Mr Bartlett: For people who are subject to it, yes.

Senator CASH: Yes, it does. What do you believe are the key protections of the UNHCR refugee convention?

Mr Bartlett: The absolute key one is nonrefoulement, which I think we have breached previously. We did inadvertently, and that is something that is absolute. Obviously that is meant to be in the current agreement and that is good, but—

Ms van Galen-Dickie: Treatment under law as nationals in the same country. That includes access to education, health, housing, work rights.

Senator HANSON-YOUNG: And the courts.

Ms van Galen-Dickie: And the courts.

Senator CASH: Could I get you to take on notice what you believe are the key protections of the refugee convention? Are these protections enshrined in the Malaysian agreement?

Mr Bartlett: I will take that on notice so we can do a more thorough response.

Senator CASH: Thank you very much, I appreciate that—enshrined and able to be upheld in the Malaysian agreement.

Ms van Galen-Dickie: Yes, all right.

Mr Bartlett: I will ponder that in the context of Nauru and particularly Manus Island, given that is the shared position—

Senator CASH: My preference is that you contemplate it in relation to the Malaysian agreement.

Mr Bartlett: Yes, no worries.

Senator CASH: If you wish to provide additional information please feel free to, but I am interested in the Malaysian agreement as such, because that is what we are currently contemplating.

Mr Bartlett: Yes, but I guess—

Senator CASH: Thank you.

Mr Bartlett: The other alternatives are also part of terms of reference. There is a range of them on the table.

CHAIR: Well, I am not sure that it is. But if you want to add the information feel free.

Mr Bartlett: Well, there is a range of them on the table in the public debate—that is what I meant.

CHAIR: Yes, in terms of the public debate. Thank you very much to Mr Bartlett, Ms van Galen Dickie and Dr Watson via telephone.

Proceedings suspended from 12:07 to 13:04

BURNSIDE, Mr Julian AO QC, Policy Committee, Liberty Victoria

DOWD, the Hon. John AO QC, President, International Commission of Jurists (Australia)

Evidence from Mr Dowd was taken via teleconference—

CHAIR: The public hearing of the Legal and Constitutional Affairs References Committee inquiry into the agreement with Malaysia in relation to asylum seekers will recommence. I am pleased to welcome a representative of the International Commission of Jurists (Australia), Mr John Dowd, and Mr Julian Burnside from Liberty Victoria. We have received submission No. 4 from the International Commission of Jurists and submission No. 15 from Liberty Victoria. Are there any amendments or alterations to either of those submissions?

Mr Dowd: I have some complementary comments which were not covered by the submission and some additional material that I can cover in an opening statement.

CHAIR: That is fine. Mr Dowd, would you care to make an opening statement, please.

Mr Dowd: Thank you for the opportunity to appear non-visually before you. I apologise for my inability to arrange to be before you in person and intend no discourtesy by that. I want to say at the outset that the International Commission of Jurists (Australia) is opposed to mandatory detention as a matter of principle as being in breach of our refugee convention obligations. Secondly, we are opposed to processing people offshore. Thirdly, we are opposed to the exclusion zone, which is in breach of our international refugee convention obligations.

Our opposition to the proposed arrangement—it is not an agreement as your terms of reference suggest—is based, firstly, on the fact that it will not work. During the period between the announcement of the arrangement, before the arrangement was concluded, some 570-odd people arrived. From the time of the arrangement until the High Court declared it unlawful from Australia's point of view, some 340-odd, I think, people arrived. Since the High Court decision time there have been a couple of hundred arrivals, including the 122 that arrived last night and in the early hours of this morning. It is our view that the 800 people to be processed in Malaysia will, after a slow start, in addition to those already arrived, arrive within six to 12 months. Therefore, the arrangement is, from our point of view, complete and then the floodgates will open again. The arrangement will not constitute a deterrent and, because of the now 900-odd that have arrived, anyone wanting to sell Australian residence to prospective customers will have no difficulty persuading that Australia cannot get its act together.

The next point is that we are opposed to Nauru and Manus Island but do not believe that those countries cannot be brought within the existing 198A provisions. We have heard the federal Solicitor-General's advice but do not know with what he was briefed. There are going to be circumstances in terms of practices in Papua New Guinea and on Manus Island, with their ratifying the treaty and it coming into effect, where they will be able to comply to the extent that it would satisfy the proper exercise of discretion.

The next point I would like to make is that we are opposed to the minister being the guardian, as is demonstrated by what the High Court has done, for unaccompanied minors. It is clear that that is a conflict of interest with a government imperative to do something political about this issue and the minister's obligation as a guardian. We have put out a press release to say that that should not continue. The other point I would like to make is that the whole arrangement is predicated on a false premise that 800 would be a big enough number. The evidence is, of course, to the contrary.

Another point I would like to make—it was covered in part in the submission—is that we have entered into arrangements by way of treaty on a whole range of issues—the rights of the child; the rights of people with disability; CEDAW, the Convention on the Elimination of Discrimination of Women. All of these cast on Australia obligations—where it has been domesticated in the law, legal obligations and, where it has not been domesticated, moral obligations—to deal with those treaties. The primary concern is, of course, in the annexure to the arrangements. There are issues such as self-reliance and basic support in annexure 3.2, where in fact no support will be given to the refugees if they are taken illegally to Malaysia. It means that women, particularly in order to feed children and provide accommodation to children, very often have to resort to prostitution and other undignified activities for the purposes of survival, and indeed some men will. It is appalling that Australia, with its once high reputation for protecting people and human rights, should subject people to that. These people come to Australia lawfully. They may not enter lawfully, but once they make the claim they are lawful, irrespective of what happens.

The last point I would like to emphasise is that this arrangement does not protect non-refoulement. In fact, it gives the right to Malaysia, under the arrangements, to send people back to their country of origin if they are not assessed to be refugees, and there is not necessarily a proper appeal mechanism, because there are mechanics that

need to be worked out. Many of the people that are sent back to countries such as Sri Lanka, Afghanistan or wherever they come from will be subjected to torture, detention and in some cases death. That is not something that we ought lightly to entertain. We were one of the earliest countries in the world to enter into the refugee convention and the 1967 protocol, and we ought to stick to that and not enter into this agreement. I otherwise refer you to our submission.

CHAIR: Thank you, Mr Dowd. I will just clarify one thing you just said. You said something did not prevent nonrefoulement. Was it the agreement?

Mr Dowd: Yes, the agreement—sorry, the arrangements. The arrangements do not prevent nonrefoulement, and I think it is also referred to in the annexure.

CHAIR: Okay. Thank you very much. Mr Burnside, would you like to make an opening statement?

Mr Burnside: Yes, thank you. Could I start by saying that I agree with everything Mr Dowd has said but I would make observations about two aspects. He referred to mandatory detention and the ICJ being opposed to mandatory detention. I agree with that, but with this qualification: what is objectionable is mandatory indefinite detention. I do not think anyone would rationally oppose the idea that, if people come into the country without any prior authority and without papers, those people should be detained initially for health and security checks. The real question is: should that be just for a month, which is a sensible time for that function, or should it be for as long as it takes to process their application for asylum? I think the record so far in the last decade is something like eight years. To hold an innocent person in detention for eight years and not be able to tell them when, if ever, they will be released is really at the heart of the problem that Liberty Victoria object to. Most people say 'mandatory detention' when they are referring to the indefinite aspect of indefinite detention. The second thing he said that I do not agree with is: he referred to the floodgates opening again if 800 people come. 'Floodgates' is one of those colourful metaphors that carries with it an impression of scale which is utterly false in these circumstances. Every year approximately four million people enter Australia for tourism, business, study et cetera—temporary stays, in any event. So, out of four million arrivals, the average rate of unauthorised arrivals, the medium-term average, is about 1,000 a year. The recent peak was 7,100 I think last year; it is now about half that this year. But, even if you take 7,100 as the benchmark, that is an incredibly small percentage of four million arrivals. So, if we are talking about border control, we have got a near-perfect system, so talking about 800, a thousand or two thousand as being floodgates opening is probably not a useful metaphor.

Mr Dowd: Julian, can I say: I agree with both your qualifications.

Mr Burnside: Thank you. I will start with what we see as one of the basic problems with the proposal. I am now addressing the current proposal rather than the one that has been knocked on the head; there is not a lot of point in dealing with what has already passed into history.

CHAIR: What you define as the current proposal?

Mr Burnside: The current bill that is before the parliament.

CHAIR: Okay.

Mr Burnside: It is referred to, both within the bill and in the public arena, as 'offshore processing'. What that does is to conceal more than it reveals, because what it is about is not processing people offshore; it is about sending them offshore and never letting them back in again. People who are applying for asylum are pushed away to another country, and there they become that other country's problem, albeit at our expense. It is not just for the purpose of processing their claim; it is for all purposes. The difficulty with that, and what distinguishes it from the arrangement with Vietnamese boat people in the late seventies, is that the key point with any asylum claim is resettlement—resettlement in a place which is safe. I do not think Liberty Victoria would object if people were being processed on the moon, as long as the result of a successful application for protection meant swift resettlement in a safe country. So it distracts attention to talk about 'offshore processing' when what we are really doing is pushing people away from our borders once they have entered Australian territory and saying, 'We will not listen to your claim for asylum.'

That is important because it involves sending people off to face further dangers, notwithstanding our obligation under the refugee convention. In addition, what is seriously objectionable about the current bill is section 198(AB) which says, in substance, that the only test for declaring a place appropriate for offshore processing is the national interest. Really, that is looking at the wrong thing. Our concern with asylum seekers ought to be their interests and their protection. The national interest is really just a proxy for transient political interests of the government of the day, and anyone who denies that I think would be an optimist. The national interest, even if altruistically conceived, does not in the least way address the interests of people to whom we have protection

obligations under the refugee convention, and anything that looks only to the national interest and not to the interests of refugees in my opinion is simply pointing in the wrong direction.

The other difficulty with this, once one steps over those first two difficulties, is that, if the legislation as presently proposed were implemented, it would involve people who come to Australia seeking our protection being sent to countries which may not and, in some instances, very likely will not offer them anything like the protection to which they are entitled under the refugee convention. There has been plenty of public debate about what does happen to refugee applicants in Malaysia. Sending them to any country that is not a signatory to the convention has problems. Sending them to other countries—for example, Nauru, or Manus Island, which is part of PNG—creates even further problems.

Malaysia, we think, will not offer protection. Nauru, we think, cannot offer protection. Nauru is an interesting case. It is an interesting case because we have tried it before. Nauru as a nation is bankrupt. It has a population of I think between 8,000 and 10,000 people. It is very small physically and it does not have sufficient water or food supply for its own people. They ship in food and water in order to sustain their own people.

The idea that Nauru is better able to take, receive and hold indefinitely people who come to Australia asking for protection is ludicrous. Let us suppose that, because of adverse events overseas, 8,000 asylum seekers arrived here during the next 12 months. Can anyone sensibly say that Nauru would be capable of accommodating an additional 8,000 people, doubling its population? It only has to be stated to be knocked back. It would not just be for the temporary purpose of processing their claims; it would be for as long as it takes to find them a safe country that is willing to resettle them. Nauru's population would be doubled for the next year, two years, 10 years or however long it takes. That, with respect, is a crazy idea; it is self-evidently crazy.

Australia receives between 200,000 and 300,000 permanent new migrants every year. We do that without any particular demographic or social problems. How could it possibly be thought that we cannot manage an extra 8,000 people but Nauru could manage an extra 8,000?

Manus Island has different problems. The population of Papua New Guinea is significantly greater than that of Nauru. Manus Island, which is the specific place used under the Pacific solution and which is being toyed with by I think both major parties, is rife with malaria. The idea that we can discharge our protection obligations to people by sending them to a place where they have a really substantial chance of contracting malaria is difficult to understand. In addition, New Guinea's finances are not very strong, so its capacity to offer real protection to people is necessarily very limited.

