



Australian
Human Rights
Commission

everyone, everywhere, everyday

Inquiry into Australia's agreement with Malaysia in relation to asylum seekers

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Australian Human Rights Commission Submission
to the Senate Standing Committees on Legal and
Constitutional Affairs

14 September 2011

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Senate Standing Committees on Legal and Constitutional Affairs in their Inquiry into Australia's agreement with Malaysia in relation to asylum seekers. The Commission is established by the *Australian Human Rights Commission Act 1986* (Cth) and is Australia's national human rights institution.
2. This submission draws on extensive work the Commission has undertaken in relation to Australian immigration law, policy and practice over the past decade. This includes national inquiries,¹ examinations of proposed legislation,² the investigation of complaints from individuals subject to Australia's immigration laws and policies,³ and commenting on policies and procedures at the request of the Department of Immigration and Citizenship (DIAC).
3. More specifically, this submission draws on the Commission's work on issues regarding the offshore and third-country processing of asylum claims, including analyses in academic journals,⁴ specific elements of national inquiries,⁵ examinations of relevant bills,⁶ and numerous public statements.⁷

2 Background

4. The Prime Ministers of Australia and Malaysia announced on 7 May 2011 that they would enter into an arrangement in relation to asylum seekers and refugees in the Asia-Pacific region. The Prime Ministers stated that, under the arrangement, 800 asylum seekers who arrived in Australia by boat would be transferred to Malaysia to have their claims for protection assessed and Australia would resettle 1000 recognised refugees from Malaysia per year for up to four years.⁸
5. On 25 July 2011, the *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement* (the arrangement) was signed;⁹ the 'Operational guidelines to support transfers and resettlement' (operational guidelines), produced to supplement the arrangement, were issued;¹⁰ and the Minister for Immigration and Citizenship declared that asylum seekers could be transferred from Australia to Malaysia under the 'Instrument of Declaration of Malaysia as a Declared Country under subsection 198A(3) of the Migration Act 1958'.
6. The High Court of Australia's decision in *Plaintiff M70/2011 and Plaintiff M106/2011 v Minister for Immigration and Citizenship* on 31 August 2011 held that the Minister for Immigration and Citizenship's declaration of Malaysia as a third country to which 'offshore entry persons' can be removed was invalid. The majority of the High Court concluded that the Minister could make a valid declaration under s 198A(3)(a) of the *Migration Act 1958* (Cth) (Migration Act) only if the third country to which the declaration related satisfied the criteria set out in s 198A(3)(a)(i)-(iv) as a matter of objective fact.¹¹ Moreover, it concluded that the particular protections and procedures prescribed by s 198A(3)(a) must be available in the third country as a matter of law; it was insufficient for the

Minister to have regard merely to what has happened, is happening or may be expected to happen in that country.¹² The High Court found that Malaysia was, and is, not obliged under international law to provide the protections referred to in s 198A(3)(a)(i)-(iii) and nor does its domestic law contain provisions recognising or affording rights to asylum seekers. The Court also held that in order to satisfy the criteria in s 198A(3)(a)(i)-(iii), the procedures for determining refugee status and the protection provided by the country are protections of the kind that Australia undertook to provide when it signed the *Convention Relating to the Status of Refugees* (Refugee Convention); that is, the protections are to be understood as 'a reflex of Australia's obligations'.¹³ Lastly, the High Court held that the removal of a person from Australia who is a 'non-citizen child' within the meaning of the *Immigration (Guardianship of Children) Act 1946* (Cth) (IGOC Act), or the taking of that child to another country pursuant to s 198A of the Migration Act, cannot lawfully be effected without the written consent of the Minister for Immigration and Citizenship (or his delegate).¹⁴ It confirmed that any decision of the Minister to provide that consent would be subject to judicial review.¹⁵

7. The Prime Minister and the Minister for Immigration and Citizenship announced on 12 September 2011 that the Australian Government intended to introduce legislation to 'restore the understanding of the third country transfer provisions of the Migration Act that existed prior to the High Court's decision on 31 August 2011'.¹⁶ The Ministers also announced on this date an intention to amend the IGOC Act 'to enable decisions to be made with respect to minors'.¹⁷
8. In light of the High Court's findings in *Plaintiff M70/2011 and Plaintiff M106/2011 v Minister for Immigration and Citizenship* and Australia's binding international obligations, the Commission strongly recommends against a revival of the arrangement to transfer asylum seekers to Malaysia. As it is unclear what form any future arrangement with Malaysia in relation to asylum seekers and refugees may take, this submission addresses the Commission's primary concerns with respect to the original arrangement and operational guidelines.

3 Summary

9. The Commission recognises the need for appropriate regional, indeed international, cooperation on issues relating to asylum seekers and refugees. The Commission also welcomes the Australian Government's agreement to accept an additional 4000 refugees over the next four years.
10. However, the Commission holds serious concerns about the human rights implications of a number of aspects of the arrangement, including that:
 - The detention of people awaiting transfer under the arrangement may be arbitrary as the conditions of detention under which these people may be held may be unnecessarily restrictive.

- Transferring asylum seekers to Malaysia under the arrangement may lead to serious breaches of Australia's international human rights obligations. Most significantly, transfer under the arrangement may lead to breaches of Australia's *non-refoulement* obligations, as well as those relating to equality and family unity.
 - There are inadequate pre-transfer assessment processes in place under the arrangement to safeguard against breaches of fundamental human rights.
 - The safeguards included in the arrangement and operational guidelines are inadequate to ensure that the rights of people transferred to Malaysia with respect to liberty and humane treatment will be protected.
 - The safeguards included in the arrangement and operational guidelines are inadequate to ensure that people transferred to Malaysia will receive appropriate services and support.
 - There is limited provision for independent oversight and monitoring of the arrangement. In the absence of independent monitoring, the Australian Government may not be able to adequately ensure that Malaysia is complying even with the modest safeguards included in the arrangement.¹⁸
 - The arrangement may compromise Australia's obligation to ensure that children's best interests are a primary consideration in all actions concerning them. The Commission is particularly concerned about the fate of any unaccompanied minors transferred to Malaysia under the arrangement.
11. The Commission was highly critical of past policies of third-country processing established under bilateral agreements with Asia-Pacific nations such as Nauru and Papua New Guinea. In the Commission's view, re-establishing third-country processing in these places would not be a humane, viable alternative to the arrangement with Malaysia.
12. In the Commission's view, all people who make claims for asylum in Australia should have those claims assessed on the mainland through the refugee status determination system that applies under the Migration Act. Further, in other than exceptional cases, those who claim asylum should be placed in community-based alternatives to detention while their claims are processed.

4 Recommendations

Recommendation 1: Asylum seekers should not be transferred from Australia to Malaysia under the *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement*.

Recommendation 2: All people who make claims to Australia for asylum should have those claims assessed on the mainland through the refugee status determination system that applies under the Migration Act. Community-based

alternatives to mandatory and indefinite immigration detention should be used while asylum seekers' claims are being processed.

