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**Submission to Inquiry into the agreement between  
Australia and Malaysia on the transfer of asylum seekers to  
Malaysia**

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## Executive Summary

We thank the Standing Committee on Legal and Constitutional Affairs for the invitation and opportunity to make a Submission to the 'Inquiry into the agreement between Australia and Malaysia on the transfer of asylum seekers to Malaysia'.

In this Submission we express our deep concerns about the Arrangement made between the Government of Australia and the Government of Malaysia in relation to the Terms of Reference (ToR) considered in this Submission (all are considered except (d) and (e)). Our concerns relate to both the legality and fairness of the Arrangement, as well to broader political and regional issues. We also pay particular attention to concerns with the implications of the Arrangement for unaccompanied minors (ToR (c)(v) and (vi)).

Whilst we support the concept of regional solutions, we conclude that the current Arrangement does not meet the objectives of such, framed as it is under the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime.

Further, we cannot support the fact that under the Arrangement, Australia effectively intends to contract out its role to both the UNHCR and IOM.

## Introduction

According to the UNHCR website,<sup>1</sup> as of end July 2011, there are some 94,800 refugees and asylum-seekers registered with UNHCR in Malaysia.

- 92% or some 89,900 are from Myanmar.
- There are some 7,900 refugees and asylum-seekers from other countries, including some 4,300 Sri Lankans, 1,100 Somalis, 720 Iraqis and 480 Afghans.

70% of refugees and asylum-seekers are men, while 30% are women. There are some 19,000 children below the age of 18.

There is also a large number of persons of concern to UNHCR who remain unregistered. Refugee communities themselves estimate that the population of unregistered refugees and asylum-seekers to be some 10,000 persons.

This is the context in which Australia has entered into an Arrangement with the Government of Malaysia under the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (<http://www.baliprocess.net/>), for the exchange of 800 asylum seekers arriving irregularly by boat in Australian excised territory, with up to 4,000 recognised refugees awaiting resettlement in Malaysia.. As a signatory to the 1951 *Convention relating to the Status of Refugees*, (Refugees Convention) Australia has an obligation to cooperate

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<sup>1</sup> <http://www.unhcr.org.my/>

internationally to achieve 'a satisfactory solution' to this problem (Preamble). However, in our view the proposed Arrangement was not entered into in the spirit of international or regional cooperation, but rather as a deterrent to asylum seekers who are exercising legitimate rights under international law to freedom of movement in order to seek asylum.

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

Australia's international obligations to asylum seekers

As a signatory to the 1951 *Convention relating to the Status of Refugees*, (Refugees Convention) Australia has protection obligations to asylum seekers who meet the requirements of the definition of a 'refugee' in Article 1A(2) of the Convention, and who come under its jurisdiction or control. Those obligations are not dependent upon a formal recognition of refugee status; they arise the moment that Australia's protection obligations are engaged by its exercise of jurisdiction or control.

In addition to the basic and fundamental right against *refoulement* (Refugees Convention, Article 33 – see **(g)** below), the rights which 'accrue' to an asylum seeker \ putative refugee include at a *minimum*: rights relating to non-discrimination, respect for personal status, respect for property rights, access to the courts, access to rationing systems, elementary education, administrative assistance, equity in tax (Refugees Convention, Articles 3, 12, 13, 16.1, 20, 22.1, 25, 29). If the asylum seeker is actually in Australian territory at any point before a transfer takes place additional rights accrue. These include religious freedom, provision of identity documents and non-penalization for illegal entry<sup>2</sup> (which includes freedom of movement) (Refugees Convention, Articles 4, 27, 31). The overall effect of these provisions is to recognise that asylum seekers are persons to whom rights attach at all stages of their flight from home to ultimate destination \ resettlement.

The High Court in *Plaintiffs M70/2011 and M106 of 2011 v Minister for Immigration and Citizenship* ('the Malaysia-Swap Arrangement case') ([2011] HCA 32) accepted that once Australia's protection obligations under the Convention are engaged, Australia cannot contract out its responsibilities unless equivalent 'effective protection' is provided in a third country to which Australia sends the asylum seekers. This is known as the doctrine of 'accrued' or 'acquired rights'.

Australia will be deemed to have taken control of, or to have exercised jurisdiction over, asylum seekers by interdicting them on the high seas or in Australian waters, or by landing them on Christmas Island and processing them under the terms of the Arrangement made between the Government of Australia and the Government of Malaysia ('the Malaysia-Swap Arrangement') or any similar arrangement. A raft of legislation passed in the wake of the *MV Tampa* incident of August 2001 formed the

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<sup>2</sup> There is some disagreement about the extra-territorial operation of Article 31. The position stated here is the conservative view, but in fact we agree with the opinion that Article 31 operates extra-territorially.

legislative basis of the Pacific Plan, which involved extra-territorial processing of asylum seekers on Nauru and Manus Island, PNG from 2001 to 2008. It included provisions which gave the Australian government the power (inter alia) to intercept and transfer interdicted asylum seekers (see S Kneebone, 'The Pacific Plan: the Provision of "Effective Protection"?' (2006) 18 (Nos 3 and 4) *International Journal of Refugee Law* pp 696-721)..

In *M70*, the judges in the joint judgement (Gummow, Hayne, Crennan and Bell JJ) accepted that the accrued rights included those relating to non-discrimination, education, the practice of religion, employment, housing and access to the courts wherever they are processed (Refugees Convention, Articles 3, 4, 16.1, 17.1, 22.1, 26) ([2011] HCA 32 [118]). Keifel J approved expressly the doctrine of 'accrued rights' and this list of the relevant rights ([2011] HCA 32 [216]). French CJ applied the standards of the Refugees Convention in analysing compliance with the provisions of the *Migration Act* which were in issue in that case (see **(b)** below).

Notably, in *M70* all judges in the majority cited a passage from *Plaintiff M61/2010E v The Commonwealth* ("the *Offshore Processing Case*") ((2010) 85 ALJR 133; 272 ALR 14; [2010] HCA 41) when the High Court said that the provisions of the *Migration Act*, read as a whole, are directed to the purpose of responding to Australia's obligations under the Refugees Convention. In *M70* French CJ noted ([2011] HCA 32 [10]) that in *Plaintiff M61*, the Court observed that the changes to the *Migration Act* effected by the enactment of ss 46A and 198A reflect 'a legislative intention to adhere to that understanding of Australia's obligations under the Refugees Convention and the Refugees Protocol that informed other provisions made by the Act' ((2010) 85 ALJR 133 at 141 [34]; 272 ALR 14 at 23, [2010] HCA 41 at [34]). (See [2011] HCA 32 per Gummow, Hayne, Crennan and Bell JJ at [90], Keifel J at [212]).