In this connection I have seen a copy of the opposition's proposed amendments which would substitute clauses 198AA, 198AB and following with a provision that the designation of a country to be an offshore-processing country need be determined only by reference to the fact that the country is a party to the refugees convention. That is an interesting idea but it ignores completely the reality that that would mean in our region Nauru or Manus Island. Although it is true that Nauru has signed the convention and will shortly be bound by it, the fact is that it cannot offer the sort of protection or anything like the sort of protection which we by signing the convention have agreed that refugees are entitled to receive.

I step back by way of conclusion and say that both the Malaysian solution and the Pacific solution are put forward as solutions to a problem, but what is the problem? The problem it seems is one of several possible things. The problem might be the demographic difficulties associated with Australia receiving an influx of boat people, but that could hardly be the problem because the number we receive is so small. By international standards and by any relevant measure the number of boat people who arrive in Australia is incredibly small. As I say, the long-term average is about 1,000 a year and the peak is seven thousand and a bit. They are very small numbers by any standard.

Is the problem then overcrowding in detention centres? That has been a problem in recent times but the reason it is a problem is that we insist on holding boat people—not other asylum seekers, just boat people—in detention indefinitely. That means, on average, you have about two or three years supply of boat people in detention at any given time. That will necessarily lead to overcrowding at times when there is a spike in the number of arrivals, and there was a spike last year, principally of Hazaras from Afghanistan, where the Taliban are engaged in ethnic cleansing, and Tamils from Sri Lanka as a consequence of the end of the Tamil liberation struggles in that country. Given those spikes in numbers, it is a certainty that we will see overcrowding in detention centres if we insist on holding these people in detention indefinitely. Not only will we cause overcrowding problems, we are certain to cause massive psychiatric harm to those people. We have seen it before. All the psychiatrists agree that this is what happens. It happened during the early 2000s and it is already happening again with long-term indefinite detention that we have seen recently.

These are problems that are wholly unnecessary and would be solved if both major parties could brace themselves and say 'Actually, it is not really necessary to hold people for more than one month for initial processing and, after that, release them into the community.' Some people object, saying 'This looks like saying we're open to all comers.' There are a couple of things against that. The first thing is it is actually quite dangerous to get here by boat. That is one of the reasons we get so few. It is also one of the reasons almost all the people who come by boat turn out to be genuine refugees, because you have to be pretty desperate to get on a boat and take that risk to save yourself. You do not do it as a lifestyle choice.

The second thing that arises out of it is it is worth comparing our treatment of asylum seekers who come by boat with asylum seekers who come by air. Those who come by air do not necessarily come on legitimate papers. Anyone can figure out that asylum seekers who are resourceful enough will get papers that are dodgy. Asylum seekers who come by air on tourist visas or student visas or whatever and then apply for asylum once they arrive here are allowed to stay in the community after their initial visa expires. They stay in the community for two, three or four years waiting for their process to be completed. Only about 20 per cent of them succeed in establishing their claim to asylum. Boat people, on the other hand, who arrive in smaller numbers are detained indefinitely and turn out, in 90-plus per cent of cases, to be genuine refugees, entitled to protection. So the great irony of our position is that we spend a billion dollars a year detaining the people most likely to be genuine refugees and causing massive psychiatric harm on them which, one way or another, is going to cost the Australian public. This is either because they will claim compensation—and a number of those claims have been settled by the government—or because they become less effective contributors to Australian society once they are allowed into it.

It seems to us that the real problem is not a need to process people offshore but rather a need to process them in the community, because the real problem is the harm we cause and the overcrowding we cause by indefinite detention.

Senator CROSSIN: Mr Burnside, thank you for your knowledge and input on this issue. Can I ask you about your understanding of what is happening in Indonesia and whether or not, if we do not have offshore processing and we totally abandon, even, some regional solution, we would have to turn our attention to what is happening in Indonesia. I premise that by saying I think everybody wants to ensure that people do not put their lives at risk by coming here. Have you had a look at what is going on in Indonesia with refugees we take from there or some process that could be enhanced in that country?

Mr Burnside: Thank you for the question. There are two aspects of it. The first is, you referred to regional cooperation; a regional solution. If that were a regional solution of the sort that we saw in the late seventies it would not be any great problem. The point is it is not regional processing, it is pushing them away to countries in the region—forever. It is only a regional solution if it includes swift and fair processing and swift resettlement for people found to be genuine refugees. To say that we can simply push people back, send them to Malaysia or wherever and let them take their chances on being accepted as refugees and then let them hang around for as long as it takes to be accepted by a country that offers safety is not a solution at all. It is just putting what we conceive to be a problem into the hands of someone else.

The second thing I would say is that you made the fairly self-evident observation that we are all concerned to avoid people losing their lives at sea. I am not sure that that is genuinely motivating the present discussion. I will tell you why: the opposition at least has suggested the reintroduction of temporary protection visas. Temporary protection visas were very directly the cause of 353 lives being lost on 19 October 2001. Most of the people who drowned when the SIEV X sank were women and children who were trying to be reunited with their menfolk who were already living in Australia as refugees. Because they were on temporary protection visas they were denied family reunion, and the only way they could be reunited as a family was to use people smugglers. A temporary protection visa is probably the most potent way of increasing the chances of people drowning at sea. Forgive me if I am being cynical, but I am not convinced that a concern for the lives of refugees is really animating most of the debate that has been going on in the public arena over the last while.

If we were really concerned about the well-being of refugees, I think we would have to accept that refugee flows are always untidy, they are never a regular process, they usually involve danger and we might as well be candid and say those who take the greatest risks are the most likely to be genuine refugees. I do not know what is the solution to the reality that some people who take a risk lose their lives. If you like, you can regard that as one of the factors that thins the flow. Maybe we have to be brutal about it and say okay, that is the way it works.

Senator CROSSIN: I was keen to know if you have any research or knowledge about what is happening in Indonesia.

Mr Burnside: Not in an organised way, but I do know this: in Indonesia—not a signatory to the convention—people who go to UNHCR and get accepted as refugees then face 10 or 15 years before a signatory country will put up its hand and say they can go there and they will offer them safety. In the meantime they have to live in the shadows because they are at risk of being thrown in jail if they are found—

Senator CROSSIN: Do we take a certain number of those ourselves from Indonesia?

Mr Burnside: I think four or five a year.

Senator CROSSIN: Hundred?

Mr Burnside: No, four or five people from Indonesia. I am open to correction on that but that is my understanding. It is a very small number. Most of our offshore resettlement is from camps certainly in Africa, and maybe other continents as well. It is a very small number of UNHCR endorsed people that we take from Indonesia.

This tells you one of the realities which we might as well face—it is the elephant in the room. Let us suppose you have escaped the Taliban and let us suppose you have travelled all the way down through Muslim countries, which offer free passage to Muslims, and you have got yourself to Indonesia and you have gone to the UNHCR and they have said yes, you are a refugee. You then have two choices. You can either hang around, at risk, for 10 years or so until a country says they can go there, or you can take a risk and jump on a boat. I know what I would do—I would go on a boat. I would take a chance—most Australians would. The tragic irony of the present position is that so many Australians who probably do not understand what it is like to be a refugee are willing to criticise asylum seekers for doing precisely what they themselves would do if faced with the same problem.

Senator CROSSIN: Can you see a way that the commitment of the government to have a regional cooperative solution could work?

Mr Burnside: In its present form, no, because it is not a regional cooperative solution in its present form.

Senator CROSSIN: What would need to be changed?

Mr Burnside: You add to the processing a guarantee that the people who are assessed as refugees will be resettled in a timely manner. That may mean in Australia, and no doubt New Zealand would take some.

Senator CROSSIN: It might mean not in Australia, either?

Mr Burnside: It depends. That is where you run into the fact that we get so few asylum seekers. Can you imagine Canberra getting in touch with Washington, and saying: 'We've got this flood of 7,000 boat people. Would you take some of them off our hands; they've been assessed as refugees in Malaysia.' I think the Americans would laugh at us. If you said that to Britain or any of the European countries, they would laugh at us, because we are getting probably five per cent of the number of informal arrivals that they get. They would say, 'What's your problem? Why can't you cope?' To that question, there is really no good answer.

It worked with boat people from Vietnam in the late seventies. It involved, I think, Australia, the United States, Canada and New Zealand. The United States, for obvious reasons, took a very substantial number of them because they were the main cause of the refugee problem in Vietnam at the end of the war. We took, I think, 85,000 in total over three or four years. It was done on a bipartisan basis because both major parties regarded us as having some sort of responsibility for what had gone on in Vietnam.

I have some difficulty understanding why both major parties do not recognise that we have a corresponding obligation to Hazaras, who are fleeing ethnic cleansing at the hands of the Taliban. We are in Afghanistan fighting the Taliban, who are trying to kill these people. It is notorious that, when the Pacific Solution was in operation, from September 2001, America and its allies invaded Afghanistan. By February 2002 they said the Taliban were vanquished. We said to people who were held on Nauru, 'You're not refugees anymore, although you are Hazaras, because the Taliban are out and therefore it is safe for you.' We literally forced a lot of them back to Afghanistan where a number of them were hunted down by the Taliban and killed. I really do wonder why it is that we cannot draw a lesson from that.

I know of one particular case where a man was sent back to Afghanistan by Australia from Nauru. He got back to his village where he was hunted out by the Taliban, who dragged him into the town square, threw him down a well and dropped a hand grenade after him. If that is what we regard as consistent with our protection obligations, then I think we have lost the plot.

Senator GALLACHER: I have listened to your numbers and you have obviously researched all that, but I suppose the political question is that only Australia and New Zealand are offering asylum to people in this part of the world. Our combined populations, when we look at the geography around us, are pretty small. Do you have an

in principle position that has no upper limit or lower limit—you just obey your obligations and if one million people are heading this way, then take them on that basis. Or do you have a political view?

Mr Burnside: That is a fair question. I would not venture a political view, because I am ignorant in relation to politics. But I would say this: given that we can cope with a couple of hundred thousand new migrants every year—that is to say, permanent new migrants—that probably identifies the upper limit. History tells us that the arrival rates have always been very small. Geography explains why the arrival rates have been very small. Even in the year of *Tampa* the total arrival of unauthorised boat people was, I think, 4,100, a really small number. Is there an upper limit to my thinking? Yes. If the arrival rate got up to 20,000 a year in more than just a spike, then I would say we have to rethink the whole thing. But I cannot imagine that is likely. My understanding of the figures recently put out by the department was 600 a month—7,200 people a year. That is a walk in the park. I just do not think for an instant that Australia would have difficulty absorbing 7,200 people a year, even if it was on a continuing basis.

Senator GALLACHER: A recurring theme comes from constituents that because these people have access to funds or property or sources of money that allow them to pay criminals to get them here, that somehow they are advantaging themselves over more deserving but poorer asylum seekers.

Mr Burnside: That is a reasonable question. There are two things about that. Firstly, whether or not you have access to money makes no difference to whether you are a refugee. You only have to look at Jewish refugee flows in the 1930s to understand that. Secondly, I have had a great deal to do with Hazara refugees from Afghanistan. Typically, they will scratch together whatever it takes to get one son to safety and, typically, it is the eldest son. Interestingly, the cheapest place to get to is Australia. It costs more again to get to Europe and it costs more again to get to America. So the fact that they arrive here is not a measure of their wealth; it is a measure of their poverty.

In addition, many of them borrow money in order to get the amount that is necessary to get one son to safety. When the son gets to Australia and is locked up for a few years, waiting to hear whether they will be released, that causes terrible problems back in Afghanistan because the son is not able to work and send money back to repay the people who have lent money to them.

By the way, can I exploit the fact that you have asked such an interesting question and give you one little anecdote. There has been a lot of rhetoric recently about the evils of people smugglers. Let us accept they are not all perfect specimens of humanity. But I think they are not all equally wicked.

One Afghan I know, a Hazara, used a people smuggler, who is a Pashtun. Pashtuns of course are the ethnic group who have, for a long time, persecuted the Hazaras. This people smuggler had a set tariff—this much to Australia, twice as much for Europe and three times as much for America. But for Hazaras he offered half-price. He could see what a hard time they were having under the Taliban. He could not have been all bad. Somebody who was prepared to offer half-price for his enemy is not necessarily a dreadful person. So I just think we need to be a little bit careful about bagging all of the people smugglers as irredeemably awful people. Also, we need to recognise that whilst the rhetoric has been 'Let's smash their business model,' they provide a service without which boat people cannot escape. We need to think very carefully about whether it is a desirable thing to cut off the only line of escape for people who self-evidently are in real trouble.

CHAIR: Mr Dowd, you have said that the 'agreement'—which in fact you said was not an agreement—with Malaysia does not prevent nonrefoulement. You are saying it is possible for a person sent to Malaysia, pursuant to the agreement, to be returned to the place from which they came and placed in harm at the initiative of the Malaysian government?

Mr Dowd: The arrangement is that if they are found not to be refugees, then Malaysia, if it cannot send them back to Australia, has not protected them from refoulement, sending them back to the country of origin. If they are a refugee, they are dealt with in the order provided by the UNHCR. If they are not, then there is no protection in that arrangement against refoulement and of course the arrangement is subject to Malaysia changing its policy at any stage. There is absolutely no obligation on Malaysia, moral or otherwise, not to send them back.

CHAIR: So there is no special status that they obtain vis-a-vis other refugees or asylum seekers in Malaysia itself?

Mr Dowd: No.

CHAIR: You made a comment about the floodgates being opened again once the 800 had been sent to Malaysia and the 4,000 received by Australia—and, as I say, you resiled somewhat from the 'floodgate' description. But I assume it would be open to the government, if it effected this agreement, to negotiate a further

people swap, if they had exhausted their 800 people sent to Malaysia, and to refresh or renew the arrangement. Presumably, they could offer another 800 asylum seekers, could they not?

Mr Dowd: Of course they can, but the 800 is an exchange for the 4,000. That is 1,000 a year; it is going to take four years to implement. If they are going to come to some arrangement with Malaysia—or for that matter any other country; the Philippines, for instance, is a refugee convention country—we would have to take another number. I personally believe that is correct and I agree with Julian Burnside that we should be taking about 20,000. I also agree that Nauru and Manus Island are not solutions at all; I am just saying that maybe they are made eligible. I think perhaps I would rather be on Nauru than in a barbed wire enclosure up in northern New South Wales in the heat. But those are not solutions and there is no present regional solution. They have talked about it, but the Bali arrangements are not in effect and, unless you have a large number of countries—South American countries or whatever—to assist in placing people, they have to be processed in Australia, and 20,000 is the sort of figure that I would come to that we could handle. But that is a matter for, as Julian says, a rethink.

CHAIR: Okay. We have run out of time. I thank both of you, Mr Burnside and Mr Dowd, for your evidence given to the committee this afternoon.

Mr Dowd: Thank you.

Mr Burnside: A great pleasure, thank you.

ALLEN, Mr Stephen, First Assistant Secretary, Offshore Initiatives, Department of Immigration and Citizenship

FLEMING, Mr Garry, First Assistant Secretary, Border Security, Refugee and International Policy Division, Department of Immigration and Citizenship

PARKER, Ms Vicki Louise, Principal Adviser, Border and Humanitarian Strategies, Department of Immigration and Citizenship

SOUTHERN, Dr Wendy, Deputy Secretary, Policy and Program Management Group, Department of Immigration and Citizenship

[13:47]

CHAIR: I now welcome representatives of the Department of Immigration and Citizenship to the table. We have the submission from the department; that is submission No. 31. Thank you for that. Are there any amendments or alterations to the submission?

Dr Southern: No, Senator.

CHAIR: Thank you. I remind senators that the Senate has resolved that an officer of an department of the Commonwealth or a state shall not be asked to give opinions on matters of policy and should be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. The resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policy or factual questions about when and how policies were adopted. Officers of the department are also reminded that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for the claim. We invite you now, if you wish, to make a short opening statement before we ask questions.

Dr Southern: Thank you, Chair. I do have a short opening statement and we have copies here we can pass to the secretariat.

CHAIR: That would be very handy if you could, please.

Dr Southern: DIAC welcomes the opportunity to appear before you today to supplement the submission provided by the department on 14 September 2011. A number of the submissions received by the inquiry focus on Australia's international obligations in relation to persons who arrive irregularly in Australia and seek asylum. Many of those submissions make statements that do not accurately reflect the understanding of Australia's obligations. I would like to briefly address these issues in this opening statement, if I may. I think that it is important to note that the way in which a state chooses to implement its international obligations is a matter for them, provided they act consistently with those obligations. Implementation may involve reflecting the obligations in domestic legislation or it may involve the policies, practices and procedures that a state has in place to ensure compliance or a combination of both.

Asylum seekers do not have a right—under the 1951 Convention Relating to the Status of Refugees and its 1967 protocol which we will hereinafter refer to as the refugee convention—to demand that a contracting state which they enter must process their claims in that state and that the state grant them a right to resettle if they are found to be a refugee. This is a long understood position.

UNHCR's recent paper from November 2010 on maritime interception discusses the circumstances where it may be appropriate for a country to transfer responsibility for asylum seekers to another country or to retain responsibility but undertake processing in another country. UNHCR notes that in certain circumstances the processing of international protection claims outside the intercepting state could be an alternative to standard in-country procedures. Other states also rely on processing outside territory and the concept of return to a safe third country for processing. Examples are the USA processing asylum seekers in Cuba, arrangements under the Dublin convention in Europe and safe third country arrangements between the USA and Canada.

Successive governments have taken the view that Australia will be acting consistently with international law and accepted practice so long as it is satisfied that asylum seekers removed to another country will not be refouled and that they will be given an opportunity to have their status determined in that country. The Malaysian government has undertaken to respect the principle of nonrefoulement and to permit transferees to Malaysia to have their asylum claims assessed by the UNHCR. UNHCR were willing to undertake this assessment, and Australia was negotiating supplementation in funding to make sure UNHCR could undertake this function.

In terms of any claim a potential transferee may have made against Malaysia itself, this claim and any other non-refoulement obligations under other human rights conventions were to be assessed in the preremoval

assessment of the individual's circumstances. In relation to children, a 'best interests of the child' assessment would also be undertaken in the preremoval assessment process, thus meeting Australia's obligations under the Convention on the Rights of the Child.

In addition, the arrangement with Malaysia provides that, where a person is determined not to be a refugee, Australia will be given the opportunity to undertake an assessment against other nonrefoulement obligations before the person is removed from Malaysia.

Several submissions suggest that the Malaysia arrangement and arrangements for offshore processing generally breach article 3, relating to nondiscrimination, and article 31, relating to no penalty, of the refugees convention. Nothing in the convention prevents a different regime being in place for offshore entry persons, providing the scheme does not involve the imposition of a penalty on account of unauthorised entry.

The Australian government maintains that offshore processing does not amount to a penalty within the terms of article 31. In addition, article 31 applies to refugees coming directly from the place of feared persecution, not to those involved in secondary movement.

The discrimination referred to in article 3 is discrimination based on race, religion or country of origin. The different treatment accorded to offshore entry persons has nothing to do with the race, religion or country of origin of these persons.

Many commentators conflate the obligations that the refugee convention sets out as owed to refugees with those that are owed to asylum seekers. The convention allocates rights or protections to refugees in categories based on the type of immigration status a person has in the host state. The categories include physical presence, lawful presence, lawful stay and residence. So, for example, rights or protections concerning employment, housing and social security are restricted to refugees lawfully staying in a state's territory not to asylum seekers whose claims have not been assessed and whose status has not been regularised.

The arrangement with Malaysia also provides for decent standards of treatment for transferees, with Malaysia undertaking to treat them with dignity and respect and in accordance with human rights standards. There were also procedures being put in place to ensure only a short period of detention for initial processing, assistance with accommodation and a living allowance until self-reliance opportunities could be taken up. Transferee children were to have access to education, and transferees were to have access to appropriate medical services, including mental health services, through UNHCR's regular processes and with IOM operating as a backup. Australia does not accept that it has a legal obligation that persons outside our territory have to be accorded with the same standards of treatment in all respects as they would have received had they remained in Australia. In the case of transfers to countries for processing outside Australia, we have, however, accepted a moral obligation to ensure that such people are accorded reasonable standards of treatment. I thank you for the opportunity to provide some clarification on these issues and my colleagues and I are very happy to take your questions.

Senator CASH: I turn first to legal advice regarding the government's actual announcement of the Malaysia deal. Did the government receive advice from the Department of Foreign Affairs and Trade, including our High Commission in Malaysia, supporting the government's decision to announce their proposed arrangement with Malaysia before any details had been negotiated?

Ms Parker: Yes, we did.

Senator CASH: When was this advice received?

Ms Parker: I cannot recall the exact date but just preceding the announcement of 7 May.

Senator CASH: Could you please take on notice to provide the exact date of when the advice was received. By whom was the advice given?

Ms Parker: I believe the advice was given by the High Commissioner and possibly also the Ambassador for People Smuggling Issues. I think that is the limit.

Senator CASH: Did the government receive any request from the government of Malaysia to announce the proposal prior to its finalisation?

Ms Parker: No.

Senator CASH: Are you sure of that?

Ms Parker: I believe not; certainly not in my presence.

Senator CASH: Can you take on notice to confirm the government did not receive any request from the government of Malaysia to announce the proposal prior to its finalisation. Did the government of Malaysia express any opinion on when the proposed arrangement should be announced?

Ms Parker: No, only in terms of their readiness to be able to accommodate transferees in accordance with the arrangements.

Senator CASH: The government of Malaysia did not express any opinion on when the Australian government should announce the proposed transfer arrangement with them given that the Australian government made the announcement prior to the details being negotiated?

Ms Parker: No, not so far as I am aware.

Senator CASH: Could you take on notice to confirm that that is the exact position: the Malaysian government did not express an opinion. Did the department advise the government when it should announce the Malaysia agreement?

Ms Parker: Yes, it did.

Senator CASH: When did it advise the government on this?

Ms Parker: Just preceding the announcement.

Senator CASH: Who gave the advice to the government?

Ms Parker: It would have been myself and I am not sure if it came from Canberra as well.

Senator CASH: From who as well?

Ms Parker: It may have come from Canberra is well. Certainly, I gave my views.

Senator CASH: Was that advice in writing or was it orally given?

Ms Parker: It was oral advice.

Senator CASH: Was the advice to the effect that they should announce the Malaysian decision prior to the details being negotiated?

Ms Parker: The advice was in terms of the pros and cons of undertaking such an announcement before the details of the agreement had been negotiated.

Senator CASH: Are you able to outline to the committee what those pros and cons ones were?

Ms Parker: It was policy advice.

Dr Southern: That is going to the policy advice that we gave to the government at the time.

Senator CASH: Can the department advise whether advice was provided by the Office of International Law on the government's agreement with Malaysia or subsequently in the defence of the High Court action?

Ms Parker: In relation to the arrangement with Malaysia, the Office of International Law provided comments on several occasions during the course of those negotiations, which took place over a number of weeks. I am not able to answer specifically in relation to the High Court action.

Senator CASH: In relation to the advice that was provided by the Office of International Law, you said they provided comments on several occasions. Were those comments in the nature of advice? Were they merely comments or were they in the nature of advice?

Ms Parker: They were comments and advice and issues that have been raised with them in their capacity in the Attorney-General's Department.

Senator CASH: When was this advice sought?

Ms Parker: It was during the course of negotiations. I do not believe I have the exact date.

Senator CASH: When you say during the course of negotiations, was that prior to the announcement on 7 May or was it during ongoing negotiations?

Ms Parker: I would need to check that. Certainly we had a memorandum of understanding as it was handed to the Malaysians for discussion and I believe—although I would need to check it—that the Office of International Law was provided with a copy of that.

Senator CASH: Are you are able to provide the committee with a copy of the memorandum of understanding that was provided to be Malaysian government?

Ms Parker: That was a preliminary document that was further negotiated with the Malaysian government.

Senator CASH: I assume the preliminary document is still in existence. Are you able to provide the committee with a copy of the preliminary document? You can take that on notice.

Dr Southern: Yes, of course.