5 Detention of people awaiting transfer

13. The Commission has concerns about the detention in Australia of people who are subject to the arrangement prior to their transfer. People subject to transfer to Malaysia face considerable uncertainty as to their future and it is inhumane to place them under the additional and unnecessary pressure of detention in a high-security facility. In the Commission's view, if people awaiting transfer must be detained, they should be held in the least restrictive form of detention appropriate to their circumstances.
14. Until recently, people awaiting transfer to a third country were held in secure immigration detention facilities on Christmas Island.¹⁹ Restrictive detention of people waiting transfer may be arbitrary in breach of Australia's obligations under article 9 of the *International Covenant on Civil and Political Rights* (ICCPR) and article 37(b) of the *Convention on the Rights of the Child* (CRC).²⁰ Further, this detention appears inconsistent with the Australian Government's *New Directions in Detention* policy, which requires that people be detained in the least restrictive environment appropriate to their circumstances.²¹ In addition, the CRC requires and the Migration Act affirms that children should be detained only as a measure of last resort and for the shortest appropriate period of time.²²
15. Families with children and unaccompanied minors were, until recently, detained in the secure Bravo compound at the Phosphate Hill immigration detention facility rather than in the Construction Camp, a less restrictive facility which at the time was empty. Unaccompanied minors were also detained in the Lilac compound at North-West Point Immigration Detention Centre.²³
16. In the Commission's view, the classification of the Bravo and Lilac compounds as Alternative Places of Detention is misleading and inappropriate. Both look and feel like Immigration Detention Centres, and in practice have been operated as such for the past year or two. The Commission believes the detention of families and unaccompanied minors in these environments undermines the Australian Government's commitment that children and their family members will not be detained in Immigration Detention Centres.²⁴
17. The Commission is also concerned that people in detention who are subject to transfer under the arrangement may have very limited access to communication facilities and news of the outside world. Under international human rights standards, people in detention should be able to maintain contact with family, friends and community members; and they should be provided with facilities to consult in private with legal representatives.²⁵ However, the Commission understands that people who were until recently awaiting transfer to a third country were not permitted to use the internet or to watch television. Moreover, apart from the facilitation of an 'alive' call on arrival, they were only provided with access to a telephone if they request to speak to a specific legal representative or with Legal Aid.²⁶ In the

Commission's view, these opportunities to communicate with people outside detention were inadequate.

18. The lack of independent oversight of the detention of people awaiting transfer under the arrangement is a further source of concern. Independent monitoring of immigration detention facilities is essential in order to increase accountability and transparency, and to ensure compliance with internationally accepted human rights standards. However, the Commission has been informed by DIAC that people awaiting transfer were not provided with contact details for independent oversight bodies such as the Commission or the Commonwealth Ombudsman.²⁷ All people subject to transfer to a third country should be provided with contact details for independent oversight bodies and should be able to communicate with those bodies freely and confidently should they wish to do so.

6 Transfer to Malaysia

19. Transferring asylum seekers to Malaysia under the arrangement risks breaching a range of Australia's international obligations. The Commission's main concerns relate to the principle of *non-refoulement*, the right to family unity and the principle of equality.

6.1 Refoulement

20. The arrangement creates an increased and ongoing risk of breaches of Australia's international *non-refoulement* obligations.²⁸
21. Australia is prohibited under article 33(1) of the Refugee Convention from expelling or returning refugees to territories where their lives or freedom would be threatened on the basis of their race, religion, nationality, membership of a particular social group or political opinion.²⁹ Australia has further and broader *non-refoulement* obligations under the ICCPR, CRC and *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT),³⁰ which prevent the removal of anyone from Australia to a country where they are in danger of death, torture or other mistreatment including arbitrary detention.³¹
22. Transferring asylum seekers to Malaysia increases the risk that they will be returned to persecution or danger in their countries of origin, in breach of these *non-refoulement* obligations. The transfer arrangement creates a situation in which Australia's *non-refoulement* obligations are 'passed on' to Malaysia. In other words, Australia places itself in a position in which it relies on Malaysia to comply with the *non-refoulement* obligations that are in fact owed to asylum seekers by Australia. The Commission is not convinced that there are adequate safeguards to ensure that these obligations will be respected in Malaysia. Malaysia is not a signatory to the Refugee Convention, ICCPR or CAT, and consequently is not bound by the principle of *non-refoulement* under these treaties. Although the Government of Malaysia has agreed to respect the principle of *non-refoulement* in the arrangement, the

arrangement is merely 'a record of the Participants' intentions and political commitments' and is not legally binding.³²

23. The Commission is particularly concerned about the potential *refoulement* of transferees who are found not to satisfy the criteria in the Refugee Convention, but who nevertheless are in need of protection. The arrangement provides that people who are found not to be refugees in Malaysia are to be returned to their countries of origin, by force if necessary.³³ Before such a return takes place, the arrangement provides an opportunity for the Australian Government to 'consider the broader claims of any Transferee to protection under other human rights conventions' and 'make suitable alternative arrangements for the removal of [a] Transferee from Malaysia'.³⁴ However, it is not clear how these arrangements will operate in practice and whether they will be sufficient to safeguard the rights of non-refugees in need of protection. For example, the arrangement merely provides an *opportunity* for the Australian Government to consider people's claims to protection under international law, it does not prescribe the circumstances in which such consideration must or should take place. Nor does the arrangement contain any detail in relation to the assessment procedure to be used; who will conduct the assessment; whether the assessment will take place in Australia or Malaysia; what the outcome of a positive assessment will be; or whether a person who receives a negative assessment will have any avenues of appeal.
24. Moreover, transferring asylum seekers to Malaysia could of itself amount to a breach of Australia's *non-refoulement* obligations. As noted above, Australia is bound by the principle of *non-refoulement* under the ICCPR, CRC and CAT, in addition to the Refugee Convention.³⁵ The United Nations Human Rights Committee has held that a state will contravene its obligations under the ICCPR if it removes a person to another country in circumstances where there is a real risk that their rights under the ICCPR – including those relating to arbitrary detention – will be violated.³⁶ Malaysian domestic law does not recognise the status of refugees or asylum seekers. Further, Malaysia's record regarding the treatment of asylum seekers has been the subject of extensive documentation by reputable non-government organisations, including Amnesty International, which has reported that asylum seekers and refugees in Malaysia are routinely subject to arrest, detention in poor conditions, exploitation and corporal punishment.³⁷ In light of this record, the Commission is concerned about the possibility of mistreatment of asylum seekers transferred from Australia to Malaysia.
25. The arrangement and operational guidelines contain some ostensible safeguards against mistreatment. For example, the arrangement provides that Malaysia will 'facilitate Transferees' lawful presence' in Malaysia while their claims for asylum are being processed and that transferees will be 'treated with dignity and respect and in accordance with human rights standards'.³⁸ The operational guidelines further state that people transferred under the arrangement will be 'permitted to remain in Malaysia and will not be liable to being detained and arrested due to their ongoing presence in Malaysia under [the] Arrangement' and that detailed guidance will be provided to law enforcement officials in Malaysia as to the operation of the arrangement.³⁹ However, in the Commission's view, these are not adequate assurances of the

safety of people transferred to Malaysia. Neither the arrangement nor the operational guidelines are legally binding.⁴⁰

26. In addition, the Commission is not satisfied that the safeguards provided in the *Immigration (Exemption) (Asylum Seekers) Order 2011* (Malaysia) (the Order) will adequately protect asylum seekers from mistreatment. Section 4 of the Order provides that persons transferred pursuant to the agreement can enter and stay in Peninsular Malaysia and are exempt from s 6 of the *Immigration Act 1959* (Malaysia) (Malaysian Immigration Act), titled 'Control of entry into Malaysia'. However, s 4 of the Order also provides that the exemption will be void immediately if any of five circumstances arise, including that the person was found to be involved in any activity contrary to Malaysian law or has been listed as a prohibited immigrant. Moreover, the burden of proof that a person is subject to the exemption order lies on that person. There is no special provision for assistance to minors. Section 6 of the Malaysian Immigration Act imposes penalties, including whipping, for breaches of that section.

6.2 Family separation

27. The arrangement undermines Australia's international obligations to respect the right of everyone to family unity.
28. The ICCPR and CRC both provide that everyone has the right to freedom from interference with their family.⁴¹ Article 10(1) of the CRC specifically states that 'applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with ... in a positive, humane and expeditious manner'.
29. If asylum seekers who are transferred to Malaysia already have family members in Australia, they may face potentially indefinite separation from their family members and Australia could breach its obligation to protect the right to family unity.

6.3 Discrimination

30. Subjecting asylum seekers who arrive in Australia by boat to transfer under the arrangement may amount to discrimination, in breach of Australia's international human rights obligations.
31. Article 31 of the Refugee Convention prohibits state parties from penalising asylum seekers on account of their unlawful entry.⁴² Further, Australia is bound to respect the right of everyone to equality and non-discrimination under article 26 of the ICCPR.⁴³ The arrangement creates a system under which asylum seekers who arrive by plane in non-excised places have access to Australian refugee status determination processes and procedural safeguards, such as the independent assistance of a migration agent and review of decisions by tribunals and courts, whereas asylum seekers who arrive by boat will be unable to make a valid visa application in Australia and will be subject to transfer to Malaysia.⁴⁴ This two-tiered system arguably penalises asylum

seekers on the basis of their mode of arrival, in breach of Australia's obligations under the Refugee Convention and the ICCPR.