In the context of the history of the High Court's approach to the relationship between the Refugees Convention and the *Migration Act* (see S Kneebone, Chapter 4, 'The Australian Story: Asylum Seekers Outside the Law' in *Refugees, Asylum Seekers and the Rule of Law* (Cambridge University Press, 2009, pp171-227), *M70* represents the strongest indication possible that the High Court will continue to interpret the domestic law in light of international obligations. The decision in *M70* is consistent with the jurisprudence of international courts in respect to the particular issue that was considered, namely accrued rights (see *MSS v Belgium and Greece*<sup>3</sup>).

#### Consistency of the agreement with Australia's international obligations

Two preliminary points should be noted. First, under the doctrine of accrued rights referred to above, the assessment of whether Australia is acting consistently with its international obligations is to be assessed according to Australian standards. Second, it is important to note that the provisions of the Malaysia-Swap Arrangement are not legally binding (see Clause 16). That is, as the High Court in *M70* noted, the Arrangement is not an agreement as it leads only to political commitments.

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<sup>3</sup> Application No 30696/09, 21 January 2011. European Court of Human Rights, Grand Chamber.

The nature of the Malaysia-Swap Arrangement underlines the reality that the rights of the asylum seekers who are subject to the Arrangement are treated there-under as arising from political commitments rather than under international law. Effectively, the asylum seekers (who are known as 'transferees' under the Arrangement) are being 'commodified' as objects of a political arrangement (see M Gibney, 'Forced Migration, Engineered Regionalism and Justice Between States' in S Kneebone and F Rawlings-Sanaei eds, in *New Regionalism and Asylum Seekers: Challenges Ahead* (Berghahn Books, 2007) Chapter 3).

However Clause 1(3) of the Arrangement explicitly states that it 'is subject to the respective participant's relevant international law obligations in accordance with the applicable international law instruments or treaties to which the Participant is a Party.' This means that the Arrangement is subject to Australia's obligations under international law and, in particular, the Refugees Convention.

*Article 3 of the Refugees Convention: Non-discrimination as to race, religion or country of origin*

We conclude that 'transferees' under the Arrangement will be discriminated against in a number of different ways, in a manner which is contrary to Article 3 of the Refugees Convention.

The Arrangement made between the Government of Australia and the Government of Malaysia is expressed to apply to 800 'transferees' 'seeking international protection' in Australia who arrive in Australia after the signing of the Arrangement (7 May 2011). It applies to the category of asylum seeker labelled as 'a boat person'. Such asylum seekers are to be distinguished from on-shore arrivals who arrive on a lawful visa and subsequently claim asylum. Generally, boat arrivals come from countries whose nationals are often refused visas to Australia. This accounts for their choice of mode of arrival in Australia. Effectively these transferees are discriminated against under the Arrangement due to their country of origin (eg Afghanistan, Sri Lanka, Iraq) which often coincides with their race and religion (eg Hazara, Tamil).

Further, unlike asylum seekers processed in Australia, the transferees will not be given the opportunity of resettlement in Australia.

For marginalised groups such as Shi'a Muslims in Malaysia, the prohibition on discrimination as to race, religion or country of origin under Article 3 is unlikely to be realised.

The Arrangement also imposes a penalty on the first 800 'transferees' for their mode of arrival as 'secondary movers' in breach of Refugees Convention, Article 31.

Such persons are at risk of being subject to Malaysia's *Immigration Act* which renders them vulnerable to a range of punishments. This is recognised in French CJ's judgment in *M70*, referring to the DFAT assessment tendered in evidence where it was stated that: 'Illegal immigrants in Malaysia are liable to imprisonment and/or a fine and caning of not more than six strokes' [2011] HCA 32, [28]. Although the Arrangement states in clause 10.3 that the Government of Malaysia will *facilitate* the transferees' 'lawful presence'

during the period that their claims for protection are being considered and whilst they are waiting to be resettled, there is no guarantee that their status as refugees will protect them against the action of non-state actors who harass and kill refugees in Malaysia. It is well known that refugees holding UNHCR cards have been detained and harmed by members of RELA, an armed vigilante group which until recently has operated with the approval of the Malaysian government.<sup>4</sup>

The non-binding arrangement between Australia and Malaysia provides that '[t]ransferees and persons to be resettled will be treated with dignity and respect and in accordance with human rights standards' (Clause 8.1). The transferees' lawful presence was to be facilitated under Clause 10.3 by means of an exemption order made on 5 August 2011 subject to a range of voiding criteria. In *M70* French CJ concluded that '[t]here is nothing on the face of the exemption order to protect the plaintiffs from being charged and prosecuted in a Malaysian court for an offence under section 6 of the Malaysian Immigration Act' ([2011] HCA 32, [28]) with respect to their earlier entry into Malaysia.<sup>5</sup> Section 6 creates an offence of entry without a valid permit which is punishable by fine and/or imprisonment of up to 5 years and caning of up to 6 strokes.

The Operational Guidelines to implement Arrangement recognise the possibility of detention when they state that:

If detained on arrival, Transferees should be held only for the period necessary to confirm identity or undertake security or other checks [clause 3.0].

The DFAT assessment tendered in evidence in *M70* states: 'Credible allegations have been made regarding inadequate standards in immigration detention centres' ([2011] HCA 32, [28]).

#### *Article 22 of the Refugees Convention: Education*

Under clause 9(c) of the Arrangement Australia will pay costs related to the 'health and welfare (including education of minor children) of Transferees in accordance with UNHCR's 'model of assistance in Malaysia'. Article 22 requires that in relation to elementary education the Contracting State shall accord the 'same treatment' as is accorded with respect to elementary education. In relation to education other than elementary education the requirement is that the education provided be 'as favourable as possible' and 'not less favourable than that accorded to aliens'. As discussed below under **(c)(v) 3. Right to education**, this is unlikely to meet the standard of the Refugees Convention.

#### *Article 4 of the Refugees Convention: The practice of religion*

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<sup>4</sup> Alice Nah, 'Struggling with (Il)legality: The Indeterminate Functioning of Malaysia's Borders for Asylum Seekers, Refugees, and Stateless Persons', in Prem Kumar Rajaram and Carl Grundy-Warr eds *Borderscapes: Hidden Geographies and Politics at Territory's Edge* (Borderlines, Vol 29; University of Minnesota Press Minneapolis, London 2007) Chap. 2.

<sup>5</sup> One important aspect of Malaysia's laws is that immigrants are responsible for ensuring that their status is 'regular'.

Article 4 of the Refugees Convention requires 'treatment at least as favourable as that accorded to their nationals' with respect to religious freedom and education. Malaysia's stance with respect to Shi'a Muslims calls into question the fulfilment of Article 4.

*Article 17 of the Refugees Convention: Employment*

The Operational Guidelines to implement Arrangement state that

Transferees will enjoy an adequate standard of treatment, including having access to the same support as other asylum seekers and refugees in the community. In limited circumstances modest backup 'safety net' provisions will be available through IOM on an 'as needs' basis [3.0].

In relation to employment, they state:

- (a) Transferees will have ongoing access to self reliance opportunities particularly through employment.
- (b) Transferees will be encouraged to become self sufficient as soon as possible. [3.2]

Notably the DFAT assessment referred to above states that: 'Lack of official status has impeded access by refugees to sustainable livelihoods or formal education' [2011] HCA 32, [28]. In practice it will be difficult for asylum seekers to compete in the local labour market which is already saturated with regular and irregular migrant workers.<sup>6</sup>

*Article 21 of the Refugees Convention: Housing*

According to a Press Release of the IOM dated 27 July 2011, transferees will be accommodated by IOM in a reception facility upon arrival and will be expected to move into the community after a maximum of six weeks. It was stated that 'IOM is looking into how it can help them find affordable housing, health care, jobs and education for their children'. These arrangements are reflected in the Operational Guidelines to implement the Arrangement, clause 3.1.

*Article 16 of the Refugees Convention: Access to the courts*

Article 16 of the Refugee Convention provides that all refugees shall have access to the courts of the *Contracting State* – in this case Australia. This provision has been interpreted and accepted by the High Court to apply to wherever the asylum seeker is situated.

Under the Arrangement it is anticipated that UNHCR will conduct refugee status determinations. Under clause 9(e) of the Arrangement Australia will pay costs related to the 'registration' and 'refugee status determination (and any appeal in relation to that determination) and assessment of any other protection obligations'. In practice, asylum

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<sup>6</sup> It has been estimated that there are between 1.5 to 2 million 'illegal' \ undocumented migrants in Malaysia of whom less than 1 million are 'refugees'. Confidential interview by Susan Kneebone Kuala Lumpur 24 May 2010.

seekers will not have access to Malaysia's legal system. Thus there will not be compliance with Article 16.

The role of the UNHCR is not to conduct refugee status determination (RSD); that is the responsibility of the Contracting State (Australia). Further, the standard of UNHCR procedures in Malaysia has been called into question.<sup>7</sup> In relation to the Pacific Solution, the UNHCR notably refused to conduct RSD on Nauru. The UNHCR's resources to conduct RSD in Malaysia (in practice only in Kuala Lumpur) are manifestly overstretched. Professor Kneebone has visited the UNHCR in Kuala Lumpur and can verify that fact.

In summary, we have grave concerns about the consistency of the Agreement with Australia's international obligations.

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

In responding to this ToR we first point out that according to the majority in *M70*, the relevant provisions of the *Migration Act 1958* (Cth) incorporate the Refugees Convention. As was stated in the joint judgment in *M70*: 'The references in s 198A(3)(a)(i) to (iii) to a country that provides access to certain procedures and provides protections of certain kinds must be understood as referring to access and protections of the kinds that Australia undertook to provide by signing the Refugees Convention and the Refugees Protocol. In that sense the criteria stated in s 198A(3)(a)(i) to (iii) are to be understood as a reflex of Australia's obligations' ([2011] HCA 32) [119]). *M70* established that these obligations are relevant in reviewing exercises of power under the *Migration Act* and in construing its provisions.

The judgment in *M70* builds upon the court's unanimous decision in *Plaintiff M61/2010E*<sup>8</sup> and its conclusion that 'read as a whole, the *Migration Act* contains an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and the Refugees Protocol.'<sup>9</sup>

Section 198A(3) in its current form requires evidence 'that a specified country: (i) provides access, for persons seeking asylum, to effective *procedures* for assessing their need for protection; and (ii) provides *protection* for persons seeking asylum, pending determination of their refugee status; and (iii) provides *protection* to persons who are given refugee status, pending their voluntary *repatriation* to their country of origin or resettlement in another country; and (iv) meets relevant *human rights standards* in providing that protection ...'. Section 198A(3) read as a whole provides a standard of 'effective protection' which mirrors the Refugees Convention (see S Kneebone, 'The

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<sup>7</sup> Jack Hoystead, 'UNHCR must account for determining refugee status in Malaysia', *The Australian* 26 August 2011 (<http://theaustralian.com.au/business/legal-affairs>).

<sup>8</sup> *Plaintiff M61/2010E v The Commonwealth* (2010) 85 ALJR 133.

<sup>9</sup> (2010) 85 ALJR 133 at 139 [27].



Pacific Plan: the Provision of “Effective Protection”?’ (2006) 18 (Nos 3 and 4) *International Journal of Refugee Law* pp 696-721).

Manifestly, the High Court in *M70* was satisfied that Malaysia could not provide effective protection according to the standards of Australian law.

In addition to the standards provided in the Refugees Convention, other key standards which apply under Australian law include those provided by the International Covenant on Civil and Political Rights, (‘ICCPR’)<sup>10</sup> and the International Covenant on Economic, Social and Cultural Rights,<sup>11</sup>(‘ICESCR’). Malaysia is not a party to either instrument. Relevant rights to which Australia but not Malaysia is bound include:

- equality and non-discrimination (ICCPR, Articles 2(1) and 26);
- the right to personal liberty (ICCPR Article 9);
- the right to the highest standard of physical and mental health (ICESCR, Article 12);
- free access to courts (ICCPR Article 14);
- freedom from torture and cruel, inhuman and degrading treatment as proscribed by Articles 1 and 16 of CAT<sup>12</sup> and Article 7 of the ICCPR;
- The right to personal liberty, including freedom from arbitrary detention and the right to have the lawfulness of detention determined by a court (ICCPR Article 9).

Many of these rights overlap with provisions of the Refugees Convention which have been discussed above. We have similar concerns about compliance with these rights.

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

**(i) oversight and monitoring**

**(ii) pre-transfer arrangements**

**(iii) mechanisms for appeal of removal decisions**

**(iv) access to independent legal advice and advocacy**

As indicated above, the Arrangement is to be implemented largely through the assistance of the IOM and UNHCR (see however Clause 13 of the Arrangement). We have grave concerns about the capacity of these bodies to adequately address the needs of an extra 800 asylum seekers in addition to the tens of thousands already under its care.

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<sup>10</sup> New York, 16 December 1966, in force 23 March 1976, UN Doc. A/6316 (1966), 999 UNTS 171.

<sup>11</sup> New York, 16 December 1966, in force 3 January 1976, UN Doc. A/ 6316 (1966), 99 UNTS 3.

<sup>12</sup> Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, in force 26 June 1987, UN Doc. A/39/51 (1984), 1465 UNTS 85 (‘CAT’).

The UNHCR struggles to meet the current demand. IOM's presence in Malaysia is not officially recognised by the Malaysian government. Its presence in Malaysia is tolerated, but it operates out of a temporary office in the UNHCR compound.

As to (ii), we refer to the judgment of French CJ in *M70* in which he expressed concerns about pre-transfer assessments (see ([2011] HCA 32 [34] – [44])).

Whilst there is an active NGO community in Malaysia, it is small and underfunded. There is however an active Bar, but we cannot be confident that asylum seekers will receive access to independent legal advice and advocacy [(iv)].

**(v) Implications of the Malaysian solution for unaccompanied minors, in particular, whether there are any guarantees with respect to their treatment**

The transfer of unaccompanied children to Malaysia is contested because of concerns about the treatment they will face in Malaysia and the fact that Australia will have little or no control over that treatment.

The concerns relating to the Malaysian solution for adult asylum seekers, as discussed earlier in this submission, will also apply to unaccompanied minors.

We note that unaccompanied children are particularly vulnerable as they do not have the protection of a parent or other family member. This has been noted by the Committee on the Rights of the Child which noted, in General Comment No. 6 of 2005, the 'particularly vulnerable situation of unaccompanied and separated children'.<sup>13</sup>

We also have particular concerns about the treatment likely to be given to unaccompanied minors in Malaysia as follows:

**1. Lack of legal guarantees as to treatment**

Clause 8(2) of the Malaysian Arrangement provides that '[s]pecial procedures will be developed and agreed to by the Participants to deal with the special needs of vulnerable cases including unaccompanied minors.'<sup>14</sup> As the High Court in *Plaintiff M70* found, the Malaysian Arrangement is not legally binding.<sup>15</sup>

Although Malaysia is a party to the leading international treaty on children's rights, the Convention on the Rights of the Child (CROC)<sup>16</sup> it has lodged significant reservations to that Convention.<sup>17</sup> Malaysia's reservation to CROC reads as follows:

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<sup>13</sup> Committee on the Rights of the Child, General Comment 6 (2005), at p.5.

<sup>14</sup> The Arrangement between the Government of Malaysia and Australia, 2011, Clause 8(2), at [http://www.minister.immi.gov.au/media/media-releases/\\_pdf/20110725-arrangement-malaysia-aust.pdf](http://www.minister.immi.gov.au/media/media-releases/_pdf/20110725-arrangement-malaysia-aust.pdf).

<sup>15</sup> *Plaintiff M70/2011*, [22].

<sup>16</sup> Status of Ratifications to CROC as of 19.06.2011; at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en#37](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#37).

<sup>17</sup> *Ibid.*

The Government of Malaysia accepts the provisions of the Convention on the Rights of the Child but expresses reservations with respect to articles 2, 7, 14, 28 paragraph 1 (a) and 37, of the Convention and declares that the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.<sup>18</sup>

Malaysia's reservation to the non-discrimination principle in CROC (Article 2) is particularly significant because Article 2 prohibits any discrimination on the basis of the status of a child (including on the basis of being unaccompanied or as being a refugee or asylum seeker).<sup>19</sup>

## 2 'Best interests' principle

Article 3(1) of CROC states that:

'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'<sup>20</sup>

The Committee on the Rights of the Child has clearly stated that the 'best interests' principle requires granting a child access to the territory of a Contracting State and assessment of a child's protection needs.<sup>21</sup>

The Malaysian Arrangement does not state (as it should) that the 'best interests' of children should be primary consideration in decisions about transfer of unaccompanied children. Both Malaysia and Australia are parties to the Convention on the Rights of the Child and, as such, are under an international obligation to treat children (including unaccompanied minors) according to the 'best interests' principle.

The Committee on the Rights of the Child has suggested that in addition to the *non-refoulement* principle under the Refugees Convention, states parties to CROC are not permitted to return a child to a country where there are 'substantial grounds for believing that there is a real risk of irreparable harm to the child . . . either in the country to which removal is to be effected or in any country to which the child may subsequently be removed'.<sup>22</sup> This is important as it sets out a 'complementary protection' criteria for unaccompanied children. That is, it is not limited to situations of persecution.

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<sup>18</sup> Ibid.

<sup>19</sup> Committee on the Convention on the Rights of the Child, General Comment 6 (2005), at p. 8.

<sup>20</sup> The Convention on the Rights of the Child, 20 November 1989, UNTS 1577, p. 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html>.

<sup>21</sup> Committee on the Rights of Child, General Comment 6 (2005), p.9.

<sup>22</sup> Ibid, p.10.

Importantly, the Committee on the Rights of the Child has stated that in any initial assessment process carried out by States in relation to unaccompanied minors, one requirement is to gather information to 'determine the potential existence of international protection needs, including those due to holding a well-founded fear of persecution for a Convention reason'<sup>23</sup> or 'relating to the indiscriminate effects of generalised violence'.<sup>24</sup> Although the Convention on the Rights of the Child has not been enacted into domestic law, the High Court case of *Teoh* is authority for the proposition that in all decisions affecting children, a decision maker must consider the best interests of the child.<sup>25</sup>

In this context we draw the Committee's attention to two important European Union instruments on refugee law and procedures: The EU Procedures Directive<sup>26</sup> and the EU Qualification Directive.<sup>27</sup> The EU Procedures Directive sets out common standards for the processing of refugee claims within the European Union. It provides that applicants for refugee status should have effective access to procedures, the opportunity to cooperate and properly communicate with the competent authorities and sufficient procedural guarantees at all stages of the refugee procedure.<sup>28</sup> Significantly, Recital Clause 14 of the EU Procedures Directive sets out the special needs of unaccompanied minors and requires the 'best interests of the child' to be a primary consideration of Member States:

. . . specific procedural guarantees for unaccompanied minors should be laid down on account of their vulnerability. In this context, the best interests of the child should be a primary consideration of Member States.<sup>29</sup>

Recital 12 of the EU Qualification Directive, which deals with the criteria for refugee status, also provides that '[t]he best interests of the child should be a primary consideration of Member States when implementing this Directive'.<sup>30</sup>

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<sup>23</sup> These include race, religion, nationality, membership of a particular social group or political opinion.

<sup>24</sup> Committee on the Rights of Child, General Comment 6 (2005), p.12.

<sup>25</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. The decision in *Teoh* was criticised in obiter comments of some High Court judges in the subsequent case *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 195 ALR 502. However, *Teoh* remains good law and has been cited with approval in other cases.

<sup>26</sup> European Union Council Directive on Minimum Standards on Procedures in Member States for granting and withdrawing refugee status, 1 December 2005, 2005/85/EC, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF>.

<sup>27</sup> European Union Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ('EU Qualification Directive') [2005] OJ L304/12, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML>.

<sup>28</sup> EU Procedures Directive, above n22, Recital Clause (13).

<sup>29</sup> EU Procedures Directive, above n22, Recital Clause (14). See also Article 17(6) of the EU Procedures Directive

### 3 Right to education

We note that Malaysia is not a party to the 1951 Refugees Convention and has a reservation to Article 28 of the Convention on the Rights of the Child. Thus, it is under no international legal obligation to provide unaccompanied minors and other asylum seeker children access to education.

Clause 9(1)(c) of the Malaysian Arrangement deals with education. But it simply states that Australia agrees to meet ' [c]osts related to the health and welfare (including education of minor children) of Transferees in accordance with UNHCR's model of assistance in Malaysia'.<sup>31</sup> Clause 3 of the Operational Guidelines provides that transferees of 'school age' will be permitted access to 'private education arrangements in the community, including those supported by UNHCR.' It then provides that '[w]here such arrangements are not available or affordable, school age Transferees will have access to informal education arrangements organised by IOM.'<sup>32</sup> However, it does not give a legally-enforceable guarantee that such education will be provided. Furthermore, Human Rights Watch has stated that neither 'private education' nor 'informal education' meet the standards for the right to free and compulsory primary education in Article 28 of the Convention on the Rights of the Child, to which both Australia and Malaysia are parties.<sup>33</sup>

The UN Committee on the Convention on the Rights of the Child have raised concerns about the treatment of asylum seeker children in Malaysia:

. . . the Committee expresses concern at the absence of a legal framework in Malaysia for the protection of refugee and asylum-seeking children. In particular, the Committee regrets that the State party has not acceded to the 1951 Convention relating to the Status of Refugees or its 1967 Optional Protocol, . . . The Committee is particularly concerned that the implementation of the current provisions of the Immigration Act 1959/63 (Act 155) has resulted in detaining asylum-seeking and refugee children and their families at immigration detention centres, prosecuting them for immigration-related offences, and subsequently imprisoning and/or deporting them.

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<sup>30</sup> EU Qualification Directive, Recital 12.

<sup>31</sup> Malaysia Arrangement, Clause 9(1)(c).

<sup>32</sup> Malaysia Operational Guidelines, Clause 3.

<sup>33</sup> Human Rights Watch, Letter to the Prime Minister of Australia and Malaysia, 26 July 2011, at <<http://www.hrw.org/news/2011/07/26/letter-prime-ministers-australia-and-malaysia-regarding-australia-malaysia-transfer->>. See also US Department of State Report on Malaysia: 'Refugees had no access to formal education, and although there were schools run by NGOs and ethnic communities, opportunities for schooling were limited by a lack of resources and qualified teachers.' (US Department of State, Bureau of Democracy, Human Rights, and Labor, [2010 Country Reports on Human Rights Practices](http://www.state.gov/documents/organization/160468.pdf), 8 April 2011, p. 28, at <http://www.state.gov/documents/organization/160468.pdf>).

The Committee notes with concern that many asylum-seeking and refugee children, among them the Muslim children from Myanmar, including the *Rohingya* refugee children who have lived in Malaysia since 1990s, lack access to formal education.<sup>34</sup>

It is arguable that once asylum seeker children enter Australian territory, Australia becomes internationally obliged to grant them certain rights under the 1951 Convention, including the right to education.<sup>35</sup> It is therefore arguable that Australia cannot send child asylum seekers to a country where they will not receive adequate education.

**(vi) the obligations of the Minister for Immigration and Citizenship as the legal guardian of any unaccompanied minors arriving in Australia, and his duty of care to protect their best interests**

**1. The Minister's guardianship duties under the *Immigration (Guardianship of Children) Act (1946) Cth***

Australian migration legislation confers on the Minister for Immigration clear guardianship duties in relation to unaccompanied asylum seeker children. Section 6 of the *Immigration Guardianship of Children Act 1946* states the minister 'shall be the guardian . . . of every non-citizen child who arrives in Australia . . . and shall have, as guardian, the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have'. This provision recognises the vulnerability of unaccompanied asylum seeker children.

Section 4AAA of the Guardianship Act defines a non-citizen child as a child who:

- (a) Has not turned 18; and
- (b) Enters Australia as a non-citizen; and
- (c) Intends, or is intended to become a permanent resident of Australia.

The Minister for Immigration and the Commonwealth have recognised that '[t]he powers and duties of the Minister are . . . akin to that of a parent'.<sup>36</sup>

The guardianship duty of the Minister is a serious one – both morally and legally. A guardian is considered to hold a 'fiduciary duty' – a special position of trust – and is legally obliged to protect the interests of his or her guardian in the same manner as his or her own interests. This includes a duty to protect the child from danger or harm.

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<sup>34</sup> Committee On The Rights Of The Child, Forty-fourth session, 15 January-2 February 2007, UN Doc CRC/C/44/3, pp. 129-30 (paras 544-46).

<sup>35</sup> See eg J.C. Hathaway, *The Rights of Refugees under International Law*, (2005) at 156-192.

<sup>36</sup> Minister for Immigration and the Commonwealth of Australia, 'Defendant's Submissions', *Plaintiff M70*, [99], citing *Sadiqi v Cth (No. 2)* (2009) 181 FCR 1 at 63.

In this context, we note with concern that under the Malaysian Arrangement, the guardianship duty of the Minister of Immigration ceases to apply to unaccompanied minors once they leave the jurisdiction of Australia. That is, there is no transfer of that guardianship duty to an official or government department within Malaysia. Furthermore, Malaysian law does not require that a guardian must be appointed to unaccompanied minors.<sup>37</sup> Therefore there appears to be no arrangement for the appointment of guardians for those unaccompanied children transferred to Malaysia.

In *X v Minister for Immigration and Multicultural Affairs* ('X's case'), the Federal Court accepted that the responsibilities of the Minister for Immigration under s.6 of the Guardianship Act include responsibilities in relation to fundamental rights of children.<sup>38</sup> Justice North stated:

'The guardian must therefore address the basic human needs of a child, that is to say, food, housing, health and education. Over the course of this century, attention to the needs has come to be recognised as a fundamental human right of children, including in various international instruments to which Australia is a party'.<sup>39</sup>

The Minister for Immigration and Commonwealth argued before the High Court that although it may be accepted that a person exercising guardianship powers 'must treat the best interests of the child as the paramount consideration . . . it does not follow that that obligation displaces powers or duties which the guardian has in another capacity'.<sup>40</sup> They continue:

the Minister's *quasi*-parental status as "guardian" of a non-citizen child does not give him the power, or impose on him the obligation to intervene on the child's behalf in the performance of functions of the exercise of statutory powers under the Act.<sup>41</sup>

We note that the High Court recently adjudicated upon this matter in *Plaintiff M70/2011 and Plaintiff M106 of 2011*.<sup>42</sup> In that case, the majority held that:

A determination by the Minister (or his delegate) that an unaccompanied minor should be taken from Australia to a country declared under s 198A(3)(a)

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<sup>37</sup> Agreed Statement of Fact, para 55, as cited in 'Plaintiff's Submissions' in *Plaintiff M70*, [125].

<sup>38</sup> (1999) 92 FCR 524 at 535-38.

<sup>39</sup> (1999) 92 FCR 524 at 535.

<sup>40</sup> Defendant's Submissions, *Plaintiff M70*, [101]. Note that the Minister also noted that the obligation to act in the child's best interests in this context is 'of somewhat doubtful force' [101].

<sup>41</sup> Defendant's Submissions, *Plaintiff M70*, [102].

<sup>42</sup> *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* 31 August 2011 [2011] HCA 32.

of the Migration Act would not constitute a consent in writing of the kind required by s 6A of the IGOC Act. Nor would the exercise of power to take an offshore entry person to another country pursuant to s 198A(1) fall within the operation of s 6A(4) of the IGOC Act and its provision that s 6A "shall not affect the operation of any other law regulating the departure of persons from Australia". . . . removal of a person from Australia who is a "non-citizen child" within the meaning of the IGOC Act, or the taking of that child to another country pursuant to s 198A, cannot lawfully be effected without the consent in writing of the Minister (or his delegate). The decision to grant a consent of that kind would be a decision under an enactment and would therefore engage the provisions of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and, in particular, the provisions of that Act concerning the giving of reasons as well as the availability of review on any of the grounds stated in that Act. . . the removal of the second plaintiff without that consent would be unlawful.<sup>43</sup>

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

Article 33 of the Refugees Convention provides that state parties shall not expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. *Refoulement* to another State where there are substantial grounds for believing that a person would be in danger of being subjected to torture is prohibited under CAT Article 3 and has been recognised as a fundamental component of the customary law prohibition of torture and cruel, inhuman and degrading treatment.<sup>44</sup> The scope and content of the customary principle has been expressed as follows:

*No person shall be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception.*<sup>45</sup>

The removal of asylum seekers to other nations did not absolve Australia of this obligation, instead creating a danger of indirect or chain *refoulement*. Goodwin-Gill has observed that '[a]mong others, non-refoulement is precisely the sort of obligation which is engaged by extra-territorial action, for it prohibits a particular result-return to persecution or risk of

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<sup>43</sup> Gummow, Hayne, Crennan and Bell JJ at [143-147]; Kiefel J at [257].

<sup>44</sup> E Lauterpacht and D Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion' in E. Feller, V. Türk, and F. Nicholson (eds) *'Refugee Protection in International Law' UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 78-177 at 162.

<sup>45</sup> *Ibid*, at 163.



torture-by whatever means, direct or indirect, and wherever the relevant action takes place'.<sup>46</sup>

Clause 10(2)(a) of the arrangement provides that the Government of Malaysia will respect the principle of *non-refoulement*. This non-binding statement of intent is a tenuous basis with which to ensure that Australia does not breach this core obligation in the Refugees Convention which underpins the protection referred to in section 198A(3)(a). The High Court has found that '[n]ot only did the Arrangement not oblige Malaysia to provide any of [the Refugees Convention] rights, no provision was made in the Arrangement that (if carried out) would provide any of those rights'.<sup>47</sup> The commitment to respect the principle of *non-refoulement* does not apply where there are reasonable grounds for regarding a person as a danger to security or a conviction of a particularly serious crime (Clause 10(2)(b)). It is conceivable that this exemption may be given a broad interpretation.

Like all nations, Malaysia is subject to customary international law but has a history of forced return of asylum seekers. In recent weeks, it was reported that 24 Uighurs were returned by Malaysia to China where they are at real risk of persecution. If asylum seekers transferred from Australia to Malaysia were returned to their home country or another country in which they were endangered, Australia will have engaged in indirect or chain *refoulement*.

Beyond this, we believe that transferring asylum seekers to Malaysia may itself constitute direct *refoulement*. There are substantial grounds based on law, practice and the non-binding nature of the arrangement with Australia, for concluding that Malaysia may subject transferees to torture or cruel, inhuman or degrading treatment. The danger of mistreatment is heightened for Shi'a Muslims in Malaysia. Both plaintiffs in M70/M106 were Shi'a Muslims who had entered Malaysia without authority prior to travelling to Australia. Notwithstanding the terms of the arrangement,<sup>48</sup> the plaintiffs were vulnerable to prosecution for immigration offences.<sup>49</sup> The protection contemplated in s 198A(3)(a) essentially means protection from *refoulement*.<sup>50</sup> The reality that the protection criteria in sub-paragraphs (ii) and (iii) could not be met in the circumstances of the case<sup>51</sup> illuminates the danger that transfer of the plaintiffs (and other asylum seekers) to Malaysia could constitute *refoulement*.

In light of the non-derogable nature of the *non-refoulement* right and its central importance to the Refugees Convention, we believe that Australia should not proceed with its arrangement with Malaysia.

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<sup>46</sup> Goodwin-Gill G, 'The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Obligations' 9 *UTS Law Review* (2007) 26-40 at 33.

<sup>47</sup> Judgment of Gummow, Hayne, Crennan and Bell JJ at [127].

<sup>48</sup> At [66].

<sup>49</sup> See French CJ at [66], Kiefel J at [249] in relation to Plaintiff M 70.

<sup>50</sup> French CJ at [63], see also joint judgment of Gummow, Hayne, Crennan and Bell JJ at [117].

<sup>51</sup> See for example joint judgment of Gummow, Hayne, Crennan and Bell JJ at [134].

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

### General

Beyond raising deep concerns about compliance with human rights obligations, bilateral arrangements of the type contemplated under s 198A have had a tendency to damage Australia's relations with the receiving country and within the broader region.<sup>52</sup> These tensions manifested themselves during the Pacific Solution and resurfaced more recently in Australia's attempts to negotiate a processing arrangement with East Timor.

### **The Pacific Solution**

The arrangement between Australia and Nauru under the Pacific Solution was described in 2002 by then Nauruan president Rene Harris as a 'Pacific nightmare'.<sup>53</sup> Harris alleged that the Australian government failed to fully provide the foreign aid to Nauru as agreed under the Memorandum of Understanding of 11 December 2001 and failed to provide him with particulars as to its plans for the processing of asylum seekers after the expiry of the deadline for processing.<sup>54</sup>

The Senate Foreign Affairs, Defence and Trade Committee concluded in 2002 that the Pacific Solution "accentuates the perception that Australia tends to take advantage of Pacific island countries."<sup>55</sup> It has been further observed that the Pacific Solution created a perception in the Asia-Pacific region that Australia subordinated regional concerns to its own domestic political objectives.<sup>56</sup> Speaking at CHOGM in March 2002, the Secretary-General of the Pacific Islands Forum Secretariat, made the following comments with reference to the Pacific Solution.

The political fabric of many of our countries is pretty fragile. If you allow these people to stay longer, under the Convention... the state is obligated to give them services and the services would not be in proportion to what they give to its own people. And then you are likely to create a situation where the people become restless and complain that as taxpayers, they're not being looked after by their governments.<sup>57</sup>

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<sup>52</sup> See generally Penovic T and Dastyari A (2007) 'Boatloads of Incongruity: the evolution of Australia's offshore processing regime', 13(1) *Australian Journal of Human Rights* 2007 pp33-61.

<sup>53</sup> Louise Dodson and Sophie Douez, 'Pacific Solution a nightmare', *The Age*, 10 June 2002.

<sup>54</sup> ABC Lateline, 'Pacific solution or Pacific nightmare?' Reporter: Emma Griffiths, 10 June 2002 at <http://www.abc.net.au/lateline/stories/s578234.htm>

<sup>55</sup> Senate Foreign Affairs, Defence and Trade Committee, 'A Pacific engaged: Australia's relations with Papua New Guinea and the islands of the southwest Pacific', 12 August 2003 <[www.aph.gov.au/Senate/committee/fadt\\_stte/completed\\_inquiries/2002-04/png/report/index.htm](http://www.aph.gov.au/Senate/committee/fadt_stte/completed_inquiries/2002-04/png/report/index.htm)>

<sup>56</sup> Oxfam Community Aid Abroad, 'Still Drifting: Australia's Pacific Solution becomes a Pacific Nightmare' August 2002 <[www.oxfam.org.au/campaigns/refugees/still\\_drifting/still\\_drifting.pdf](http://www.oxfam.org.au/campaigns/refugees/still_drifting/still_drifting.pdf)>

<sup>57</sup> ABC Radio Australia News, 1 March 2002 as quoted in Oxfam Community Aid Abroad, 'The Pacific Solution is no solution' March 2002 <[www.oxfam.org.au/campaigns/submissions/nosolution.pdf](http://www.oxfam.org.au/campaigns/submissions/nosolution.pdf)>

The Secretary-General's comment could equally apply to the government's efforts to secure an arrangement facilitating the processing of asylum seekers in East Timor.

### **East Timor**

Year long negotiations towards a regional processing centre in East Timor foundered in May 2011. The state of development, infrastructure and economic capacity of the newest nation in our region are such that Australia's proposal would have created an onerous burden. Notwithstanding the role envisaged for the UNHCR and technical support from Australia, the miasma of facilitating status determination, merits and judicial review, deportation and the practical difficulties which may inhere in repatriation and locating willing resettlement places (a problem under the Pacific Solution) would have created complexities for East Timor. It is conceivable that the cost and complexity of implementing Australia's proposal would have presented a threat to the nation's political and economic stability.

The relative economic and political power of Australia and East Timor combined with the Australian government's persistence to advance negotiations in the face of East Timor's clear unwillingness to pursue the project did not create a favourable impression of our nation domestically or within the region. The controversy generated by the plan was inevitable. The delay in releasing details of the proposal to our Asia Pacific neighbours amplified the problem.

Dewi Fortuna Anwar, a senior Indonesian political aide who travelled to Australia with Vice-President Boediono warned that the East Timor plan would create significant security and socio-economic problems for Indonesia, stating that '[i]t is one of the poorest regions in the country. We have yet to settle our security problem in West Papua. A refugee processing centre in East Timor will only attract more problems, like a rise in crime, and pose a new security challenge for Indonesia.'<sup>58</sup>

Prime Minister José Xanana Gusmão considered that such an arrangement would render him unable to 'explain to his poor countrymen why foreign asylum-seekers would be entitled to international-grade health care, food, clothing and schooling for their children while so many Timorese do not.'<sup>59</sup> Gusmão's partner, Kirsty Sword Gusmão went further and told media that 'it wasn't really appropriate to be foisting this problem on Timor-Leste when it's grappling with so many other bread-and-butter issues. And that really it could potentially put East Timor in a very tricky situation politically, given the relationship with Indonesia. The thought that came into my mind when I first read about it was, here we are again. In the Second World War, we (Australia) sacrificed East Timor to our national interest of defending our nation.'<sup>60</sup> The perception that Australia was calling on its poorer neighbouring nation to accept an unpalatable arrangement in order to absolve itself of a relatively small problem is surely one that Australia should strive to avoid.

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<sup>58</sup> PT Singam, Timor solution a 'terrible idea', The West Australian, 11 March 2011 at

<http://au.news.yahoo.com/thewest/a/-/national/8989921/timor-solution-a-terrible-idea/>

<sup>59</sup> The Economist, Banyan Blog, 'Timor-Leste and the Processing Centre- All Process, No Solution', 30 March 2011 [http://www.economist.com/blogs/banyan/2011/03/timor-leste\\_and\\_processing\\_centre](http://www.economist.com/blogs/banyan/2011/03/timor-leste_and_processing_centre)

<sup>60</sup> Ellen Whinnett, 'Leading by Example' 21 April 2011 at <http://www.theweeklyreview.com.au/article-display/Leading-by-example/3824>

## Relations with Malaysia

Australia has enjoyed a long and generally cordial relationship with Malaysia. In May 2006, then Foreign Affairs Minister Alexander Downer referred an inquiry into Australia's relationship with Malaysia to the Joint Standing Committee on Foreign Affairs, Defence and Trade.<sup>61</sup> The enquiry revealed Malaysia to be Australia's third largest trading partner in ASEAN and eleventh largest trading partner overall.<sup>62</sup> Apart from calling for strategies to address an increase in Malaysian overstayers and passport holders being refused entry into Australia, the enquiry was focussed on promoting the trade relationship.

Australia sponsored Malaysia's membership of the United Nations. Nevertheless, what the Joint Standing Committee enquiry describes as the 'occasional political difference' arose frequently under the leadership of Dr Mohammed Mahathir, generally in response to suggestions about his nation's domestic affairs (and those of other nations in the region) including issues of human rights.

Malaysia's current Prime Minister Najib Razak expressed his reservations about the East Timor plan while visiting Australia in March this year. Australia's arrangements with Malaysia may have also harmed international relations. The Malaysia Solution, from the time of its announcement, generated domestic scrutiny of Malaysia's treatment of refugees and its human rights record more generally. We hope that this scrutiny may become a catalyst for positive reform in Malaysia. Nevertheless, entering an arrangement for the processing of vulnerable people with a nation well known for its ill-treatment of such people makes for bad policy. The Minister's 'clear belief' deposed to in his affidavit that Malaysia's government 'had made a significant conceptual shift in its thinking about how it wanted to treat refugees and asylum seekers'<sup>63</sup> is clearly insufficient basis for pursuing such a policy. A culture of hostility and ill-treatment of asylum seekers does not lend itself to immediate change. As outlined above, the transferees would be rendered vulnerable to abuses. Our relationship with Malaysia and other nations in the region may also be undermined.

### In relation to unaccompanied minors

We would also like to alert the Committee to some important points from international practice of transfers of unaccompanied minors

In particular, we note that under the European transfer agreement, called the 'Dublin Convention'<sup>64</sup>, unaccompanied children are exempted from the normal requirement for transfer of adult asylum seekers within the EU. Under the normal transfer procedure the

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<sup>61</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, Foreign Affairs Sub-Committee, Australia's relationship with Malaysia, March 2007 at

<http://www.aph.gov.au/house/committee/jfadt/malaysia/report/fullreport.pdf>

<sup>62</sup> Ibid at 1.2.

<sup>63</sup> Minister's affidavit, referred to in judgment of French CJ at [29].

<sup>64</sup> Council Regulation (EC) No [343/2003](#) of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national ('Dublin Convention'), at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0343:EN:NOT>.

country in which an asylum seeker first arrives into the EU, is the country which is responsible for consider that person's asylum application. Thus, under the Dublin Convention, a refugee must lodge their asylum application in the first EU country of arrival. However, the Dublin Convention sets out special rules for unaccompanied minors. Article 6 of the Dublin Convention provides:

Where the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor.

In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum.<sup>65</sup>

We endorse the findings of the High Court in relation to the guardianship duty of the Minister for Immigration in *Plaintiff M70* and submit that this is the correct interpretation of the *Immigration (Guardianship of Children) Act* (1946) Cth.

Likewise, the transfer arrangement between the United States and Canada,<sup>66</sup> has an exception for unaccompanied minors.<sup>67</sup> This is in recognition of the particular vulnerabilities of unaccompanied minors. We submit that Australian practice should accord with the practice of that of other developed states who are parties to the 1951 Refugee Convention and that unaccompanied children should not be subject to transfer to an offshore processing country, such as Malaysia, Nauru or Papua New Guinea.

### **Concluding comments**

In *M70* in determining the scope of the Ministerial power under section 198A(3)(a) of the Migration Act, the court necessarily focussed on Malaysia's ability to meet the criteria set out in sub-paragraphs (i) to (iv) based on present and continuing circumstances in Malaysia. This entailed some ventilation of Malaysia's international human rights obligations, Constitution, domestic immigration law and treatment of asylum seekers. Supporting the conclusion that the criteria in s 198A(3)(a) could not be met were the particulars of advice received by the Minister from DFAT and details of Malaysia's domestic immigration laws which do not recognise the status of refugees in domestic law and impose penalties for the offence of entry without a valid visa (including 5 years imprisonment and caning).

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<sup>65</sup> Council Regulation (EC) No [343/2003](#) of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national ('Dublin Convention'), Article 6.

<sup>66</sup> Canada - United States Safe Third Country Agreement, 5 December 2002, at [www.cic.gc.ca/english/policy/safe-third.html](http://www.cic.gc.ca/english/policy/safe-third.html).

<sup>67</sup> Article 4(2)(c) of the Canada-US agreement provides that a claimant will be admitted into the territory of the 'receiving party' for the purposes of making a refugee claim if he or she is 'an unaccompanied minor, meaning that she is unmarried, under eighteen, and has no parent or legal guardian in either Canada or the United States'.

The defendants submitted to the court that the 'making of such judgments may affect Australia's international relations with State (sic) with whom it has friendly relations.'<sup>68</sup> Accordingly, it was submitted that judgments concerning the laws or conduct of another state ought to remain exclusively within the competence of the executive government and a court should be slow to conclude that they were intended to be subjects for judicial determination.<sup>69</sup>

The defendants' argument found acceptance in the dissenting judgment of Heydon J. His Honour warned of taking the 'potentially dangerous course' of issuing judgments about whether other countries meet relevant human rights standards. One of his key reasons for rejecting the Plaintiffs' submissions is that '*[i]ntrusion by the courts into those dealings may be very damaging to international comity and good relations*' [at 163]. While we endorse the majority view that the criteria in sub-paragraphs (1) to (iv) of s 198A(3)(a) were jurisdictional facts which were not properly construed by the Minister, cases such as *M70* necessarily entail some examination of another nation's human rights record and that this may give rise to diplomatic tensions. This must be accepted as a foreseeable outcome flowing from the adoption of such a policy. In the ensuing debate, much has been said about Malaysia's poor human rights record by members of the Coalition who may eventually play a role in the Australian government. While this may tarnish Australia's relations with Malaysia, it must again be accepted as a concomitant of adopting such a policy.

Australia has effective procedures for assessing the protection needs of asylum seekers who arrive by boat (or other means). The absence of corresponding procedures in Malaysia is well established –and now well ventilated. Australia's arrangement with Malaysia seeks to subject asylum seekers to the risk of human rights abuses in order to relieve Australia of a processing burden that it is capable of discharging.

Australia is situated in a region in which few neighbouring countries have ratified the Refugee Convention and other core human rights treaties. With its commitment to the rule of law, its democratic traditions, prosperity and early adoption of core human rights standards, Australia is uniquely positioned to lead by example. In seeking to outsource its refugee processing obligations to a nation with a poor human rights record, Australia has eschewed the mantle of standard bearer in the region. Other nations with greater domestic challenges will be given little incentive to improve their treatment of asylum seekers. Relationships with our neighbours will be challenged and Australia will become widely perceived as a nation willing to assume a broad range of human rights obligations which it is not willing to honour.

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<sup>68</sup> Submissions of the Defendants, at [73].

<sup>69</sup> *Ibid.*