Senator CASH: In terms of the advice that was sought and provided by the Office of International Law about the ongoing negotiations on the Malaysian agreement, can you take on notice to provide to the committee when each piece of advice was sought and when each piece of advice given? Can you also take on notice—unless you are able to answer it now—by whom was the advice sought?

Ms Parker: I was involved or it went through our AGS Special Counsel, Mr Ian Deane, who is in the department.

Senator CASH: You could take it on notice to confirm, in relation to each piece of advice, who actually sought the advice. When the advice was received, who reviewed the advice?

Ms Parker: I and Special Counsel Ian Deane and officers in the legal division.

Senator CASH: On what issue were instructions sought? I am not asking for the nature of the advice given, but for a general idea of on what issue the instructions were sought.

Ms Parker: My recollection is that one issue was in relation to privileges and immunities for Australian officers operating in Malaysia. There was also the general issue of compliance with international obligations.

Senator CASH: So you did seek legal advice on Australia's compliance with its legal obligations?

Ms Parker: That advice was provided from OIL.

Senator CASH: The Office of International Law.

Ms Parker: Yes.

Senator CASH: Could you take on notice to provide the committee with a copy of the legal advice that you received from the Office of International Law?

Ms Parker: I will take that on notice.

Senator CASH: Was any advice sought from the Office of International Law on the defence of the High Court action?

Ms Parker: That I cannot answer.

Senator CASH: Would that have been sought by somebody else, another department?

Ms Parker: It would have been sought by our department, but I was not directly involved in the High Court action.

Senator CASH: Was anyone else?

Ms Parker: No.

Senator CASH: You could take that on notice. On a similar line of questioning—and I am happy to provide it in writing to you—on the advice provided by OIL about the defence of the High Court action: did the department receive any advice from the Attorney-General's Department, the Office of International Law, about the government's proposed amendments to the migration act?

Ms Parker: Yes, it did.

Senator CASH: When was this advice sought?

Ms Parker: I would have to take that on notice as to the exact date.

Senator CASH: By whom was the advice sought?

Ms Parker: I believe it would have been by our Special Counsel, Mr Ian Deane. There were several lots of advice provided.

Senator CASH: You could take on notice, in relation to each piece of advice that was sought: when it was actually sought, by whom it was sought and when the advice was received.

Ms Parker: I would have to take that on notice.

Senator CASH: Who reviewed the advice in the department?

Ms Parker: Myself, Special Counsel Ian Deane, the chief lawyer and officers within legal division.

Senator CASH: Are you able to advise the committee on what issue the instructions were sought?

Ms Parker: Again, it was generally in relation to international obligations.

Senator CASH: So Australia's compliance with its international obligations.

Ms Parker: Yes.

Senator CASH: Under the refugee convention.

Ms Parker: Yes.

Senator CASH: Would you also take on notice to provide a copy of any of the legal advice that you received in that regard to the committee?

Ms Parker: I will take that on notice.

Senator CASH: Thank you very much. Has the department sought any legal advice, again, including from the Office of International Law, on the coalition's proposed amendments that would enable offshore processing in countries that have signed the refugee convention or protocol and that former Solicitor-General David Bennett QC says provide more protection for asylum seekers than the two government versions and are less likely to be the subject of complex legal proceedings?

Ms Parker: I do not believe formal advice has been sought.

Senator CASH: Has informal advice been sought?

Ms Parker: I do not believe so.

Senator CASH: What would you consider informal advice to be?

Ms Parker: There may have been discussions in relation to what Mr Bennett said.

Senator CASH: When you say there may have been discussions, you obviously have some idea about some discussions. Who would have had these discussions?

Ms Parker: It would have been between me, Mr Deane, the chief lawyer and possibly the Solicitor-General. I cannot recall.

Senator CASH: If you were part of those informal discussions, are you able to confirm if they occurred?

Ms Parker: Briefly, yes. I would hate to make out that they were long, far-ranging and detailed discussions. It may have been mentioned.

Senator CASH: Was anything provided to the department in writing in relation to the coalition's amendments?

Ms Parker: Not that I am aware of.

Senator CASH: Could you take on notice to confirm whether or not there was anything in writing?

Ms Parker: Yes.

Senator CASH: Could you also take on notice to provide to the committee with whom those informal discussions did occur and when those informal discussions were held?

Ms Parker: Yes.

Senator CASH: The majority of the submissions raise concerns regarding the ability of the government to establish offshore processing in a country where refugees can be returned to the country from which they are seeking asylum. Do the government's proposed amendments to the Migration Act render illegal a decision by any current or future minister to establish offshore processing in a country where refugees can be returned to the country from which they are seeking asylum?

Ms Parker: Could I have that question again, please? It was very long.

Senator CASH: Yes. It is in relation to the submissions. We have had a number of submissions that raise concerns regarding the ability of the government to establish offshore processing in a country where refugees can be returned to the country from which they are seeking asylum—refoulement basically. Do the government's proposed amendments to the Migration Act render illegal a decision by any current or future minister to establish offshore processing in a country where refugees can be returned to a country from which they are seeking asylum?

Ms Parker: The bill currently provides that the minister, in designating a country, has to have assurances from the country in relation to, essentially, nonrefoulement and access to procedures.

Senator HANSON-YOUNG: That is not what it says. 'Needs to consider' is the wording.

Senator CASH: Exactly.

Ms Parker: 'Has regard to', I think.

Senator CASH: Specifically what I would like to know is: do the amendments render illegal or unlawful a decision by any current or future minister? I understand they may have to take into consideration, but if they make such a decision, a positive decision, and the person is able to be returned, under the government's proposed amendments is that decision rendered unlawful?

Ms Parker: I think I would have to leave it to our lawyers to provide that answer.

Senator CASH: If you could take that on notice, that would be greatly appreciated. I will now turn to the cap, the agreed number, as it is referred to at clause 7 of the agreement. At clause 7 it states that the agreed number of transferees from Australia to Malaysia is a maximum of 800. What was the rationale behind actually announcing the cap?

Ms Parker: The rationale behind announcing the cap was that the Malaysian government was, quite appropriately, interested in understanding what sorts of numbers the Australian government was talking about.

Senator CASH: In terms of transferring to them?

Ms Parker: Yes, in terms of transfers to Malaysia and, obviously, what sorts of arrangements would need to be put in place. In terms of announcing the actual cap, there was some consideration about whether that was necessary. In the interests of transparency, it was felt that that announcement needed to be part of the arrangement.

Senator HANSON-YOUNG: Why was 800 chosen?

Senator CASH: That will be one of my questions. Did the government seek to negotiate an open-ended agreement with Malaysia, one that would have no cap?

Ms Parker: No, I do not believe so. The original position papers always envisaged a ratio of transferees to persons coming to Australia for resettlement.

Senator CASH: Were there ever any conversations in relation to the potential for the agreement to have no cap?

Dr Southern: Do you mean conversations with the Malaysian government?

Senator CASH: Correct, or within the department.

Ms Parker: Not that I can recollect.

Mr Fleming: I think it is fair to say that in a dream world it might be open ended, but it was always recognised that to have any chance of success the negotiations from the beginning would have to envisage something that was not open ended.

Senator CASH: Mr Fleming, I hope you appear at estimates with me because we will explore that further then. Are we able to have a copy of the original position papers in relation to the negotiations surrounding the cap?

Ms Parker: I will take that on notice.

Senator CASH: Thank you very much. Considering there are still boats arriving—we have had two arrive in the last few hours—would an open-ended arrangement, one that cannot be exhausted, not have been a more effective way of breaking the people smuggler's model? Under an open-ended arrangement, all of those who arrived in Australia would have been returned to Malaysia. Under what we currently have we are now over halfway towards reaching the 800. Once we have reached the cap—lucky lottery winner 801; I think we all agree it is very bad news for Mr 800—they will be processed here.

Dr Southern: Our judgment was that 800 was a reasonable number and a number within which we could work. Our secretary has given evidence before in Senate estimates and in other committee hearings that our judgment was that we would not reach the 800. Should the arrangement be in place and returns be affected, that would have a deterrent impact.

Senator CASH: So that was your judgment. Can I then ask why, in the briefing that was given to the coalition by Mr Metcalfe, the departmental secretary, on 7 September, which I understand you attended, Ms Parker, when the department was asked how it arrived at the figure of 800 and whether it was true that this was just conjecture, the answer was yes.

Ms Parker: I do not believe that was the answer.

Senator CASH: What was the answer then? Perhaps you could provide us with the rationale behind how 800 was actually chosen.

Ms Parker: It certainly was not a matter of conjecture. It was a number that we thought would be sufficient, as Dr Southern has indicated, to provide enough places for the deterrent effect to cut in before the quota or cap was reached. It was also looked at in relation to the number of people we would be resettling from Malaysia, the 4,000 over four years.

Senator CASH: But what was the rationale behind 800?

Ms Parker: It was a number that we thought would be sufficient—

Senator HANSON-YOUNG: What evidence was there?

Senator CASH: Exactly. What was the evidence? We had over 6,000 people come to Australia unlawfully in the previous financial year, three times the amount that the government had actually budgeted for. How did you get to 800?

Ms Parker: We had to come up with a figure, given that we were negotiating with the Malaysians in terms of not having an open-ended arrangement. It was felt that that would be sufficient, that the deterrent effect of having a virtual tow back to Malaysia, although it would be done by air, would cut in sufficiently early that we would not reach the cap of 800.

Senator CASH: Okay. You said 'it was felt'. What evidence did you use to get to the figure of 800? You cannot just pluck a number out of the air and say 'it was felt' that it was a reasonable number. What is the evidence that you relied on that indicated that the figure of 800 was sufficient to break the people smugglers model, given that as of today over 500 people have arrived since the agreement was signed and over 1,000 have arrived since the agreement was announced?

Ms Parker: The cap of 800 represented between eight and 10 boats, on average. We thought that would be sufficient to stop or deter boats from coming. In terms of the numbers that have arrived since the announcement, it was felt that the deterrent effect would come from actual returns to Malaysia, as opposed to just the signing of the agreement.

Senator CASH: Have there been any returns to Malaysia since the agreement was signed? Could you just confirm that for me.

Dr Southern: No.

Ms Parker: No.

Senator CASH: No. There have been none. But the boats are still coming?

Ms Parker: Yes.

Senator CASH: So would you say the deterrent effect is working?

Ms Parker: No, it is not, Senator, because the deterrent effect is in the actual removals taking place, not just the signing of the agreement.

Senator CASH: Then the government has failed miserably to date, hasn't it, because how many of the 4,000 has Australia taken? How many have been resettled in Australia or are looking at being resettled?

Mr Fleming: I do not think I have the number with me, but we have an ongoing resettlement program out of Malaysia so—

Senator CASH: No; in relation to the 4,000 that are part of this deal, how many have been resettled in Australia?

Mr Fleming: I will have to take that on notice—

Senator CASH: You do not know. You have come here today and you do not know. This is the Malaysian inquiry, and you are telling this committee that you have come here today and you do not know how many of the 4,000 have been resettled in Australia to date?

Mr Fleming: If I can at least partially explain that. It is not that there are just these 4,000; we have an ongoing resettlement program out of Malaysia so—

Senator CASH: So how many are the 4,000 mixed in with?

Mr Fleming: It is usually around 200 to 500 a year out of Malaysia.

Senator CASH: Hold on. Then how do you know that, when you bring a Malaysian here under the agreement, they are part of the 4,000? Is there no process that the government has put in place?

Mr Fleming: There is no need for a process that says 'you're part of the extra 1,000 a year and you're part of the 200 to 500 that would happen anyway'—

Senator CASH: How does that work out?

Senator HANSON-YOUNG: So how do we know?

Senator CASH: How do we know? That is exactly right. How do we know who is coming here under the arrangement for the 4,000?

Senator HANSON-YOUNG: How do we know you are doing it at all?

Mr Fleming: We will report figures on the number of people being resettled out of Malaysia. My point is it will be more than the 1,000 a year; it will be somewhere between 1,300 and 1,500, depending on what UNHCR global priorities and processing deliver.

Senator CASH: Okay. Mr Fleming, for the purposes of your evidence, what you have just told the committee is that the government has not put in place any process to identify the 4,000 people it will be bringing in under the Malaysian transfer arrangement. They are mixed in with whatever else we are bringing in.

Mr Fleming: From Malaysia.

Senator CASH: From Malaysia.

Mr Fleming: We will be keeping track of the number of refugees resettled out of Malaysia—

Senator CASH: So when we get to 1,000 this year, you can say, 'Malaysia, guess what? We've just done our thousand.' So perhaps that is the process?

Mr Fleming: Yes.

Senator CASH: The first 1,000 is the thousand.

Mr Fleming: That is—

Senator CASH: Great process! We just thought it up here and now!

Mr Fleming: With respect, Senator, there is no need to tag people as part of the thousand—

Senator CASH: You are tagging them at the other end, though, aren't you?

Mr Fleming: No, we are not—

Senator CASH: You are going to tag them at the other end. Why are you tagging them at the other end but you are not tagging them here? You are happy to tag them at the other end—well, I hope you are happy to tag them at the other end: please tell me we actually do know what is going to happen to these people when they get to Malaysia.

Mr Fleming: Yes.

Dr Southern: Yes, Senator, of course we do.

Senator CASH: Good. Let us move on, then, because clause 16 of the agreement says it is 'not legally binding'. What does that mean in legal terms?

Ms Parker: It means that it is not legally binding. A number of the arrangements and understandings that Australia has entered into are not in fact legally binding. It indicates, though, by the signature of a minister of the Malaysian government, that it has the political commitment of the Malaysian government.

Senator CASH: Clause 16 of the agreement states:

This Arrangement represents a record of the Participants' intentions and political commitments but is not legally binding on the Participants.

Are you saying that that is enough to satisfy the government and the department that the human rights of the people that we send to Malaysia will well and truly be upheld? Because I can tell you right now I am not satisfied, and the witnesses I have listened today are also not satisfied. In fact, Professor Ben Saul will be providing us with a body of case law coming out of the UNHCR where political commitments have been entered into, and in each case they have been broken; and, because they were not legally enforceable, there was no recourse. So you were satisfied that a 'political commitment' discharges Australia's obligations?

Ms Parker: We were, Senator, combined with—

Senator CASH: You were or you are?

Ms Parker: We are.

Senator CASH: You are satisfied with clause 16 of the agreement?

Ms Parker: We were, Senator, yes.

Senator CASH: You were or you are? You just said 'we are'. What do you mean by 'we were'?

Ms Parker: Well, we are. The government continues to be satisfied that the arrangements that we negotiated with Malaysia would be met by Malaysia and that they would provide the appropriate protections to people that we were transferring to Malaysia.

Senator CASH: What evidence do you have in writing from the Malaysian government that this is indeed the case? And I am hoping it is not merely the agreement.

Ms Parker: I am not sure what you are asking for.

Senator CASH: What evidence do you have in writing from the Malaysian government that they will uphold the human rights of the 800 people that we send to them under this transfer arrangement, given that it is stated in clause 16 that it is merely a handshake deal, a 'political commitment', and specifically that it is 'not legally binding'?

Ms Parker: I think the fact that the Malaysian government was willing to sit down and negotiate with us over a number of weeks, and there were practical arrangements that they were actually putting in place to ensure that the terms of the arrangement were going to be met, is an indication that they had every intention of meeting the commitments that had been made in the arrangement. The fact that a minister of state also signed the arrangement is, I think, a strong commitment from the government.

CHAIR: Can I interpose there and ask a question. If we were to accept our 4,000 a year from Malaysia but partway through the agreement they stopped and said, 'We're not going to accept any more people from Australia; we will accept 600 but no more,' what would stop the Malaysians doing that under this agreement if it is not legally binding?

Ms Parker: Their commitment to the agreement that they have entered into with Australia.

CHAIR: It is not legally binding. There is no obligation on them to fulfil that term of the agreement, is there?

Ms Parker: No, but there are a number of international arrangements that we enter into with countries regularly that are not legally binding.

CHAIR: If they did not accept the full 800, would we be entitled to not accept the 4,000 that they send to us?

Ms Parker: That, I think, would be a matter of negotiation with the Malaysian government, as that is not anticipated under the arrangement.

CHAIR: So we would have to separately renegotiate that element of it, if that were the case?

Ms Parker: I believe there is a provision for discussion in relation to issues that arise out of the implementation of the arrangement. It is clause 18, 'Resolution of differences', which states:

Any differences between the Participants over the interpretation or application of this Arrangement will be resolved as soon as reasonably practicable by consultation between the Participants.

So there is a provision for further discussion if there were misunderstandings or differences in application of the provisions.

Senator CASH: What is the definition of 'as soon as reasonably practicable'? Seventy-two hours?

Dr Southern: Senator, I think that would be a commonsense interpretation of 'reasonably practicable'—

Senator CASH: Is that the Malaysian commonsense interpretation or the Australian commonsense interpretation?

Dr Southern: I think that would be the subject of the negotiations between us and arriving at that—

Senator CASH: So there is no actual definition of 'as soon as reasonably practicable'?

Dr Southern: Not in the agreement, no.

Senator CASH: I would like very quickly to move onto the second part of clause 4, the transfer exemptions. Will there be IMAs who arrive in Australia who are unable to be sent to Malaysia under the transfer agreement?

Ms Parker: There will be.

Senator CASH: Okay. Could you please outline who those people will be?

Ms Parker: The arrangements for transferring people to Malaysia incorporate what was called pre-removal assessments, which were essentially to assess whether a person was fit for travel, to ascertain whether they had any vulnerabilities and to ascertain whether there were any risks that they would face in being sent to Malaysia. Also—this is slightly separate—there was to be some screening undertaken in relation to character- and security-type issues.

Senator CASH: Will the government be able to send pregnant women to Malaysia?

Ms Parker: Not if there are not appropriate medical arrangements in place for such people.

Senator CASH: Is the government able to send a sick child to Malaysia?

Ms Parker: Again, it would depend on the circumstances.

Senator CASH: Is the government able to send a person with a communicable disease to Malaysia?

Ms Parker: We were undertaking screening, I believe, for TB.

Senator CASH: Yes. If someone is found to have TB, are we able to send them to Malaysia?

Ms Parker: No. The agreement does not specifically cover that, but—

Senator HANSON-YOUNG: So we send children but not someone with TB.

Ms Parker: Only if there was—

Senator HANSON-YOUNG: You have a very definite answer on whether we can send to somebody who has TB to Malaysia—you are saying we cannot—but you cannot tell us whether you can send a sick child.

Ms Parker: The assessment of whether a sick child would be sent to Malaysia—I doubt very much that we would—would be done on the basis of the individual circumstances. When the child arrives in Australia—

Senator HANSON-YOUNG: Why do you have a definite answer on tuberculosis but not on whether a sick child can be sent to Malaysia?

Mr Allen: The specific requirement in relation to tuberculosis was created because of the 'fit to travel' requirement. Somebody with active TB would not be fit to travel on board an aircraft.

Senator CASH: Okay. Is the government able to send someone who has received an adverse ASIO assessment during the pre-transfer process to Malaysia?

Mr Fleming: An adverse security assessment by ASIO is actually unlikely to be issued in that period, but if it were to happen then that would not necessarily turn into a security concern for Malaysia.

Senator CASH: But you can confirm that there will be a category of people who may be exempted from being transferred to Malaysia under the current agreement.

Dr Southern: That is correct.

Senator CASH: If asylum seekers are claiming to have been persecuted in Malaysia—if they come here as part of these 800 and during the pre-transfer, pre-screening process they say, 'I have been persecuted in Malaysia—will they be able to be transferred back to Malaysia? I refer in particular, for example, to the religious groups that are persecuted in Malaysia.

Mr Fleming: There would be a case-by-case consideration and, if a person would credibly be subject to persecution in Malaysia, they would not be transferred to Malaysia under the arrangement.

Senator CASH: Does Australian privacy law provide any limitations on the information that we can provide to Malaysia' about the persons that we are going to send there?

Ms Parker: Yes, it does.

Senator CASH: What are those limitations?

Ms Parker: I am not aware of those, but I am aware of the provisions in the Migration Act that allow us to provide the information to the Malaysian government in relation to people to be transferred.

Senator CASH: Okay. In accordance with clause 4.2(c) of the agreement, has the Malaysian government itself indicated which categories of potential transferees they will not provide consent to transfer? Certainly they have the ability to do that under the agreement.

Ms Parker: Yes, in the operational guidelines it indicates that the Malaysians will be running checks against what they call their watch or warning lists, and somebody that came up on those lists would not be transferred.

Senator CASH: Have they indicated any other categories of people that they will not accept?

Ms Parker: No.

Senator CASH: I will very briefly turn now to the identity documents. I refer to paragraphs 47 and 48 of the department's submission, in relation to the provision of identity documents to transferees. In the submission you state:

… this Nexcode sticker will enable Malaysian authorities to identify that individuals are subject to the Arrangement and in Malaysia lawfully.

Who are the relevant Malaysian authorities who will actually have the mobile scanning software, otherwise known as the card readers?

Mr Allen: I will just describe the arrangements. They are twofold. First of all, there was an Australian DIAC-issued identity card—a credit-card-type arrangement—which contained the biodata of the individual and their photograph. This was going to be the vehicle for the attachment of the RFID sticker, which would be issued by Malaysia. The exemption arrangement which the Malaysians had provided to exempt these people from the normal immigration arrangements actually specified a sequence of next-code numbers which were to be applied to these people. That sequence was identifiable through the bar code. It would also be identifiable physically through the sticker itself. So the number as well as the bar code would allow the person to be defined in the field.

Senator CASH: And a sticker?

Mr Allen: It is a sticker attached to the card.

Senator CASH: My understanding of the way it works is that you will have mobile scanning software. You will scan and it will say, 'Yes, this is one of the 800 people who are not part of the 94,000 currently in Malaysia and we can or cannot do certain things to them.' When you say the Malaysian authorities, who are the Malaysian authorities who will have the ability to scan the card and read it?

Senator HANSON-YOUNG: Not the vigilante groups?

Mr Allen: They will be the normal Malaysian law enforcement and immigration authorities.

Senator CASH: Will the card readers be available to regular Malaysian police? The answer is actually no.

Mr Allen: As I indicated, this has been structured such that you do not actually need a card reader to identify the person as being subject to the arrangement.

Senator HANSON-YOUNG: How do you know, then?

Senator CASH: Then we have a big problem, don't we? It was actually better when you needed the card reader.

Mr Allen: No. The number that is visibly present on the card, which is part of a sequence issued under this arrangement, will identify the person as being subject to the arrangement and the card itself is further proof of the person's identity as part of the arrangement. There are—

Senator CASH: You are saying that you do not need the card readers. Why have we even contemplated having this card-reading software if you do not need them—if the card alone is proof?

Mr Allen: The FID sticker technology is the standard way that Malaysians identify all foreigners who have entered their country.

Senator CASH: Does that include the RELA? Do they have the ability to identify foreigners?

Mr Allen: My understanding is that RELA do not have access to this technology.

Senator CASH: Exactly. That would be the point.

Mr Allen: RELA are not responsible for in any way imprisoning or incarcerating these people in Malaysia.

Senator CASH: They are not?

Mr Allen: No.

Senator CASH: Can you explain the reports that come out about the activities that RELA do undertake in relation to people who do not have a lawful status in Malaysia?

Senator HANSON-YOUNG: What do they do?

Senator CASH: Yes, what do the RELA do? Please tell us.

Ms Parker: There were reports in relation to RELA over some period, but there was also a report recently, and we are advised also by the Malaysian government, that RELA are no longer involved in immigration matters without at least being in the company of police.

Senator CASH: That is very reassuring. Was that advice given in writing? The committee would really like to see a copy of that advice.

Ms Parker: No, it was given orally—

Senator CASH: Oh, it was given orally. Who was it given by?

Ms Parker: and reported in the Malaysians papers as well.

Senator HANSON-YOUNG: The media!

Senator CASH: That is fantastic, seriously. How many RELA are there in Malaysia?

Ms Parker: There are many thousands.

Senator CASH: Many thousands? So the government is satisfied on the basis of some oral advice that was confirmed in the Malaysians papers. Do you know what Malaysians paper it was confirmed in?

Mr Allen: No, I do not, but the advice was given by a senior—

Senator CASH: Could you get the committee a copy of the article that appeared in the Malaysian paper? Would you also inform the committee where the advice actually came from via Malaysia, what the advice was, to whom it was provided here and why you say that, based on a report in a Malaysian newspaper and a conversation

with someone in Malaysia, you were satisfied that RELA will no longer conduct the absolutely atrocious acts that they are reported to have committed in the past on people who do not have lawful status in Malaysia.

Ms Parker: Can I just say it was not a casual conversation; it was with an official who was involved in the negotiations of the Malaysia arrangement, and I merely referred to the newspaper as being another confirmation that it was in fact the government's position.

Senator CASH: A bit of backup information. That is fine. If you could provide the name of the official and their position within the Malaysian government, that would be appreciated. Would you also advise whether or not the department or the government took it upon themselves to have this information confirmed in writing. Or did they merely rely on the information that was provided to them by the official?

You said there are several thousand RELA in Malaysia, so you are obviously satisfied that every single one of them will comply with this instruction that has been given. You are satisfied with that, are you? Or is the department satisfied? Is that a yes?

Ms Parker: I am satisfied to the best that I can be satisfied, but in the same way that I—

Senator CASH: Well, how about I put it this way—

Ms Parker: am probably not satisfied that every police officer in Australia is going to obey every order.

Senator CASH: I think we are treading on some very difficult ground there—

Ms Parker: I mean I am as satisfied as I can be that the government indicated—

Senator CASH: Are you actually comparing Australian police officers with the RELA?

Ms Parker: No, I am not.

Senator CASH: Right; just for the record. How about I put it this way: can the department guarantee that the people transferred to Malaysia will not be subject to arrest when those who conduct these arrests will not have access to the technology to identify their verification?

Ms Parker: We were satisfied that the RELA was no longer involved in matters relating to immigrants without being accompanied by law enforcement authorities. We were also satisfied that arrangements were going to be put in place for law enforcement authorities to be aware of the status of transferees.

Senator CASH: Excellent. What were those arrangements—or should I say, what are those arrangements?

Ms Parker: They are not in place yet as I understand it—

Senator CASH: They are not in place.

Ms Parker: because there have not been any people transferred yet.

Senator CASH: So the Australian government is not pressing for some form of assurance that they are being put in place? There are tens of thousands of these types of people. You cannot just put a process in place overnight. What steps is the Australia government taking to ensure that these people will actually be compliant?

Mr Allen: In terms of our current arrangements, we are not undertaking any further operational discussions in Malaysia until the matter has been settled by the parliament.

Senator CASH: Okay, but we are still accepting our part of the deal. So whilst everything else is stopped, we are still honouring our end of the bargain and we are taking people from Malaysia, even though no other discussions are actually currently underway, because we are at a stalemate? So it has stopped at our end, but it is still going on at their end? Is that a yes or a no? *Hansard* cannot record a head nod.

Mr Fleming: We have an ongoing resettlement program out of Malaysia, so—

Senator CASH: No, no, no. That is not my question.

Mr Fleming: we would be—

Senator CASH: I am not talking about the ongoing resettlement program. I am talking about the Malaysian transfer arrangement. Are we still accepting people under the agreement from Australia's end whilst, from Australia's end, not progressing any of the matters of concern because of the stalemate we face in Australia? So it is operating at one end but it is not operating at the other end.

Mr Fleming: I do need to answer with reference to an ongoing resettlement program because, until we get to an order of magnitude that would be higher than the normal sort of program we would run out of Malaysia per year, there is not a crunch decision point. But what I would confirm is: as per the minister's media conference following the High Court decision, he did point out that the inclination was to honour the commitment to—

Senator CASH: So the answer is yes. The minister has said that. The answer is clearly yes. Is the department aware that refugees with a UNHCR card in Malaysia are regularly arrested and detained in police lockups and detention centres, where it takes between two weeks and two months for their status to be confirmed and for them to be released, if they are released? What procedures are in place in the Malaysian agreement to ensure that, if any of the 800 asylum seekers sent from Australia to Malaysia are actually arrested and detained, they do not become lost in the system?

Ms Parker: We are aware of cases where refugees or holders of UNHCR cards have been in Malaysian detention facilities. I cannot say that I am aware of the exact details that you read out there, but that has in fact happened. The arrangements that were put in place under the Malaysian agreement or arrangement were in relation to the special identification for the 800 people. Also, there was to be access by these people to a hotline into UNHCR and IOM.

Senator CASH: A hotline—a 1800 number?

Ms Parker: That I am not aware of.

Senator CASH: How do they access this hotline?

Ms Parker: By phone.

Senator CASH: By phone?

Senator HANSON-YOUNG: From the detention centre?

Senator CASH: We are giving mobile phones, are we? How do they access this hotline?

Ms Parker: In the same way that anyone would access a telephone number: through a phone.

Senator CASH: Has the department put in place any procedures—

Senator HANSON-YOUNG: The boat phone.

Senator CASH: The boat phone—better than the bat phone. Has the department put in place any procedures to ensure that, if one of these 800 people is arrested and goes into the system, we are able to get them out?

Ms Parker: The arrangements put in place or that are to be put in place are as I have indicated: the fact that they have a special identification card; that law enforcement authorities will be made aware of their special status; and that they will have access to a hotline into UNHCR and IOM.

Senator CASH: How is the Malaysian government making the law enforcement authorities aware of the special status of the 800 people?

Ms Parker: I need to take that on notice.

Senator CASH: Can the department confirm that the identity document system is foolproof and will not be open to bribery?

Mr Allen: The identity card we have issued has been developed with safeguards in terms—

Senator CASH: What are those safeguards?

Mr Allen: I would not actually like to go into too much detail about the specific safeguards within the card. The more people know about the safeguards built into the card the more likely it is that they will be able to overcome those safeguards.

Senator CASH: Is there any specific reason that you cannot advise this Senate committee of what those safeguards are?

Mr Allen: In general they are the kind of safeguards you would use to ensure that a card issued by an authority cannot be easily forged by somebody else.

Senator CASH: What are those safeguards?

Mr Allen: They include things such as special printing, design and laminar surfaces that are put over the top of the card that reflect in certain kinds of light.

Senator CASH: Are you actually kidding me?

Mr Allen: No, these are the sorts of things—

Senator CASH: Have you heard of credit card fraud in Australia, a First World country?

Mr Allen: Yes, I was going to go on to say that I am not giving you an absolute rock-solid guarantee that any identity document cannot be—

Senator CASH: There are 94,000 asylum seekers in Malaysia. Are you satisfied that the system we are putting in place for these 800 people is not going to be abused by people in Malaysia?

Mr Allen: I am satisfied that there are reasonable safeguards in place to protect the use of the card.

Senator CASH: If you do not want to provide it by way of *Hansard* evidence, can you take on notice to provide to the committee exactly what those safeguards are?

Mr Allen: Yes, we will take that on notice.

Senator CASH: Turning to the 400 who have already arrived—it is 531 as of today, I think—has the transfer agreement been signed by the relevant parties?

Dr Southern: The arrangement has been signed, of course.

Senator CASH: Clause 4 of the agreement states, 'Subject to Clause 4(2), the Transferees to be transferred to Malaysia are those persons who, after the date of signing of this Arrangement'—and you have just confirmed it has been signed—have arrived unlawfully in Australia. Given that more than 500 people have arrived since the agreement with Malaysia was signed, and it is now over 1,000 since the agreement was announced, which of these people are subject to the transfer—assume it is the over 500 and not the 1,000—based on the fact that clause 4 specifically states that it is those who arrive here after the agreement was signed.

Mr Fleming: Following the High Court case the minister announced that we would actually revert to processing the asylum claims of irregular maritime arrivals in Australia unless and until we could proceed with transfers to Malaysia. So essentially—

Senator CASH: So basically clause 4 is null and void.

Mr Fleming: No. Essentially, the counting of the 800 only counts those who are actually transferred, so it is the first 800 transferred.

Senator CASH: So we have hit the reset button.

Ms Parker: No, clause 4(1)(b)(i) indicates that the government of Australia determines who should be transferred to Malaysia, so there is that as part of the clause as drafted.

Senator HANSON-YOUNG: Hang on, what does that mean? Does that mean that we can send other people there?

Ms Parker: No, it is in addition. It is cumulative in relation to the other requirements.

Senator CASH: So we could get to about 10,000 at the rate we are going and you are still going to say that the 800 have not arrived?

Ms Parker: In theory—

Senator CASH: The agreement states that the people to be transferred to Malaysia are those persons who, after the date of signing of this arrangement, have arrived unlawfully in Australia. On that very simple analysis, over 500 have arrived unlawfully in Australia since the signing of the agreement. If the government and department say they are absolutely satisfied with this agreement in relation to everything else that is in it, why is that clause up for dispute?

Dr Southern: It is not up for dispute. I think what my colleague Ms Parker was saying is that those who are to be transferred are those who after the date of signing arrived irregularly by sea, as you mentioned, but also who the government of Australia determines should be transferred to Malaysia. It is all part of the same clause.

Senator CASH: The 500 who have arrived since the signing are eligible to be transferred, aren't they? We could actually transfer all of them tomorrow if the agreement were up and running. Those 500 are subject to the transfer agreement unless through the pre-assessment process we determine they are not going.

Mr Fleming: It would be open to the Australian government to decide to transfer them but, as the minister announced on 31 August, they will now have their claims processed in Australia.

Senator CASH: Now we have a real problem. The minister, as you said, has made an announcement which has actually changed the nature of that clause.

Dr Southern: I do not believe it has, because clause 4(1)(b)(i) says that they are people who the government of Australia determines should be transferred to Malaysia.

Senator CASH: Exactly, but you have to read it in conjunction with clause 4(2), which states that those people are the people who arrive here unlawfully after the agreement was signed.

Ms Parker: It is cumulative: it is both arriving unlawfully after the agreement was signed and the government of Australia determines should be transferred to Malaysia.

Senator CASH: So the number is not 800 at all. In terms of those who arrive, it could be 10,000. The government could determine that 800 of those 10,000 can go. That is what you are actually saying. It is not 800 at

all who arrive here; it is 800 of those who arrive here after the transfer that the government determines should go. We could have 10,000 people arrive here.

Senator HANSON-YOUNG: This part of the arrangement would allow for someone who is currently being held in a Darwin detention centre to be transferred to Malaysia.

Mr Fleming: If they arrived post the date the agreement was made.

Senator HANSON-YOUNG: They could already have come to the Australian mainland and then you could transfer them to Malaysia afterwards?

Mr Fleming: That is correct.

Senator CROSSIN: I want to ask about the department's interaction with the UNHCR. Could you indicate to us the UNHCR's views on the Malaysia arrangement? What dialogue or discussions have you had with them about that?

Dr Southern: We have had ongoing discussions with the UNHCR through the course of the negotiations on the arrangement and since it has been signed. Those discussions and consultations have occurred here in Australia, in Malaysia and in Geneva. As the UNHCR have said, they are able to work with us on this agreement. I do not know if my colleague Ms Parker would like to elaborate on those consultations.

Ms Parker: At very much a working level they took place in Malaysia with the both the UNHCR and IOM Malaysia and at a more policy level we were engaged with discussions on two occasions—physically in Geneva and one via teleconference as well with people from headquarters—`and have been involved in numerous discussions with the local representatives in Canberra.

Senator CROSSIN: Has the UNHCR expressed any view about or preference in relation to the arrangement with Malaysia versus, say, Nauru?

Ms Parker: They have clearly. They have indicated that they feel the arrangement with Malaysia is workable and something that could add to the protection space within the region. They have indicated that they would not be willing to work in relation to Nauru, as I understand it. That was certainly their position when the government was last processing in Nauru.

Senator CROSSIN: Even though Nauru has now signed the refugee convention? Has that indicated a difference in their ability to process or protect the rights of people in Nauru?

Ms Parker: I believe the UNHCR see the Malaysia arrangement as part of the broader regional cooperation framework that was entered into by Bali process ministers in March this year, that it is part of a broader regional solution, that it relates to a country of transit in the region, that it is trying to grapple with issues of asylum seekers and that it offers some burden-sharing arrangements in terms of Australia agreeing to resettle the 4,000 refugees over four years. It also puts in place the appropriate protection for transferees who are being sent to Malaysia in terms of the limited period of detention, living in the community, the capacity to undertake employment and those sorts of arrangements.

Senator CROSSIN: Is this because, if people were sent to Nauru, they would eventually perhaps end up coming to Australia anyway, versus going to Malaysia as part of broader cooperation and we would get 4,000 people out of that regional assessment?

Ms Parker: I am not sure whether that is part of their reasoning, but they certainly take a different view in relation to situations where they have been engaged in processing as they would be in Malaysia and are happy to undertake resettlement referrals to the normal resettlement countries around the world, as opposed to when a country is to undertake the processing, as would be expected in Nauru by either Australia or Nauru as a signatory.

Senator CROSSIN: Can I ask you your opinion about Nauru? It was once the only option and we know that people who went there mostly settled in Australia or New Zealand. Is it your view—

CHAIR: I do not know that we do know that. That is a matter of some dispute. I think less than half of all the people who went there actually returned to Australia.

Senator CROSSIN: Let's get those figures from Dr Southern then. Perhaps you could clarify on the record exactly the statistics about the relocation of people on Nauru.

Mr Fleming: Our view is that offshore processing under the Pacific solution played a role in stopping the boats last time, in amongst a range of factors. The contribution that Nauru played was it fed into the uncertainty. Up until a range of things happened, it had been a product where, if you were coming to Australia, you would almost certainly get permanently settled in Australia. What Nauru did was to throw that into doubt. We know that that message of uncertainty fed back up through people smugglers and asylum seekers otherwise headed for

Australia. The difficulty today in our view is that what was once uncertainty would now be marketed by people smugglers and seen by asylum seekers as part of a certainty—the certainty being that if you wait it out you will get resettled in a Western country.

Picking up the chair's point, what happened last time was that no-one was sent home involuntarily from Nauru or Manus. While about 30 per cent went home voluntarily after a while, everyone who waited it out ultimately got resettled, and 95 per cent of those went to Australia and New Zealand. So what worked as uncertainty last time we believe would now be marketed as part of the certainty that you will ultimately end up living in a Western country.

CHAIR: To clarify, of those that were sent to Nauru by Australia, fewer than half ended up with visas in Australia.

Mr Fleming: I think I have the breakdown for Australia and New Zealand.

CHAIR: I am talking about Australia. Can you tell me how many came to Australia?

Mr Fleming: There were 705 who went to Australia.

CHAIR: Out of?

Mr Fleming: There were 1,053 who were resettled in Australia and other countries. Would you prefer me to give you this in writing, on notice?

CHAIR: Could you just repeat that? Give me the figures.

Senator CROSSIN: The total number, I think. What was the total number?

Mr Fleming: There were 1,637 people processed under the Pacific solution.

CHAIR: That was how many were sent to Nauru?

Mr Fleming: Yes, or to Manus Island. Of those, 483 returned home voluntarily, 1 person died and 1,153 were resettled. Of those who were resettled, 705 went to Australia, 401 to New Zealand, 21 to Sweden—

CHAIR: Please give me the rest of those figures in writing. Of the 1,637—

Mr Fleming: I only have three to go. Of those who were resettled, 16 went to Canada, 6 to Denmark and 4 to Norway.

CHAIR: Of the 1,637 who were sent to Nauru by Australia, only 705 ended up as people living in Australia.

Mr Fleming: That is how many were resettled directly to Australia.

Senator CROSSIN: I had discussions with Julian Burnside about the number of refugees we take from Indonesia. He thought it was around four or five, but my recollection is that it is 500. Is that correct? I just want that on the record to make sure it accurately reflects our discussion this morning.

Mr Fleming: In the program year 2010-11, which is the same as the financial year, 480 refugees were resettled out of Indonesia and 20 persons under the Special Humanitarian Program, giving a total of 500 resettled out of Indonesia under our Humanitarian Program.

Senator HANSON-YOUNG: I will go to the agreement first up to get some clarification. Is there anything other than the agreement which has been signed or agreed to between Australia and Malaysia in relation to the arrangement?

Ms Parker: I believe some practical protocols and arrangements have been put in place in Malaysia, but these represent the formal documentation in relation to the arrangement.

Senator HANSON-YOUNG: So there is nothing else other than the document we have which underpins the arrangement?

Ms Parker: There are processes in Australia in relation to the pretransfer assessment—before people would be taken to Malaysia.

Senator HANSON-YOUNG: What do you mean by processes?

Ms Parker: There were processes and documentation in relation to that process.

Senator HANSON-YOUNG: And where are they? Who signed them?

Ms Parker: They are internal departmental policy documents and guidelines.

Senator HANSON-YOUNG: Can the committee have a copy of those?

Mr Fleming: Yes, we can provide those.

Senator HANSON-YOUNG: I refer to clause 15 in the agreement:

Clause 15 (Confidentiality)

The terms and conditions of this Arrangement will remain confidential between the Participants unless otherwise agreed.

Where are the terms and conditions?

Ms Parker: They are the clauses of the arrangement.

Senator HANSON-YOUNG: So this document that is signed—these are the terms and conditions?

Ms Parker: That is correct.

Senator HANSON-YOUNG: There is nothing that remains confidential?

Ms Parker: No.

Senator HANSON-YOUNG: An overarching principle of this arrangement, clearly set out at the front, before we even get to the clauses, is that this arrangement is signed:

RECOGNIZING further the sovereignty of states in determining their own immigration policy and laws relating to immigrants, including determining entry into their territory and under which conditions immigrants may remain

That is obviously the principle of ensuring that both Malaysia's and Australia's own domestic laws prevail. Is that correct?

Ms Parker: To the extent that they would be inconsistent with the arrangement, I believe so. But there was an understanding that the arrangement could work consistently with both Australia's and Malaysia's domestic laws.

Senator HANSON-YOUNG: What do you mean by 'inconsistent', given that the conditions in this arrangement are inconsistent with Malaysian domestic law.

Ms Parker: In what way?

Senator HANSON-YOUNG: The right to be able to self-sustained.

Ms Parker: The non-access to employment opportunities issue relates to people who are illegal in Malaysia. The 800 transferees going to Malaysia were going to be given lawful status.

Senator HANSON-YOUNG: Where in domestic law will it say that they have been given lawful status?

Ms Parker: They are the subject of an exemption under section 55 of the Immigration Act, Malaysia.

Senator HANSON-YOUNG: Say somebody gets caught up in a situation and they are subject to domestic Malaysian law. We know that one of the punishments under domestic Malaysian law is caning.

Ms Parker: The caning offence is actually for entering Malaysia without appropriate documentation.

Senator HANSON-YOUNG: Caning is used for other punishments.

Ms Parker: Being exempt means you have not committed an offence in relation to that entry provision.

Senator HANSON-YOUNG: Caning is not just used against illegal immigrants, though, is it?

Ms Parker: No, it is not. It is used in relation to a number of offences that are committed under Malaysian criminal law.

Senator HANSON-YOUNG: The Prime Minister, in her press conference when this arrangement was signed, said that not one person that Australia sends to Malaysia will ever be caned. How could she make that assessment when it is under domestic Malaysian law?

Ms Parker: I cannot comment on the exact words the Prime Minister said, but they will certainly not be caned for offences of entering. As per normal for anyone who goes to a country like Malaysia, or to the US or wherever, if you commit an offence you will be subject to their criminal laws.

Senator HANSON-YOUNG: Of course, because it is the domestic law of the country that prevails, yes?

Ms Parker: Yes.

Senator HANSON-YOUNG: None of this arrangement is, of course, legally binding; it is Malaysian domestic law that prevails.

Ms Parker: If you are suggesting that, if a transferee were to go to Malaysia under the arrangement—

Senator HANSON-YOUNG: No, I just asked you the question; I did not suggest anything. I said that this arrangement is not legally binding. The treatment of people who we send to Malaysia will be subject to normal Malaysian domestic law, surely?

Ms Parker: Which the arrangement is consistent with, yes.

Senator HANSON-YOUNG: Except that, if there is an inconsistency, it is Malaysian domestic law that will prevail, because this document is not legally binding.

Ms Parker: The Malaysian government has undertaken, in relation to the 800 people that were to be sent to Malaysia, to act in relation to them in a particular way, and nothing in the arrangement as far as I am aware actually contravenes anything in the Malaysian domestic system that would have caused them a problem—that the arrangement was actually in conflict with their domestic law.

Senator HANSON-YOUNG: The issue of nonrefoulement is not just in relation to Australia's obligations not to send somebody back to their country of origin where they may face persecution or ill treatment, degrading treatment; it also means 'to any country that we may put that person in'—isn't that right? Indirect refoulement is much the same as the principle of nonrefoulement.

Ms Parker: There are two issues. The first one is that we do not engage in chain refoulement—that is, send them to a country that would send them to another country where they would be persecuted, and also they do not have a claim in terms of any claims for protection against Malaysia.

Senator HANSON-YOUNG: So what assessment will be done before we transfer people to ensure that they are not fleeing persecution or ill-treatment, degrading treatment, from Malaysia?

Ms Parker: I think I indicated that earlier in relation to Senator Cash's questions. There will be an individual assessment undertaken of all people arriving before they are transferred to Malaysia, which will take into account their individual circumstances.

Senator HANSON-YOUNG: How would that be done within 72 hours?

Ms Parker: If I could hand this over to Mr Fleming; it is actually his area.

Mr Fleming: We would have a process that would include specific—

Senator HANSON-YOUNG: What is the process?

Mr Fleming: Officers from the department would be specifically asking the clients about things, including whether there was any reason—

Senator HANSON-YOUNG: Where is this process written down?

Ms Parker: That is in the preremoval assessment document that we spoke of earlier, that we will provide.

Senator HANSON-YOUNG: Why isn't that in this agreement?

Ms Parker: Those arrangements are purely for Australia in terms of our assessment—

Senator HANSON-YOUNG: There are plenty of things—half this arrangement is in relation to Australia; the other half is in relation to arrangements in Malaysia. Why is the pretransfer assessment process not included in the arrangements?

Ms Parker: It is referred to in the arrangements.

Senator HANSON-YOUNG: It says that it was yet to be decided. Why was this document signed before those processes were worked out?

Ms Parker: Because those processes were being developed in consultation with UNHCR.

Senator HANSON-YOUNG: Why was the document signed before those processes were decided upon?

Ms Parker: They were running in parallel.

Senator HANSON-YOUNG: Why are those arrangements not included in this document? You refer to them, and you say that work is yet to be done. Why was it finalised and signed before those processes had been completed?

Mr Fleming: Even if they had been—

Senator HANSON-YOUNG: No, why? I am asking what is the rationale for signing the documents before we understood how people would be treated, processed and assessed.

Mr Fleming: My point is, even if they had been finalised I do not think they are a document we would have incorporated into the arrangements.

Senator HANSON-YOUNG: Why?

Mr Fleming: From our perspective, it would be sufficient that under clause 4 we would only transfer people that the government of Australia determined would be transferred to Malaysia.

Senator HANSON-YOUNG: I will take you to the operational guidelines to support transfers and resettlement, which is the additional information that is included in the signed arrangement. It goes through, step by step, how people will be transferred and yet the assessment process, which is absolutely crucial to ensuring that we do not transfer people to Malaysia or, indirectly, to anywhere else, is not included in that section, who will

take over the person once the plane arrives on the ground, step by step. Yet the crucial element of pretransfer assessments is not included. Why is that?

Mr Fleming: Because, in terms of an agreement or an arrangement between Australia and Malaysia, it only gets enlivened once a person has been determined that they will be transferred. The process we are talking about goes to prior to that in determining whether somebody will be transferred or not.

Senator HANSON-YOUNG: Was that assessment process ever included in a previous draft before the arrangement was signed?

Mr Fleming: No.

Ms Parker: Do you mean the guidelines? No.

Senator HANSON-YOUNG: Why would you not ensure that those protections would be part of the agreement if they are so crucial, as you have already said, to ensuring that Australia does not breach its obligations?

Ms Parker: Because it is entirely a matter for us, not for the Malaysian government as to how we undertake to meet our international obligations. The guidelines were developed by us in conjunction with UNHCR. There was no real role for the Malaysian government.

Senator HANSON-YOUNG: Okay, yet the reason that this entire proposal has been shunted by the High Court is that you cannot guarantee these things. They are absolutely crucial to ensuring that people are protected; that we do not transfer people we should not be transferring; we do not know what needs they have, particularly vulnerable children, pregnant women, the sick and the elderly—all those issues that were crucial to that High Court decision. Are you saying that it is a mistake that they were not included?

Mr Fleming: No. We would reiterate that they were not a matter for the agreement because it is purely for Australia. It is not about Australia—

Senator HANSON-YOUNG: No, it is not.

Mr Fleming: and Malaysia together.

Senator HANSON-YOUNG: It is not purely for Australia because there are parts of this agreement based on the assessments that need to be of people before we transfer them as to what special needs those people may require to be met once they get to Malaysia, and none of that is in this document. Those core principles are not in this document, are they?

Mr Fleming: No, they are in our guidelines for Australian government officials.

Senator HANSON-YOUNG: Where is the direction in this arrangement? If you assess somebody as being vulnerable and needing special arrangements, where is the certainty and protection within this arrangement that that will happen?

Mr Fleming: It is not within the arrangement; it would go to when and whether we would determine to make that particular individual a transferee—

Senator HANSON-YOUNG: If you decide to send them to Malaysia, where in this agreement does it mean that their needs will be met?

Ms Parker: On arrival there is a medical assessment undertaken by IOM in which any special needs will be identified and accommodated as necessary.

Senator HANSON-YOUNG: Where does it say that the needs of people, before Australia transfers them, will be met under this agreement?

Mr Fleming: It does not state it in the agreement it is—

Senator HANSON-YOUNG: It does not. It says that it yet to be worked out between the parties.

Mr Fleming: That is not a matter to be worked out between the parties in terms of whether Australia sends somebody or not—

Senator HANSON-YOUNG: No, it assesses the needs of those people. There are going to be two categories of people, and you will assess them. I think it is ridiculous that we do not even have a copy of what those guidelines are—trying to prove to us that somehow you have this all in hand and yet we do not have the documents. It is not in your submission.

Mr Fleming: We have agreed to provide this documents.

Senator HANSON-YOUNG: But why would you not include that in your submission?

Mr Fleming: They were not in the submission, but we will gladly provide them.

Senator HANSON-YOUNG: But why? Why would you not include them in the submission?

Dr Southern: The submission includes quite a lot of detail of what is in the pre-removal guidelines.

Senator HANSON-YOUNG: There are two categories of people. People who, after you have done an assessment, you will decide then are not able to be transferred. You will not transfer them, right? One group of people?

Mr Fleming: Yes, correct.

Senator HANSON-YOUNG: Then there will be a group of people who you may say, 'Well, we will transfer them, but they have special needs that must be met.' Correct?

Mr Fleming: Yes.

Senator HANSON-YOUNG: In the signed agreement between Australia and Malaysia where does it say that those needs will be met and the process for ensuring that that would happen?

Mr Fleming: There is a range of governance arrangements in the arrangements, which I will leave to Ms Parker to talk about—

Senator HANSON-YOUNG: But, the agreement is silent on that particular part, is it not?

Dr Southern: I think we could go to paragraph 3.5 of the operational document, which talks about vulnerable transferees and the access they will have to being supported as vulnerable cases, backup safety nets provided through UNHCR and IOM.

Senator HANSON-YOUNG: Where is the agreement between Australia and Malaysia that the needs of vulnerable people will be met by Malaysia?

Mr Fleming: The agreement is, as Dr Southern has pointed out, that under the auspices of the agreement between Australia and Malaysia, there would be access to IOM and UNHCR.

Senator HANSON-YOUNG: But it is not IOM and UNHCR who determine whether people's met needs will be protected by the government of the country.

Mr Fleming: Sorry, I thought you were asking about putting special arrangements in place for vulnerable persons with special needs.

Senator HANSON-YOUNG: Yes, I am. Where in this agreement does it say that the Malaysian government will uphold and protect those needs? For example, 'We will ensure that when we have assessed somebody, the assessment that we make that these people are vulnerable, that this child who is unaccompanied is going to be sent to Malaysia, a) will know who will look after them, b) that the Malaysia government agreements to do that.' Where is that detail in this arrangement? It is just not there, is it?

Dr Southern: The operational document talks about the arrangements that will be in place for the accommodation, the health care et cetera of the transferees and the way in which that will be provided through the UNHCR and IOM. We have pointed you to the paragraph which talks about how the vulnerable transferees will be deal with.

Senator HANSON-YOUNG: But it is not the UNHCR who runs the country of Malaysia.

Dr Southern: Clearly not, but the signed documents contemplate the arrangements which will involve UNHCR and IOM. Those were the agreements that we reached with Malaysia.

Senator HANSON-YOUNG: Why was the agreement signed with specific clauses that say, 'These are details yet to be decided?' You obviously knew you had to do them.

Dr Southern: The kind of pre-transfer—

Senator HANSON-YOUNG: Was the arrangement signed too early?

Dr Southern: No.

Senator HANSON-YOUNG: So why are there gaps?

Dr Southern: Clearly there was going to be a period following the signing of the arrangement when we moved to operationalise it. We knew that we were going to be having those discussions with Malaysia to put those into place.

Senator HANSON-YOUNG: The arrangement was signed on the Friday before the first two boats arrived on the Friday and Saturday at the first planned transfer was going to be on the Monday afternoon, is that right?

Mr Allen: Are you talking about the original signing of the agreement back on 25 July?

Senator HANSON-YOUNG: No, I am talking about the signed agreement.

Mr Allen: Could you repeat the question, please?

Senator HANSON-YOUNG: The day that the arrangement was signed, how many boats arrived?

Mr Allen: Immediately following the agreement I believe there were about two.

Senator HANSON-YOUNG: And when was the first planned transfer meant to occur, before the High Court injunction?

Mr Allen: From memory, I believe it was being planned for Monday and that Monday would have been 7 or 8 August—I would have to check.

Senator HANSON-YOUNG: So the agreement was signed on the Friday.

Mr Allen: Yes.

Senator HANSON-YOUNG: And the first planned transfer was going to be on the Monday yet there were things which had not been decided about how people would be assessed prior to their removal and how their needs would be met at the other end.

Dr Southern: Senator, no. I think Mr Allen's evidence was that the agreement was signed on Friday, 25 July. but the first transfer was proposed for the Monday around 8 August, if that is the correct date—it was two weeks or so later.

Mr Fleming: It was over two weeks, yes.

Senator HANSON-YOUNG: By the time that was going to occur, did you have the details of how the process of pre-transfer assessment was to occur and, if there were needs, how they would be met in Malaysia?

Mr Fleming: Pre-transfer assessments were undertaken and the initial group which were to go were all unaccompanied adult males who had been assessed as not having any particular vulnerabilities or special needs.

Senator HANSON-YOUNG: Take me through how the pre-transfer assessments will occur. We do not have that detail.

Mr Fleming: They would be centred around interviews or discussions with clients.

Senator HANSON-YOUNG: Take me through, step by step, within the 72 hour period, how these pre-transfer assessments will occur.

Mr Allen: The pre-removal assessments would occur very soon after the arrival of people at Christmas Island. The intention was to complete all pre-removal assessments within the first 24 to 48 hours after which appropriate data would be provided to Malaysia to allow Malaysia to make a decision as to whether the proposed transferees were acceptable. As Mr Fleming was saying, it was basically a process of interview of people upon arrival on the answering of particular questions about their needs, any concerns they might have about where they were being transferred to and, following that, a decision being made by an appropriately delegated officer as to their suitability to transfer.

Senator HANSON-YOUNG: Who would be interviewing and assessing unaccompanied children?

Mr Allen: These are all officers who are drawn from our refugee status assessment areas. They are all highly experienced in assessing people's claims under international conventions.

Senator HANSON-YOUNG: And does that child have their legal guardian present while an assessment is being undertaken?

Ms Parker: There were arrangements in place for an independent person from Life without Barriers to be present.

Senator HANSON-YOUNG: Are they their legal guardian?

Ms Parker: No, they are not.

Senator HANSON-YOUNG: Who is the legal guardian of unaccompanied children?

Mr Allen: At that point, it is the minister.

Senator HANSON-YOUNG: Yes. So who is representing the needs of the child during the assessment?

Dr Southern: As my colleague said, we would have Life without Barriers representatives with each child.

Senator HANSON-YOUNG: Do have any legal status in regard to guardianship of these children?

Dr Southern: No.

Senator HANSON-YOUNG: Do they have any legal expertise? Are they in any way informed to deal with the legal needs of these children during the transfer assessment process?

Dr Southern: They are an organisation that we work with very closely in relation to unaccompanied minors in detention facilities, and they have—

Senator HANSON-YOUNG: I know who they are. I am asking: have you found specific people who understand the legal rights of these children while they are sitting in that assessment?

Dr Southern: Could we take that on notice to confirm who would be there?

Senator HANSON-YOUNG: I want to know—

Dr Southern: I know you want to know, and that is why I am asking if I can take it in on notice.

Senator HANSON-YOUNG: What do your guidelines, which we do not have, which you have said you will give to us—

Dr Southern: Which you will have.

Senator HANSON-YOUNG: I think it is staggering that you did not think that you should provide them to us before today as part of your submission, seeing as they go directly to the terms of reference of this inquiry. We talk specifically about pre-transfer assessments in the terms of reference and you have not given us the guidelines. In your guidelines, what is the process by which unaccompanied children will be assessed? Who is with them? What is their legal status with those children? What is their legal expertise and what is the process of review of a decision?

Mr Fleming: I think we have given what information we can on the spot. On the additional element of review you have just mentioned, there is no formal process of review.

Senator HANSON-YOUNG: There is no formal process of review. So the assessment will be made and there is no guaranteed legal representative for this child during the interview process. That is correct?

Mr Fleming: That is correct.

Senator HANSON-YOUNG: And yet this decision is not even able to be reviewed.

Mr Fleming: There is not a review process. I should mention, though, that the actual decision on the pre-removal assessment is made by a more senior officer than the one who undertook the interview. So there are two people involved, but I would not pretend that that is a review process.

Senator HANSON-YOUNG: What are the obligations under the minister's role as guardian to these children to ensure that decisions are made in their best interests?

Mr Fleming: The minister, as the legal guardian under the IGOC Act, has a duty to look after the interests of the child.

Senator HANSON-YOUNG: Do you think removing a child to Malaysia is in their best interests?

Mr Fleming: Up until the High Court case, we thought that another provision of the IGOC Act actually meant that, because we were undertaking the removal or transfer arrangements, the Migration Act provisions had dominance over the IGOC Act provisions. It is only since the High Court case that we have thought the position was different.

Senator HANSON-YOUNG: I think all you would need to do is go and speak to any mother or father in the shopping centres tonight to point out that the best interests of the child should be paramount. If you are the legal guardian of the child, you do what you can to act in their best interests. Any mother or father could tell you that. I do not think you have to have the High Court explain that.

Mr Fleming: I was referring to a matter of statutory interpretation.

CHAIR: I think we need to bring this to a close. We have more questions which we will put on notice to you. Can I express my appreciation for your appearance today and for the way in which you have been able to help us with our issues. I hope you will also be able to help us with the questions on notice. We have to report by 11 October, so I am proposing to the committee that we ask for questions taken on notice to be returned to us by close of business on Wednesday, 28 September, in order for us to be able to put our report together before 11 October. If that is possible, it would be much appreciated. I thank all the witnesses who have given evidence today.

Committee adjourned at 15:24