32. Moreover, subjecting children who arrive in Australia by boat to the prospect of transfer to Malaysia undermines children's right to equality. Article 22 of the CRC affirms the right of child asylum seekers and refugees to receive appropriate protection and assistance.⁴⁵ The principle of non-discrimination in article 2 of the CRC means that all children seeking asylum are entitled to the same level of assistance and protection of their rights, regardless of how or where they arrive.⁴⁶ The two-tiered asylum system created by the arrangement arguably also breaches Australia's obligations with regard to children's equality.⁴⁷

7 Pre-transfer assessments

33. The Commission is concerned that neither the arrangement nor the operational guidelines provide adequate detail about pre-transfer assessment procedures or about what specific steps will be taken to protect the rights of particularly vulnerable individuals.
34. In the Commission's view, pre-transfer assessment procedures should include a thorough assessment of the *non-refoulement* obligations owed by Australia to each individual under the Refugee Convention, ICCPR, CAT and CRC. The assessment procedures should also include an evaluation to identify vulnerable individuals, including unaccompanied minors, families with children, pregnant women, people with serious health or mental health issues, and survivors of torture and trauma. In addition, assessments should consider whether a person has immediate family in Australia from whom they would be separated in the event of transfer. Transfer should not proceed if a pre-transfer assessment identifies an unacceptable risk that a person's human rights would be breached in Malaysia; if people have a particular vulnerability; or if transfer would lead to separation from immediate family.
35. Under the arrangement, Australia has stated that it will 'put in place an appropriate pre-screening assessment mechanism in accordance with international standards before a transfer is effected'.⁴⁸ DIAC has informed the Commission that guidelines have been developed for assessing people prior to their transfer, to ensure both fitness to travel and compliance with Australia's international obligations.⁴⁹ However, these guidelines have not been made public, nor have they been provided to the Commission.
36. Furthermore, it remains unclear what the outcome of any 'pre-screening assessment' under the arrangement would be: neither the arrangement nor the operational guidelines contain any detail in this regard. The Commission remains concerned that the pre-transfer assessment processes may not adequately protect the rights of particularly vulnerable individuals.
37. In addition, the Commission has concerns about the 72-hour timeframe in which Australia and Malaysia aim to achieve the transfer of people under the arrangement.⁵⁰ Comprehensive, effective assessments may not possible in

such a short period. This is particularly problematic given the significance of the potential consequences of an incorrect assessment.

8 Conditions in Malaysia

38. The Commission has concerns about the conditions in which people transferred to Malaysia under the arrangement will live.⁵¹ The arrangement states that 'Transferees will enjoy standards of treatment consistent with those set out in the operational guidelines' while in Malaysia, and the operational guidelines prescribe an 'adequate standard of treatment' for people transferred to Malaysia.⁵² However, neither the arrangement nor the operational guidelines are legally enforceable.⁵³ Furthermore, the operational guidelines contain insufficient detail to satisfy the Commission that satisfactory provision will be made for people transferred to Malaysia with respect to accommodation and income, or that such people will receive appropriate services and support.

8.1 Detention

39. People who are transferred face the possibility of detention in Malaysia.⁵⁴ While it is expected that '[g]enerally Transferees will be allowed to reside in the community', the operational guidelines acknowledge that people transferred to Malaysia may be detained upon arrival for the purposes of identity confirmation or to undertake security or other checks.⁵⁵ According to the operational guidelines, people may be held in transit centres or unspecified alternative locations.⁵⁶ The operational guidelines provide that 'Malaysian authorities authorise departure of individual Transferees from Transit centre[s] generally within forty-five (45) days (other than in exceptional circumstances)'. However, the guidelines do not place a time limit on detention in Malaysia nor do they provide for it to be reviewed by a court or other independent authority.
40. Malaysian domestic law does not contain any protections for asylum seekers and refugees, and as noted above, Malaysian law has a poor record with respect to the treatment of these people.⁵⁷ The Malaysian Immigration Act was amended in 1997 and 2002, leading to the establishment of harsh penalties for immigration violations.
41. Some offences under the Malaysian Immigration Act are punishable by terms of imprisonment. Section 6(1)(c), for example, provides the following punishment for entering and staying in Malaysia without a permit: 'Fine not exceeding RM10,000 or ... imprisonment for a term not exceeding 5 years or ... both, and shall also be liable to whipping of not more than 6 strokes.' Other crimes subject to whipping under the Act include employing a person without a valid permit, forging identity documents, and harbouring a person who has violated the Immigration Act. Section 15(4) provides that remaining in Malaysia after the expiration of an entry permit also carry the punishment of a '[f]ine not exceeding RM10,000 or ... imprisonment for a term not exceeding 5 years or ... both'.⁵⁸

42. The Commission is concerned that the proposed arrangement may not provide adequate protections to prevent the imprisonment of people transferred to Malaysia.⁵⁹

8.2 Cruel, inhuman and degrading treatment

43. International law prohibits cruel, inhuman and degrading treatment and punishment. For example, the ICCPR states that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'⁶⁰ and that 'persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.⁶¹ The CAT prohibits torture and other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.⁶²
44. As noted above, some offences under the Malaysian Immigration Act are punishable by whipping.⁶³ The Commission is concerned that the safeguards in the arrangement may not provide adequate protections to prevent the corporal punishment of people transferred to Malaysia.⁶⁴

8.3 Services and support for asylum seekers transferred to Malaysia

45. International human rights standards provide that everyone is entitled to an adequate standard of living for themselves and their families, including adequate food, clothing and housing.⁶⁵ It is not clear whether appropriate provision will be made in this regard for people transferred to Malaysia. The operational guidelines state that people who are transferred will be provided with basic accommodation and a subsistence allowance for one month, after which time they are expected to become self-sufficient through employment and move into private accommodation.⁶⁶ While the guidelines provide for some assistance to be provided to needy asylum seekers by the International Organization for Migration (IOM) and the United Nations High Commissioner for Refugees (UNHCR) after this initial period, there is a lack of clarity about the circumstances in which such assistance will be provided and the form that it will take.⁶⁷ As noted above, it also appears that asylum seekers transferred to Malaysia may not receive formal work permits which would ensure their legal right to employment.⁶⁸ In these circumstances, it is unlikely that people transferred to Malaysia would have any industrial safeguards or avenues or recourse, for example, in the event that their employer refuses to pay them.
46. Asylum seekers, especially those in detention, should be provided with independent legal advice and other appropriate support, for example from a competent migration agent.⁶⁹ Under the CRC, all children in detention have the right to prompt access to legal and other appropriate assistance.⁷⁰ Further, international standards provide that asylum seekers in detention are entitled to legal counsel, which should be free where possible, and access to refugee advocate bodies.⁷¹ In the Commission's view, access to competent, independent legal assistance – even for those who are not in detention – is necessary to ensure the integrity of the asylum process. However, the

arrangement and operational guidelines make no provision for even basic assistance in accessing legal advice or advocacy.

47. International human rights standards provide that all people have a right to the highest attainable standard of physical and mental health.⁷² Despite this, the operational guidelines state simply that 'Transferees will have access to basic medical care under arrangements UNHCR has for asylum seekers and refugees with some private clinics' and that 'existing IOM arrangements with a private hospital' will be used when emergency medical assistance is required.⁷³ Neither the arrangement nor the guidelines make mention of timeframes for the provision of health services; provision of specialist medical care; access to dental care; access to mental health care; or access to torture and trauma counselling. In any case, it has been suggested that no special health care arrangements have been made for people transferred to Malaysia over and above those currently provided by UNHCR and IOM to refugees and asylum seekers living in Malaysia.⁷⁴
48. Finally, it is not clear that adequate support will be provided to vulnerable people who are transferred to Malaysia under the arrangement, including unaccompanied minors, families with children, pregnant women, people with disabilities and survivors of torture and trauma.⁷⁵ The arrangement states that 'special procedures will be developed and agreed to by the Participants to deal with the special needs of vulnerable cases', but does not elaborate on these.⁷⁶ The operational guidelines provide some further detail, stating that vulnerable people will be identified through IOM's initial health assessment process; that they will have access to existing UNHCR arrangements including a welfare 'hotline'; and that a backup 'safety net' will be provided to vulnerable people by IOM. Nevertheless, it remains unclear whether these arrangements will sufficiently protect all people who require additional support for various reasons while in Malaysia.

9 Oversight and monitoring

49. The Commission is concerned about the adequacy of arrangements for the oversight and monitoring of arrangements in Malaysia.⁷⁷
50. The arrangement provides for the establishment of a Joint Committee, to be charged, among other things, with overseeing the welfare of transferees and developing special procedures for vulnerable transferees. The arrangement also provides for the creation of an Advisory Committee to provide advice to the Australian and Malaysian Governments on the implementation of the arrangement.⁷⁸ As both of these Committees comprise Australian and Malaysian Government representatives, the Commission is concerned about the potential for real and perceived partiality in their operation. The arrangement provides for no further mechanisms for fully independent oversight of arrangements in Malaysia.
51. DIAC has suggested that non-government organisations (NGOs) may play a role in overseeing the management of the arrangement.⁷⁹ However, a range of practical difficulties make the prospect of effective monitoring by NGOs

unlikely. The efforts of Australian NGOs may be hampered by geographical factors, as transnational travel requires the dedication of significant time and funds which may not be available to NGOs, limiting their capacity to have a permanent or regular presence in Malaysia. Malaysian-based NGOs would need to be adequately resourced to play an effective monitoring role.

52. The Commission is particularly concerned that the arrangement and operational guidelines make no provision for the monitoring of transit centres or other places where people may be held in detention under the arrangement. Nor do the arrangement or guidelines provide for any specific mechanism through which people who are being mistreated in Malaysia in breach of the arrangement can complain and apply for redress.
53. With no assurance of independent, impartial scrutiny, Australia may not be able to adequately monitor whether Malaysia complies with its undertakings under the arrangement, including not to *refoule*, to arrest or detain transferees due to their ongoing presence in Malaysia, and to treat transferees with dignity and respect and in accordance with human rights standards.⁸⁰

10 Implications for children

54. The Commission has serious concerns in relation to children who are subject to the arrangement. In the Commission's view, children who seek protection in Australia should not be transferred to Malaysia under the arrangement.

10.1 Children subject to transfer under the arrangement

55. Article 3 of the CRC provides that a child's best interests must be a primary consideration in all actions concerning them.⁸¹ There are real questions as to whether transferring children seeking asylum to Malaysia could be in their best interests.
56. Children who are transferred to Malaysia under the arrangement face potential breaches of a range of their fundamental rights, even with the implementation of additional safeguards. As with all people subject to the arrangement, there is the potential for children transferred to Malaysia to be *refouled* or to be separated from their families, in contravention of Australia's international obligations.⁸² The prospect of detention in Malaysia, inaccessible healthcare and inadequate arrangements for subsistence and accommodation also apply equally to children subject to the arrangement.⁸³
57. Further, the educational opportunities to be provided to children who are transferred to Malaysia may be unsatisfactory. Under international human rights standards, all children have a right to education.⁸⁴ Primary education must be available free to all and secondary education should be available and accessible.⁸⁵ Under the operational guidelines, however, private education will be provided only where it is available and affordable, and in other circumstances, children will have access only to 'informal education arrangements organised by IOM'.⁸⁶ Reference to the affordability of private education suggests that people transferred under the arrangement may be

required to bear the costs associated with their children's primary education themselves. Moreover, there is no provision made for education in the event that educational arrangements under the IOM are, for whatever reason, unavailable or inaccessible.

58. DIAC has informed the Commission that it intends to undertake a consideration of the best interests of any child prior to their being transferred under the arrangement.⁸⁷ However, the Commission is concerned that no guidelines as to the kind of assessment which will take place in relation to children have been made public or provided to the Commission. The Commission is also concerned that no indication has been made as to what the outcome of any such assessment might be: whether children identified under the assessment would not be transferred, or whether transfer might still be affected with implementation of special arrangements upon a child's arrival in Malaysia. Without further detail of this nature, the impact of a pre-transfer best-interests assessment in safeguarding the rights of children subject to the arrangement remains unclear.
59. The UNHCR also has concerns about transferring children to Malaysia under the arrangement. The UNHCR's assessment of the arrangement as 'workable' was conditional 'upon proper protection and vulnerability safeguards determining the pre-transfer/pre-removal assessment process in Australia, prior to the taking of any decision on who will be transferred under the Arrangement and when'. In particular, the UNHCR stressed that 'the pre-transfer process must ... be particularly sensitive to the best interests of the child'.⁸⁸

10.2 Unaccompanied minors subject to transfer under the arrangement

60. The Commission has particular concerns about the implications of the arrangement for unaccompanied minors. Unaccompanied minors are affected by the same vulnerabilities as any other child asylum seeker subject to the arrangement, but they also lack the protection and support associated with being accompanied by immediate family members.⁸⁹
61. The Commission recently intervened in the matter *Plaintiff M106/2011 v Minister for Immigration and Citizenship* in the High Court of Australia, which challenged the operation of the arrangement specifically in relation to unaccompanied minors.⁹⁰
62. The Commission submitted to the High Court that domestic law requires an unaccompanied child's best interests to be taken into consideration in the decision as to whether to transfer the child under the arrangement. Under s 6 of the IGOC Act, the Minister for Immigration and Citizenship is the legal guardian of 'non-citizen children' in Australia,⁹¹ including unaccompanied minors subject to transfer under the arrangement.⁹² As the guardian of unaccompanied minors under the IGOC Act, the Minister is charged with all the usual incidents of guardianship – a set of rights and responsibilities analogous to those of a parent.⁹³ Importantly, the best interests of the child are

an overriding limit on the exercise of the powers of a guardian, including those of the Minister as guardian of unaccompanied minors seeking asylum in Australia.⁹⁴

63. Under the IGOC Act, no non-citizen child shall leave Australia except with the written consent of the Minister.⁹⁵ In deciding whether to provide such consent, the IGOC Act requires the Minister to consider whether doing so would be 'prejudicial to the interests' of the minor.⁹⁶ The Commission submitted to the High Court that the Minister's power to remove unaccompanied children under s 198A of the Migration Act must be read conformably with his duties as guardian under the IGOC Act. The Commission also submitted that, in deciding whether to remove a child to a third country, the Minister must be guided by Australia's international obligation under the CRC to consider a child's best interests as of primary importance when making any decision regarding them.⁹⁷
64. The High Court decided that the Minister may not transfer an unaccompanied child to Malaysia under the Migration Act unless he gives his consent in writing under the IGOC Act for the child to be removed. The IGOC Act provides that the Minister shall not refuse the granting of consent unless he or she is satisfied that the granting of the consent would be prejudicial to the interests of the non-citizen child.⁹⁸ The Minister's decision as to whether to grant consent is judicially reviewable.
65. In the Commission's view, even if transfer of unaccompanied minors seeking asylum to a third country were lawful under Australian law, it would likely breach Australia's international human rights obligations. Owing to the particular vulnerabilities of unaccompanied children, the CRC recognises that they are entitled to special protection and assistance provided by the State.⁹⁹ Additionally, as noted above, the CRC requires a child's best interests to be a primary consideration in any decision involving them.¹⁰⁰ For a range of reasons, it is difficult to see how, in the vast majority of cases, transferring unaccompanied children to Malaysia under the arrangement could be in their best interests.
66. Unaccompanied minors transferred under the arrangement may experience a breach of their fundamental rights, including those relating to *non-refoulement*, liberty, healthcare and education.¹⁰¹ Moreover, the operational guidelines indicate that people transferred under the arrangement will be allowed to live in the community and will be encouraged to become self-sufficient.¹⁰² It is unclear how such provisions would be applied to an unaccompanied minor.
67. Additionally, arrangements for the care and custody of children transferred under the arrangement are unclear. The operational guidelines anticipate that people transferred under the arrangement will be 'handed over' to Malaysian authorities upon arrival in Malaysia.¹⁰³ From that point, unaccompanied minors will be beyond the care and custody of the Minister for Immigration and Citizenship, who is their guardian under Australian law.¹⁰⁴ In contrast to Australian law, Malaysian law permits, but does not require, the appointment of a guardian in respect of persons seeking asylum who are unaccompanied minors.¹⁰⁵ It is unclear what arrangements have been made for the

appointment of a guardian for any children transferred under the arrangement.¹⁰⁶

68. In short, unaccompanied minors transferred under the arrangement would be sent to a country with a poor record for the treatment of asylum seekers and refugees,¹⁰⁷ in the absence of clear, mandated arrangements for their guardianship, care and custody. The Commission is gravely concerned about the fate of any unaccompanied child placed into these circumstances.
69. The UNHCR also has concerns about the operation of the arrangement in respect of unaccompanied minors. The UNHCR recognised the particular vulnerabilities of unaccompanied minors seeking asylum and made its assessment of the arrangement as 'workable' subject to the provision of adequate pre-transfer assessment processes, 'particularly when it comes to the circumstances of unaccompanied minors'.¹⁰⁸

11 Alternatives to the arrangement with Malaysia

70. The Commission acknowledges that it is currently Australian Government policy to pursue a regional cooperation framework for managing people seeking asylum in the Asia-Pacific.¹⁰⁹ The Commission recognises that regional cooperation on the protection of asylum seekers and refugees could entail many advantages, including:
- enhancing understanding of, respect for and compliance with international human rights standards across the Asia-Pacific, especially those relating to refugees and asylum seekers
 - ensuring the safety and wellbeing of refugees and asylum seekers across the region, thereby preventing often dangerous secondary migration
 - achieving a more equitable distribution of the benefits and burdens associated with assisting asylum seekers and protecting refugees across the region
 - facilitating collaborative efforts to address the primary causes of forced displacement and create opportunities for safe voluntary return.¹¹⁰
71. A regional protection framework able to deliver these advantages could be a genuine, sustainable arrangement based on international human rights standards. Such a framework should involve addressing the causes of primary migration by refugees and asylum seekers at their roots; encouraging greater understanding of protection issues throughout the region; modelling best practices in relation to asylum seekers and refugees in Australia; and an expansion of Australia's offshore resettlement program.¹¹¹
72. The Commission is not satisfied that the arrangement with Malaysia represents part of a genuine, durable regional protection framework which will adequately protect refugees' and asylum seekers' fundamental human rights. The arrangement is time-limited and bilateral, rather than sustainable and region-wide. Further, the UNHCR is not a signatory to the arrangement.¹¹²

73. Processing the claims of asylum seekers in third countries in the Asia-Pacific region, such as Nauru and Papua New Guinea, has been suggested as an alternative to the arrangement with Malaysia.¹¹³ The Australian Government has recently entered into a Memorandum of Understanding (MOU) with the Government of Papua New Guinea in relation to processing the claims of asylum seekers on Manus Island, to supplement the arrangement with Malaysia.¹¹⁴ The Commission opposes third-country processing of this kind, because it may lead to breaches of Australia's international human rights obligations and may have devastating impacts on the health, mental health and wellbeing of the people subject to it. In the Commission's view, processing asylum claims on Manus Island or Nauru is not a humane or viable alternative to the arrangement with Malaysia.

11.1 The 'Pacific Solution' and Temporary Protection Visas

74. Between 2001 and 2007, the former Australian Government pursued a policy of third-country processing of asylum seekers' claims, known as the 'Pacific Solution'. Asylum seekers who arrived in Australia by boat were transferred to and detained on Manus Island in Papua New Guinea and Nauru. In addition, from 1999 to 2008 only temporary protection was afforded to asylum seekers who arrived in Australia by boat.
75. The Commission criticised the use of Nauru and Manus Island as places to process the claims of asylum seekers under the former Australian Government's 'Pacific Solution'.¹¹⁵ Third-country processing on Manus Island and Nauru at this time undermined Australia's international human rights obligations, including those relating to:
- *Non-refoulement*,¹¹⁶ first because the system for processing asylum seekers' claims in offshore places lacked many of the basic safeguards afforded to asylum seekers on the mainland, potentially increasing the risk of wrongful return as a result of incorrect decision-making;¹¹⁷ and second, due to the scheme of 'voluntary return' to countries experiencing ongoing unrest in exchange for payments to asylum seekers.¹¹⁸ There have been documented cases of people, including children, who were detained on Nauru being killed upon return to their countries of origin during this period.¹¹⁹
 - Arbitrary detention,¹²⁰ as people were mandatorily held in detention facilities on Nauru and Manus Island, sometimes for years, while their claims for protection were being processed and while they were waiting to be resettled.¹²¹
 - Conditions of detention.¹²² For example, facilities for asylum seekers on Manus Island have been described as 'hot, humid ... cramped' and 'not much more than really extended outhouses'.¹²³ People in detention on Nauru have been reported to have experienced 'overcrowding, shortage of drinkable water, oppressive heat and mosquitoes [and] lack of contact with the world outside'.¹²⁴

- Access to health and mental health care,¹²⁵ given the inadequacy of the health facilities available on Nauru and Manus Island to accommodate large detainee populations.¹²⁶
- Access to judicial or other mechanisms for independent review,¹²⁷ as asylum seekers in detention on Nauru and Manus Island were not legally permitted to access Australian tribunals or courts.
- Children,¹²⁸ given that mandatory detention on Nauru and Manus Island was inconsistent with children's rights to be detained only as a measure of last resort and for the shortest appropriate time and to have their best interests considered as of primary importance in any decision-making affecting them.¹²⁹ Children detained on Nauru and Manus Island also experienced an increased risk of a breach of other fundamental rights, including those relating to *refoulement* and family unity.¹³⁰

76. The 'Pacific Solution' had devastating impacts on some of the people subject to the policy. Some people who were detained on Nauru and Manus Island under this policy were diagnosed with a range of mental illnesses, including depression, anxiety, post-traumatic stress disorder, adjustment disorder and acute stress reaction.¹³¹ There were also high levels of actual and threatened self-harm among these people.¹³² Further, there was heavy use of medication including anti-depressant, anti-anxiety, psychotropic and sleeping medication, among people in detention on Nauru and Manus Island.¹³³ There is also one serious hunger strike on record which involved over 100 admissions to hospital for intravenous rehydration.¹³⁴ An academic who had regular contact with people in detention on Nauru said, in 2004:

Depression, anxiety, restlessness, psychical and emotional pain and other serious mental illnesses are commonplace. Many spend their days and nights crying, families are falling apart, children are losing their youth coping with the despair of their parents as well as their own. Many cannot sleep because of recurring nightmares.¹³⁵

77. The Commission was critical of the use of Temporary Protection Visas (TPVs) to supplement third-country processing under the 'Pacific Solution'.¹³⁶ Between 1999 and 2008, the Migration Act provided for the grant of TPVs. The former Australian Government's policy was that people found to be owed protection under Australia's international obligations were granted these temporary visas, rather than permanent protection visas, in the first instance. TPVs lasted for a period of three years, after which they automatically expired and the people who held them were required to establish that they were still refugees and that it would not be safe for them to return to their country of origin. After 2001, TPVs entailed a number of conditions, including that their holders:

- were not eligible for permanent residence in Australia, unless the Minister decided otherwise
- were unable to bring any family to join them in Australia for the period of their TPV, unless the Minister decided otherwise

- lost their visa if they travelled outside Australia, as TPVs were single-entry visas.
78. The Commission had concerns about TPVs while they were in use and is opposed to their reintroduction for a range of reasons. First, TPV holders' status as temporary residents created a deep uncertainty and anxiety about their future. This exacerbated existing mental health problems in some people from their time in detention and their past history of persecution. It also affected their capacity to fully participate in social, employment and educational opportunities offered in Australia. Second, the absence of the right to family reunion for the duration of a TPV, combined with the effective ban on overseas travel, meant that some people faced the possibility of separation from their family for a prolonged and potentially indefinite period of time. This had further serious impacts on some people's mental health and wellbeing. Third, TPVs created impediments to people fully integrating into the Australian community. These included limited settlement services, such as initial housing assistance; stringent reporting requirements in order to receive a Special Benefit from Centrelink; limited employment assistance programs; and limited English language tuition. Commentators have argued that TPVs 'created uncertainty, insecurity, isolation, confusion, powerlessness and health problems among the holders of these visas as well as an increased burden on community organisations, state governments and volunteers' and that TPV-holders experience uncertainties and psychological suffering on a similar scale to those held in immigration detention.¹³⁷
79. The current Australian Government has expressed its own concerns about the 'Pacific Solution' and TPVs. In 2008, the then Minister for Immigration and Citizenship, Chris Evans, stated that the 'Pacific Solution' was inhumane, unfair, ineffective and wasteful, and that abolishing it was one of his 'greatest pleasures in politics'.¹³⁸ Also in 2008, Minister Evans called the 'Pacific Solution' a 'shameful and wasteful chapter in Australia's immigration history', an 'egregious waste of taxpayers' money', 'morally wrong' and 'outrageously expensive'.¹³⁹ Minister Evans has stated that TPVs were 'one of the worst aspects of the Howard government's punitive treatment of refugees, many of whom had suffered enormously before fleeing to Australia'.¹⁴⁰

11.2 Potential third-country processing in Papua New Guinea or Nauru

80. The Commission acknowledges that Papua New Guinea is a signatory to the Refugee Convention and that Nauru is in the process of ratifying this treaty.¹⁴¹ Further, the Commission notes that the MOU with Papua New Guinea states that people transferred to Manus Island would be 'treated with dignity and respect' in accordance with 'relevant human rights standards'.¹⁴² However, in the Commission's view, these are not adequate safeguards against breaches of the human rights of asylum seekers transferred to these places.
81. The MOU with Papua New Guinea contains no detail about what would happen to those sent to Manus Island, specifically in relation to how their refugee claims would be processed, how long they may be held in detention,

and whether they would have access to timely resettlement if they are found to be refugees. Nor does the MOU indicate whether asylum seekers sent to Manus Island would have access to legal assistance or whether there would be any form of independent or judicial oversight of their detention. The Commission has particular concerns about vulnerable people transferred under the MOU, such as unaccompanied minors and people who have experienced torture or trauma. While the MOU states that 'special arrangements' will be developed for unaccompanied minors, no detail about these is included, and in any case, this and other ostensible safeguards in the MOU are non-binding.

82. Moreover, Nauru has only recently acceded to the Refugee Convention and has not yet had an opportunity to demonstrate the extent to which it can comply with its international obligations under the treaty.¹⁴³
83. In the Commission's view, the risk of mistreatment of asylum seekers transferred to Nauru or Manus Island, including breaches of their fundamental human rights, remains unacceptably high.

11.3 Mainland processing and community-based alternatives

84. The Commission believes that all people who make claims for asylum in Australia should have those claims assessed on the mainland through the refugee status determination system that applies under the Migration Act. Community-based alternatives to mandatory and indefinite immigration detention should be used while the processing of asylum claims takes place.
85. Australia receives very small numbers of asylum seekers, both by national and international standards. In the 2009-10 financial year, asylum seekers who arrived in Australia by boat comprised less than 3% of the total migration intake.¹⁴⁴ Moreover, in 2010, Australia received just 2% of claims for asylum made in major industrialised countries.¹⁴⁵ Processing the claims of this relatively small number of people promptly on the mainland would help protect against breaches of Australia's international human rights obligations and prevent the significant human cost to which policies of third-country processing can lead.
86. There are viable alternatives to Australia's system of mandatory and indefinite immigration detention. Such alternatives better align with international human rights standards and also with the Australian Government's own *New Directions in Detention* policy, which dictates that people should be detained in the least restrictive environment appropriate to their individual circumstances and that there should be a presumption that people will be permitted to reside in the community unless they pose an unacceptable risk to the Australian community.¹⁴⁶
87. The Australian Government already uses some positive community-based alternatives, including bridging visas and community detention.
88. Most asylum seekers who arrive by plane are not detained for prolonged periods, but receive bridging visas, if necessary with appropriate conditions

attached. This alternative should also be used for asylum seekers who arrive by boat. While people who arrive by boat in excised offshore places such as Christmas Island are barred from applying for a bridging visa under the Migration Act, the Minister retains discretionary powers to either lift that bar, or to grant a bridging visa to a person in immigration detention.¹⁴⁷ The Commission urges the Australian Government to make the greatest possible use of bridging visas as a community-based alternative.

89. The Commission has also consistently supported the use of community detention as an alternative to holding people in immigration detention facilities. Under the Migration Act, the Minister has the power to issue a residence determination permitting a person in immigration detention to live at a specified residence in the community.¹⁴⁸ People in community detention remain in immigration detention under law. However, they are generally not under supervision and can move about in the community subject to any conditions attached to their residence determination. Such conditions might include, for example, a curfew, the requirement to sleep at a specified residence every night, travel restrictions and requirements to report regularly to DIAC. Accordingly, the community detention system allows for people to be subjected to fewer restrictions on their liberty, while at the same time mitigating risks and promoting compliance with immigration processes. The Commission welcomes ongoing efforts by the Minister for Immigration and Citizenship to move children in immigration detention and their families into community detention and urges the continued expansion of the community detention program.¹⁴⁹
90. There are a host of benefits associated with community-based alternatives. They better align with Australia's international obligations and are more humane than mandatory, indefinite detention and policies of third-country processing. Additionally, community-based alternatives can be considerably cheaper than facility-based detention in remote locations, especially the Australian model of prolonged and indefinite detention, and are likely to be far cheaper than the costs associated with affecting a policy of third-country transfer.¹⁵⁰ Community-based alternatives also allow for much readier transition to life in the Australian community for those asylum seekers who will be resettled here. Furthermore, there are high rates of compliance with immigration processes among asylum seekers living in the community and very low rates of absconding from community-based alternatives.¹⁵¹ There is also an increased willingness to return among people found not to be owed protection when they have been living in the community, as opposed to detention facilities, while their claims are processed.¹⁵²
91. The Commission believes there is considerable scope for Australia to expand and develop its use of community-based alternatives. There is a wealth of international experience to draw from¹⁵³ as well as successful initiatives already in place in Australia.¹⁵⁴
92. Instead of pursuing legislative change in order to revive the arrangement to transfer asylum seekers to Malaysia,¹⁵⁵ the Australian Government should process asylum claims on the Australian mainland and make full use of community-based alternatives to prolonged and indefinite detention.

Transferring asylum seekers to a third-country may lead to breaches the fundamental human rights of people subject to transfer, including those relating to *non-refoulement*; equality; family unity; liberty; freedom from cruel, inhuman and degrading treatment; an adequate standard of living; access to legal advice; access to health care; educational opportunities; children's best interests; and the particular protection and assistance owed to unaccompanied minors. Conversely, onshore processing and community-based alternatives ensure better compliance with Australia's international obligations; are more humane; may be cheaper; entail high compliance rates; and allow for readier transition to the Australian community or lead to an increased willingness to return to a person's country of origin, depending on the outcome of their claim for asylum. In addition, these arrangements do not require amendment of the Migration Act or other Australian law.

93. Regardless of how or where they arrive in Australia, all people are entitled to protection of their human rights. In the Commission's view, all people who make claims for asylum in Australia should have those claims assessed on the mainland through the refugee status determination system that applies under the Migration Act. Community-based alternatives to mandatory and indefinite immigration detention should be used while asylum seekers' claims are being processed.

¹ See Human Rights and Equal Opportunity Commission, *A last resort?* (National Inquiry into Children in Immigration Detention) (2004), at http://www.humanrights.gov.au/human_rights/children_detention_report/report/index.htm (viewed 9 September 2011); Human Rights and Equal Opportunity Commission, *Those who've come across the seas: Detention of unauthorised arrivals* (1998), at http://www.humanrights.gov.au/human_rights/immigration/seas.html (viewed 9 September 2011).

² The Commission's submissions on immigration issues are available at <http://humanrights.gov.au/legal/submissions/indexsubject.html#refugees> (viewed 23 August 2011).

³ Reports are available at http://humanrights.gov.au/legal/HREOCA_reports/index.html (viewed 23 August 2011).

⁴ See J von Doussa, 'Human rights and offshore processing' (2007) 9 UTS Law Review 41.

⁵ See *A last resort?*, note 1, sections 6.4.4, 6.6.4, 6.7.8, 6.7.9, 7.8.1, 7.8.2, 7.8.3, 16.2.2, 17.4.9.

⁶ See especially Australian Human Rights Commission, *Submission to the Inquiry of the Senate Legal and Constitutional Legislation Committee on the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*, at <http://www.humanrights.gov.au/legal/submissions/migration20060522.html> (viewed 23 August 2011).

⁷ See, for example, 'Commission warns against revisiting aspects of "Pacific Solution"' (Media Release, 22 August 2011), at http://humanrights.gov.au/about/media/media_releases/2011/75_11.html; 'Sending asylum seekers to Malaysia is not the answer to addressing people smuggling' (Media Release, 25 July 2011), at http://humanrights.gov.au/about/media/media_releases/2011/61_11.html; 'More detail needed on new asylum seeker policy' (Media Release, 6 July 2010), at http://humanrights.gov.au/about/media/media_releases/2010/71_10.html; 'HREOC welcomes end of Pacific Solution' (Media Release, 5 February 2008), at http://humanrights.gov.au/about/media/media_releases/2008/12_08.html; 'Australia's treatment of refugees still has a long way to go' (Media Release, 17 June 2007), at http://humanrights.gov.au/about/media/media_releases/2007/41_07.html; "'Pacific Solution" still poses human rights risks' (Media Release, 19 September 2006), at http://humanrights.gov.au/about/media/media_releases/2006/75_06.htm (all viewed 23 August 2011).

⁸ Minister for Immigration and Citizenship, 'Joint statements by the Prime Ministers of Australia and Malaysia on a regional cooperation framework' (Media Release, 7 May 2011), at <http://www.minister.immi.gov.au/media/cb/2011/cb165099.htm> (viewed 12 September 2011).

⁹ See *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement*, at http://www.minister.immi.gov.au/media/media-releases/_pdf/20110725-arrangement-malaysia-aust.pdf (viewed 24 August 2011).

¹⁰ See *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement, Annex A: Operational guidelines to support transfers and resettlement*, at http://www.immi.gov.au/managing-australias-borders/border-security/_pdf/operational-guidelines-transfers-resettlement.pdf (viewed 30 August 2011).

¹¹ Section 198A(3)(a) of the *Migration Act 1958* (Cth) provides:

(3) The Minister may:

(a) declare in writing 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.

¹² *Plaintiff M70/2011 and Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011), para 116 (Gummow, Hayne, Crennan and Bell JJ).

¹³ Above, para 118 (Gummow, Hayne, Crennan and Bell JJ).

¹⁴ The Court found that it was not 'necessary to examine any wider question about the content or application of the Minister's duties as guardian'. See above, para 147 (Gummow, Hayne, Crennan and Bell JJ).

¹⁵ Above, para 146 (Gummow, Hayne, Crennan and Bell JJ).

¹⁶ Prime Minister and Minister for Immigration and Citizenship, 'Legislation to restore Migration Act powers' (Media Release, 12 September 2011), at <http://www.alp.org.au/federal-government/news/legislation-to-restore-migration-act-powers/> (viewed 12 September 2011).

¹⁷ Above.

¹⁸ See, for example, *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement*, note 9, clauses 8(1), 10(2)(a), 10(3)(a), 10(4)(a).

¹⁹ Men subject to the arrangement who were, until recently, awaiting transfer on Christmas Island were detained in the Christmas Island Immigration Detention Centre at North West Point. For further information about this facility, see Australian Human Rights Commission, *2009 Immigration detention and offshore processing on Christmas Island*, at

http://www.humanrights.gov.au/human_rights/immigration/idc2009_xmas_island.html (viewed 24 August 2011) and Australian Human Rights Commission, *2010 Immigration detention on Christmas Island*, at http://www.humanrights.gov.au/human_rights/immigration/idc2010_christmas_island.html (viewed 24 August 2011).

²⁰ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), at <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 30 August 2011); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), at <http://www2.ohchr.org/english/law/crc.htm> (viewed 30 August 2011). The prohibition on arbitrary detention includes detention which, while it may be lawful, is unjust or unreasonable. The United Nations Human Rights Committee has stated that to avoid being arbitrary, detention must be a proportionate means to achieve a legitimate aim. In determining whether detention is proportionate to a particular aim, consideration must be had to the availability of alternative means for achieving that end which are less restrictive of a person's rights. See United Nations Human Rights Committee, *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997), para 9.2, at <http://www.unhcr.org/refworld/docid/3ae6b71a0.html> (viewed 14 September 2011).

²¹ See C Evans, *New Directions in Detention – Restoring Integrity to Australia's Immigration System* (Speech delivered at the Centre for International and Public Law Seminar, Australian National

University, Canberra, 29 July 2008), at

<http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm> (viewed 30 August 2011).

²² *Convention on the Rights of the Child*, note 20, art 37(b); *Migration Act 1958* (Cth), s 4AA.

²³ For further information about these facilities, see *2009 Immigration detention and offshore processing on Christmas Island*, note 19, and *2010 Immigration detention on Christmas Island*, note 19.

²⁴ *New Directions in Detention*, note 21, see key immigration detention value 3.

²⁵ See Human Rights and Equal Opportunity Commission, *Immigration Detention Guidelines* (2000), section 4, at http://humanrights.gov.au/human_rights/immigration/idc_guidelines2000.html (viewed 14 September 2011).

²⁶ Information provided to the Commission by the Department of Immigration and Citizenship, 16 August 2011.

²⁷ Above.

²⁸ See Term of Reference (g) of this Inquiry, at

http://www.aph.gov.au/senate/committee/legcon_ctte/malaysia_agreement/tor.htm (viewed 30 August 2011).

²⁹ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150, art 33(1) (entered into force 22 April 1954) and *Protocol Relating to the Status of Refugees*, 606 UNTS 267 (entered into force 4 October 1967). Both at

<http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf> (viewed 24 August 2011).

³⁰ *International Covenant on Civil and Political Rights*, note 20, arts 6 and 7; *Convention on the Rights of the Child*, note 20, arts 6 and 37; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85, art 3 (entered into force 26 June 1987), at

<http://www2.ohchr.org/english/law/cat.htm> (viewed 24 August 2011).

³¹ In relation to the operation of the *International Covenant on Civil and Political Rights* in this regard, see United Nations Human Rights Committee, *GT v Australia*, Communication No 706/1996, UN Doc CCPR/C/61/D/706/1996, at <http://www.unhcr.org/refworld/country,,HRC,,AUS,,4ae9acbfd,0.html>; United Nations Human Rights Committee, *C v Australia*, Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999, at <http://www.unhcr.org/refworld/docid/3f588ef00.html>; United Nations Human Rights Committee, *Kindler v Canada*, Communication No 470/1991, UN Doc CCPR/C/48/D/470/1991, at http://www.unhcr.org/refworld/publisher,CAN_SC,,USA,3ae6b6ed0,0.html; United Nations Human Rights Committee, *Ng v Canada*, Communication No 469/1991, UN Doc CCPR/C/49/D/469/1991, at <http://www.unhcr.org/refworld/country,,HRC,,HKG,,4028b5002b,0.html>; United Nations Human Rights Committee, *Cox v Canada*, Communication No 539/1993, UN Doc CCPR/C/52/D/539/1993, at <http://www.unhcr.org/refworld/publisher,HRC,,USA,4028ba144,0.html> (all viewed 24 August 2011). In relation to the operation of the *Convention on the Rights of the Child* in this regard, see United Nations Committee on the Rights of the Child, *General Comment No 6: Treatment of unaccompanied and separated children outside their country of origin*, UN Doc CRC/GC/2006/6, at <http://daccess-ods.un.org/TMP/9334375.html> (viewed 24 August 2011).

³² *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement*, note 9, clauses 10(2)(a) and 16.

³³ Above, clause 11(1).

³⁴ Above, clause 11(2).

³⁵ See para 21 in this submission.

³⁶ See note 32.

³⁷ See, for example, Amnesty International, *Brief: Australia's refugee deal with Malaysia* (2011), at www.asrc.org.au/media/documents/amnesty-brief-malaysia-swap.pdf (viewed 24 August 2011).

³⁸ *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement*, note 9, clauses 10(3)(a) and 8(1).

³⁹ *Operational guidelines to support transfers and resettlement*, note 10, provisions 2.3.1(a) and 3.0.

⁴⁰ *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement*, note 9, clauses 10(4)(a) and 16.

⁴¹ *International Covenant on Civil and Political Rights*, note 20, arts 17(1) and 23(1); *Convention on the Rights of the Child*, note 20, art 8(1).

⁴² Where they are coming directly from a territory where their life or freedom was threatened: *Convention Relating to the Status of Refugees*, note 29, art 31. Under United Nations High

Commissioner for Refugees guidelines, this provision covers 'a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured.' It also covers 'a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there.' United Nations High Commissioner for Refugees, *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers* (1999), para 4. At <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3c2b3f844> (viewed 30 August 2011).

⁴³ *International Covenant on Civil and Political Rights*, note 20, art 26.

⁴⁴ See *Migration Act 1958* (Cth), s 46A; *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement*, note 9, clause 4(1)(a).

⁴⁵ *Convention on the Rights of the Child*, note 20, art 22.

⁴⁶ Above, art 2.

⁴⁷ See further *A last resort?*, note 1, pp 272-274.

⁴⁸ *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement*, note 9, clause 9(3).

⁴⁹ Information provided to the Commission by the Department of Immigration and Citizenship, 27 July 2011.

⁵⁰ *Operational guidelines to support transfers and resettlement*, note 10, provision 1.3.

⁵¹ See Term of Reference (f) of this Inquiry, at

http://www.aph.gov.au/senate/committee/legcon_ctte/malaysia_agreement/tor.htm (viewed 30 August 2011).

⁵² *Operational guidelines to support transfers and resettlement*, note 10, provision 3.0.

⁵³ *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement*, note 9, clauses 10(2)(a) and 16.

⁵⁴ The three types of immigration-related detention are: internment; criminal imprisonment for offences under the *Immigration Act 1959* (Malaysia); and administrative detention prior to deportation.

⁵⁵ *Operational guidelines to support transfers and resettlement*, note 10, provisions 3.1(a) and 3.0.

⁵⁶ Above, provision 2.1.1(b).

⁵⁷ See *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011), para 30 (French CJ); para 24 in this submission.

⁵⁸ *Immigration Act 1959* (Malaysia), see ss 6(3), 8(3)(d)(i), 15(4), 36, 55A(1), 55A(3), 55A(4), 55B(1), 55B(3), 55D, 55E, 56(1)(aa), 56(1)(bb), 57, 58(3).

⁵⁹ See also *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011), para 33 (French CJ).

⁶⁰ *International Covenant on Civil and Political Rights*, note 20, art 7.

⁶¹ Above, art 10(1).

⁶² *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, note 30, see arts 1, 2 and 16.

⁶³ *Immigration Act 1959* (Malaysia), see ss 6(3), 36, 55A(1), 55A(3) and 55A(4), 55B(3), 55D, 56(1)(bb).

⁶⁴ See *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011), para 33 (French CJ).

⁶⁵ See *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, art 11(1) (entered into force 3 January 1976), at <http://www2.ohchr.org/english/law/cescr.htm> (viewed 8 August 2011). See also *Convention on the Rights of the Child*, note 20, art 27(1).

⁶⁶ *Operational guidelines to support transfers and resettlement*, note 10, provisions 3.1 and 3.2.

⁶⁷ Above.

⁶⁸ 'High Court set to rule on asylum swap deal', *Lateline* (30 August 2011), at

<http://www.abc.net.au/news/2011-08-30/high-court-set-to-rule-on-asylum-swap-deal/2863212> (viewed 31 August 2011).

⁶⁹ See Term of Reference (c)(iv) of this Inquiry, at

http://www.aph.gov.au/senate/committee/legcon_ctte/malaysia_agreement/tor.htm (viewed 30 August 2011).

⁷⁰ *Convention on the Rights of the Child*, note 20, art 37(b).

- ⁷¹ United Nations High Commissioner for Refugees, *UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers* (1999), guideline 5(ii) and (v), at www.unhcr.org.au/pdfs/detentionguidelines.pdf (viewed 31 August 2011).
- ⁷² *International Covenant on Economic, Social and Cultural Rights*, note 65, art 12; *Convention on the Rights of the Child*, note 20, art 24.
- ⁷³ *Operational guidelines to support transfers and resettlement*, note 10, provisions 3.4(b) and 3.4(c).
- ⁷⁴ 'High Court set to rule on asylum swap deal', note 68.
- ⁷⁵ See section 10 in this submission for further consideration of the implications of the arrangement for children and unaccompanied minors.
- ⁷⁶ *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement*, note 9, clause 8(2).
- ⁷⁷ See Term of Reference (c)(i) of this Inquiry, at http://www.aph.gov.au/senate/committee/legcon_ctte/malaysia_agreement/tor.htm (viewed 30 August 2011).
- ⁷⁸ *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement*, note 9, clause 13; *Operational guidelines to support transfers and resettlement*, note 10, provisions 5.1 and 5.2.
- ⁷⁹ Information provided to the Commission by the Department of Immigration and Citizenship, 27 July 2011.
- ⁸⁰ *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement*, note 9, clauses 8(1), 10(2)(a) and 10(3)(a); *Operational guidelines to support transfers and resettlement*, note 10, provision 2.3.1(a)
- ⁸¹ *Convention on the Rights of the Child*, note 20, art 3(1).
- ⁸² Above, arts 6, 8(1), 10(1) and 37(a), (b) and (c); *Convention relating to the Status of Refugees*, note 29, art 33(1).
- ⁸³ See section 8.3 in this submission.
- ⁸⁴ *Convention on the Rights of the Child*, note 20, art 28(1); *International Covenant on Economic, Social and Cultural Rights*, note 65, art 13(1).
- ⁸⁵ *Convention on the Rights of the Child*, above, art 28(1)(a) and (b); *International Covenant on Economic, Social and Cultural Rights*, above, art 13(1)(a) and (b).
- ⁸⁶ *Operational guidelines to support transfers and resettlement*, note 10, provisions 3.3(a) and (b).
- ⁸⁷ Information provided to the Commission by the Department of Immigration and Citizenship, 27 July 2011.
- ⁸⁸ Agreed statement of facts of parties to *Plaintiff M70/2011 and Plaintiff M106/2011 v Minister for Immigration and Citizenship*, attachment 34, attachment C.
- ⁸⁹ See Terms of Reference (c)(v) and (c)(vi) of this Inquiry, at http://www.aph.gov.au/senate/committee/legcon_ctte/malaysia_agreement/tor.htm (viewed 30 August 2011).
- ⁹⁰ The Commission's submissions in the matter *Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011) are available at http://www.hcourt.gov.au/assets/cases/m70-2011/M106-2011_HRC.pdf (viewed 30 August 2011).
- ⁹¹ *Immigration (Guardianship of Children) