Commonwealth OMBUDSMAN

Submission by the Commonwealth and Immigration Ombudsman

INQUIRY INTO AUSTRALIA'S AGREEMENT WITH MALAYSIA IN RELATION TO ASYLUM SEEKERS

Submission by the Commonwealth
and Immigration Ombudsman, Mr Allan Asher

September 2011

1 INTRODUCTION AND SUMMARY

On 17 August 2011 the Senate referred Australia's agreement (the Agreement) with Malaysia in relation to asylum seekers to the Legal and Constitutional Affairs Committees for inquiry and report. The Committee has invited submissions on the Agreement by 14 September 2011.

The Agreement provides, amongst other things, that Australia and Malaysia will, subject to the terms of the Agreement and the laws, rules, regulations and national policies from time to time in force in each country, endeavour to promote and develop co-operation in addressing migration issues of concern. In particular, the Government of Australia will transfer certain persons seeking international protection as refugees under the 1951 Convention (the Refugee Convention) and 1967 Protocol (the Refugee Protocol) relating to the Status of Refugees to Malaysia for refugee status determination. In exchange the Government of Australia will accept certain persons who have been determined to be refugees by the United Nations High Commissioner for Refugees in Malaysia.

The Commonwealth Ombudsman welcomes the opportunity to contribute to this Inquiry.

2 BACKGROUND

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability, and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

While the primary function of the Ombudsman remains to receive and investigate complaints about government agencies, over the years the role has broadened to encompass the improvement of public administration. The independent examination of government administration through the investigation of individual complaints as well as broader, systemic issues, gives the Ombudsman a unique perspective.

The *Ombudsman Act 1976* (Cth) conferred the role of Immigration Ombudsman on the Commonwealth Ombudsman in December 2005. The Immigration Ombudsman's function is to investigate action taken in relation to immigration matters, including immigration detention.

The function also involves reviewing, every six months, the circumstances of all people who have been in detention for two years or more. When a report is received from the Department of Immigration and Citizenship (the Department) about an immigration detainee, Ombudsman staff interview the detainee, check records, make other inquiries as necessary and draft a report that the Ombudsman sends to the Minister for Immigration, which includes comments and recommendations that are considered appropriate. The Minister tables a de-identified version of the Ombudsman's report in the Parliament which is posted on the Ombudsman's website. With the introduction in 2008 of the Minister's Immigration Detention Values, the Ombudsman took on the additional role of conducting reviews under the Ombudsman's own motion power of the circumstances of anyone who has been in detention for over six months. The Ombudsman prepares a report, which is provided to the Secretary of the Department.

The Ombudsman's office also undertakes inspections, including unannounced inspections of immigration detention facilities. These inspections focus mainly on issues that have been the subject of complaint but they may also address other matters where administration needs to be improved.

In August 2008 the Commonwealth Ombudsman, on request from the Minister for Immigration, assumed an oversight role of the non-statutory refugee assessment and review processes on Christmas Island for Irregular Maritime Arrivals under the own motion power in the *Ombudsman Act 1976.* The Ombudsman advises the Secretary of the Department of any matters of concern. The Department consults with our office on proposals to change administrative processes. The oversight function is performed under the Ombudsman's own motion powers.

In the discharge of this role, Ombudsman officers meet with staff from the Department and the other agencies involved, asylum seekers and their legal representatives, Christmas Island community members and organisations providing detainee services and support. The office also has regular and frequent contact with Canberra based departmental staff. Following each visit, the Ombudsman's office reports its observations and suggestions for improvement to the Secretary of the Department. The various reports' observations and suggestions were amalgamated into a single public report released in February 2011. Its key messages were:

- the current scale of operations on Christmas Island is not sustainable
- there are significant delays in processing refugee applications, including delays in processing security clearances
- detainees are experiencing a range of health issues—particularly, in relation to mental health arising from inadequate access to medical services and exposure to circumstances that contribute to trauma.

On 29 July 2011 the Ombudsman announced that the office would be undertaking an investigation into suicide and self-harm in Australian immigration detention facilities. The investigation will assess the extent of this problem, examine the root causes, and consider practical steps that the department and its service providers (SERCO and IHMS) should take to identify and manage those at risk of suicide and self-harm. The aim is to produce evidence-based, expert-endorsed advice on guidelines and protocols for reducing or preventing the number of incidents that occur in detainee communities. We hope to release the investigation findings by the end of 2011.

In light of the above, the Ombudsman's office is well-placed to comment on migration matters, and particularly, issues relating to the treatment of Irregular Maritime Arrivals.

3 RESPONSE TO TERMS OF REFERENCE

The Terms of Reference for the Committee are 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.

The Ombudsman's office's comments will address a number of these matters.

3.1 HIGH COURT DECISION

On 31 August 2011 the High Court handed down its decision in the case of *Plaintiff M70/2011 v Minister for Immigration and Citizenship & Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32.

The High Court found that the Minister's declaration of Malaysia as a specified country for the purposes of s 198A of the *Migration Act 1958* (Cth) was invalid, and that the transferees could not lawfully be transferred to Malaysia. In addition, the High Court determined that unaccompanied minors who are Irregular Maritime Arrivals cannot be removed from Australia without the prior written consent of the Minister under the *Immigration (Guardianship of Children) Act 1946* (Cth).
It is not appropriate for the Ombudsman's office to comment upon the High Court's decision, other than to note that its effect was to prevent the transfer of Irregular Maritime Arrivals to Malaysia under the Agreement. Consequently, the Government is investigating its further options, including legislative amendments.

Assuming that the Government will fashion a response to the High Court decision, the Ombudsman's office is concerned that the Government's consideration of its options – as opposed to the outcome of those deliberations – does not have avoidable adverse impacts on those who are currently in immigration detention.

3.2 PRE-TRANSFER PROCESSES

The Ombudsman's office understands that under clause 3 of the Agreement, the United Nations High Commissioner for Refugees and the International Organization for Migration will have operational roles and functions as described in Annex A to the Agreement, and which will relate to arrangements for transferees to Malaysia after their arrival in Australia as Irregular Maritime Arrivals.

In this regard, Australian authorities will have responsibility for initial handling and pre-transfer processes up to arrival and disembarkation in Malaysia. At this point in time Malaysian authorities will also be undertaking checking and other processes necessary for its internal or domestic purposes and requirements.

An area of potential concern for the office relates to the steps that Australian authorities, or their service providers, will be undertaking to ensure that vulnerable people will not be transferred to Malaysia. These concerns may variously arise in respect of Irregular Maritime Arrivals who are unaccompanied minors in respect of whom the Minister has obligations under the *Immigration (Guardianship of Children) Act 1946*, where an Irregular Maritime Arrival claims that he or she will be at risk of persecution or refoulement by Malaysian authorities, or that the very fact of transfer will lead to his or her other human rights being breached by Malaysian authorities.

For example, it is not clear what safeguards will ensure that a proselytising Shia Muslim is not subject to prosecution amounting to persecution in Malaysia (where currently this would be a criminal offence) or that transferees' human rights will not be impugned by cruel and degrading treatment such as the judicial imposition of the death penalty or punishment by caning.

The Ombudsman's office is keen to assure itself and the Australian public that any pre-removal processes include safeguards to prevent anticipatory refoulement of transferees to Malaysia in contravention of customary international law, and that Australia can guarantee that the obligations it acceded to upon signing international human rights instruments like the Refugees Convention, the Convention Against Torture and the Convention on the Rights of the Child will be afforded to transferees.

As we understand it, the operational guidelines at Part 1 of Annex A do not clearly identify any pre-transfer vulnerability assessment processes or their content and as

such, the Australian Government has not yet made public the detail of any operational policies and procedures that have been built into the Agreement to safeguard Irregular Maritime Arrivals who may be at risk. Unpublished operational information is unreliable guidance and poor administrative policy. Section 10 of the *Freedom of Information Act 1982* (Cth) provides that unpublished policy cannot be used to prejudice a person if the person could lawfully have avoided that prejudice had he or she been aware of that unpublished information.

In our view, such processes need to be clearly described and delineated, with appropriate safeguards built in to ensure that they are fair and reasonable, and meet minimum administrative standards. Further, all officers involved in implementing the processes need to be appropriately trained and have a clear understanding of their roles and responsibilities.

This is particularly important as the Agreement aspires to complete the transfer process within 72 hours of a person's arrival in Australia. Our concern is that the desire for the speedy turnaround of Irregular Maritime Arrivals does not lead to inadequate or insufficient consideration of an individual transferee's circumstances. To guard against this possibility, we consider it necessary that transferees be given access to legal assistance and should be readily able to complain to either the Ombudsman's office or the Australian Human Rights Commission about any concerns they may have with pre-transfer assessments.

While the Australian government may have already begun measures and processes prior to the High Court's decision of 31 August 2011, including the preparation of relevant operational and procedural advice for their implementation, at this point in time such information was not publicly available. Accordingly the sufficiency and adequacy of the processes has not yet been scrutinised or considered by relevant oversight bodies. Essential issues that relate to the content of the pre-transfer assessment process include how the process will be conducted (and by whom), the nature and content of any processing safeguards to identify and correct errors, and the availability of access to review options and oversight mechanisms.

Following the High Court's decision, our office is now concerned about the efficacy of any interim and future detention arrangements pending a considered government response to the High Court's decision.

Presently Irregular Maritime Arrivals in Australia are being processed in the usual way and cannot be subjected to the Malaysian Solution. However, we are anxious that any delay in the government's response does not unnecessarily prolong the detention period for those Irregular Maritime Arrivals who are currently detained. In this regard, our office believes that the Department should take a pragmatic and practical approach to Irregular Maritime Arrivals' ongoing detention and consider all available detention options in appropriate cases, including community detention for minors and other vulnerable persons.

Further, we are also concerned about what will happen in the future. If there are additional challenges to the legality of either individual transfers or transfer arrangements more generally, it is not clear whether the Australian Government or the Department has processes or plans to deal with the consequences of such challenges. In our view, there needs to be clear contingency planning in place to ensure that the circumstances of Irregular Maritime Arrivals will be managed in a humane and considered manner pending a durable and legal solution.

3.3 TRANSFER PROCESSES

We understand that transferees will depart Australia by air for Malaysia and will be accompanied by Australian escorts, including Australian immigration authorities. Prior to departure and during the flight, transferees will receive counselling about the transfer process and briefed on what to expect in Malaysia. On arrival in Malaysia the transferees will be handed over to Malaysian authorities at Kuala Lumpur International Airport at the door of the aircraft and are expected to disembark the aircraft voluntarily. Where transferees do not disembark voluntarily, Australian authorities will hand control of the transferees to Malaysian authorities who will then effect their disembarkation.

An important issue is that in the case of involuntary departures, both Australian and Malaysian authorities will employ, or eventually resort to, the use of force to secure compliance and disembarkation.

The Ombudsman's office has previously commented on the use of force noting that officers of the Department (and their contracted providers such as SERCO) are authorised to exercise exceptional, even extraordinary, coercive powers.

In the August 2007 report called *Lessons for public administration—Ombudsman investigation of referred immigration cases*, the then Ombudsman identified a need for adequate training, proper management and oversight, good information systems, quality assurance and effective controls over the use of these coercive powers. One of the office's more important roles is to constantly review the effectiveness of administrative initiatives and controls to provide an assurance that these extraordinary powers are managed properly and employed fairly and reasonably.

We consider that this extends to their exercise in the context of executive arrangements concluded with other countries. Assurances to the public are needed to ensure that in using force, the Department and its service providers have acted appropriately and in a considered way – for example, by taking all possible steps to diffuse difficult situations before resorting to force and making records of relevant incidents so that appropriate oversight and monitoring can be performed.

Currently, it is not clear what operational procedures are in place to ensure that Australian authorities will use only proportionate and necessary levels of force, and as a last resort. As a result, we have been unable to determine whether the use of force will be subject to clear guidelines, or that relevant Australian authorities have received sufficient and adequate training and clearly understand what is expected of them.

We are not currently able to assure the Australian community that the arrangement contains sufficient and adequate guarantees that Malaysian authorities will adopt a similar approach and engage in conduct that is generally consistent with Australian legal, human rights and administrative norms. We understand the legal status of the Agreement (and any operational guidelines) to be that it is only binding as a matter of international law, and not as a matter of domestic law. That is, it provides no enforceable guarantees as to what will happen in Malaysia to the 800 transferees.

Commentators have claimed that the Agreement amounts to little more than Australia outsourcing its international obligations to assess the claims of asylum seekers and provide protection to deserving cases. Whatever the merits of such claims, 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.

3.4 POST MALAYSIAN ARRIVAL ARRANGEMENTS

Under the terms of paragraph 2.1.2 of Annex A, the International Organisation for Migration will conduct health assessments and identify vulnerable transferees once they have disembarked in Malaysia. Our concern is that these assessments will be conducted at too late a stage in the process. What if, as noted above, the vulnerability relates to treatment anticipated or feared in Malaysia?

Under paragraph 2.2.3 of Annex A, where a transferee does not seek asylum (under the Refugees Convention) and does not seek voluntary return (to their country of origin/nationality) Australian authorities will consider the transferee's broader claims to protection under other human rights conventions. If a transferee is determined to have broader claims for international protection, Australia will make suitable arrangements for the removal of the transferee from Malaysia to ensure non-refoulement.

This is problematic for a number of reasons.

Firstly, even if the Agreement does not of itself breach Australia's human rights obligations to transferees who have come to Australia as Irregular Maritime Arrivals, its effect is to place them outside of Australian jurisdiction and ensure that they will not be subject to Australian human rights standards and laws.

Secondly, a claim to refugee status can be more difficult to establish than other claims to protection under other international conventions. For example, refugee status is limited to persecution for the reasons set out in the Refugee Convention. Claims under the Convention Against Torture are not similarly confined. As a result, Australia may be obliged to secure suitable alternative arrangements for a large group of people fearing torture rather than persecution, but who have already been transferred to Malaysia.

Thirdly, at a conceptual level the Agreement and the operational guidelines seem to envisage the possibility that Malaysia could refoule people, contrary to principles of customary international law[1]. The Agreement and guidelines are concerned to ensure protection from non-refoulement under the Refugees Convention and the Convention Against Torture, but not in respect of customary international law. We consider it is incumbent to explain and reconcile this apparent inconsistency.

3.5 THE SITUATION OF TRANSFEREES IN MALAYSIA (INCLUDING VULNERABLE TRANSFEREES)

My office has already noted that the International Organisation for Migration will conduct vulnerability assessments of transferees after their arrival in Malaysia, and that this assessment should be conducted prior to their transfer.

Under paragraph 3.5 of the operational guidelines, the International Organisation for Migration's initial health assessment will identify vulnerable cases at the outset, and transferees will also have access to the existing arrangements that the United

[1] See paragraphs 2.2.3(b) and 2.3.2(b) of the Operational Guidelines.

Nations High Commissioner for Refugees has in place to identify and support vulnerable cases. Paragraph 2.2.2 provides that the United Nations High Commissioner for Refugees complete registration process and conduct refugee status determinations of transferees in Malaysia.

While this provides some safety net, we reiterate our concerns above about how the United Nations High Commissioner for Refugees, when it deals with claimants under the Refugees Convention and Protocol will adequately address claims from minors, victims of torture and trauma and other vulnerabilities against the different criteria in other human rights instruments, such as the Convention Against Torture.

There seems no real assurance that transferees will be readily able to access 'complementary protection' in these circumstances. If so, they will be unable to fully enjoy the customary international law prohibition on refoulement that exists independently of the right to non-refoulement in the Refugees Convention.

3.6 RESETTLEMENT OF REFUGEES FROM MALAYSIA TO AUSTRALIA

Under paragraph 4.2 of the operational guidelines, the Australian High Commission in Malaysia will complete character and security checking as part of the visa process for the 4000 transferees to Australia from Malaysia.

The office is aware that as a result of the increased number of Irregular Maritime Arrivals in Australia, pressure is being placed on security clearance processes. This has led to processing delays not only for Irregular Maritime Arrivals – who have been given priority as detainees – but also for other onshore and offshore visa applicants in other migration programs, including the Special Humanitarian Program under which the 4000 transferees will be accommodated. In some instances the delays have been manifestly unreasonable.

It is important that steps be taken to ensure that these 4000 transferees to Australia will not be subjected to similar processing delays, which could adversely affect community confidence and individual expectations in the efficacy of the arrangements and their implementation.

3.7 AUSTRALIAN PARTICIPATION IN JOINT AND ADVISORY COMMITTEES

Paragraph 5.1 of the operational guidelines provides that a Joint Committee will be established to oversight the day to day operations under the Arrangement. Membership of the Joint Committee will include departmental representatives and other representatives from Australian government agencies as required.

Paragraph 5.2 of the operational guidelines provides that an Advisory Committee will be established to provide advice to Ministers on issues arising out of the implementation of the arrangement. The Advisory Committee will be co-chaired by Malaysia and Australia, and will comprise two representatives from each of the Malaysian and Australian Governments, United Nations High Commissioner for Refugees and International Organisation for Migration representatives (if they agree) and any other representatives as agreed by Malaysia and Australia.

The Commonwealth Ombudsman and other relevant integrity agencies safeguard the Australian community in its dealings with Australian Government by providing for independent review and oversight of Australian Government administrative action, by

developing policies and principles for accountability, and ensuring good practice with accepted norms and standards.

Adequate and effective oversight and review mechanisms provide a means for government to address and correct administrative errors and problems as they occur. The need for oversight is particularly important for executive schemes that are singularly unusual or extraordinary. The reality of administration is that mistakes inevitably occur – our experience tells us that no system is flawless and no decision-maker is perfect. Accordingly, all administrative schemes or arrangements need to make provision for responsive and fair remedial processes to ensure that individual grievances and structural concerns can be equitably addressed. The Ombudsman's office is able to assist agencies and government by providing for practical and considered remedial and corrective action through its review and oversight roles.

With these factors in mind, we query if any consideration has been given to:

- extending invitations to relevant oversight and integrity agencies with relevant expertise and skills to participate in Joint Committee activities, and

- the provision by the Advisory Committee of regular reports to relevant oversight and integrity agencies with relevant expertise and skills.

In our view, these measures would go some way to enabling our office, and our fellow integrity agencies, to meet the challenge of ensuring that the Australian Government implements and administers processes that ensure the safety and well-being of all human beings whom are subject to its actions and policies by upholding the highest standards of public administration and accountability.

It should be noted that the Ombudsman has jurisdiction in relation to any administrative action by an Australian official, including where such actions are undertaken overseas.

3.8 THE COSTS AND UTILITY OF THE AGREEMENT

Our concluding points go to the costs and utility of the Agreement.

We understand that the Australian Government will pay for their basic living expenses and maintain responsibility for the asylum seekers for as long as they remain in Malaysia. Australia will cover all costs of the planned four-year deal, with the total price tag currently estimated at $296 million. However, this figure does not appear to factor in the costs of receiving and settling the 4000 transferees from Malaysia to Australia.

Further, in our view there are no guarantees that the Agreement will have any long term utility or efficacy. Once the 800 transferee quota has been met it seems that the Agreement will be spent. Accordingly, it is not clear whether it is an ongoing or durable solution to the problems caused by humanitarian movements of people.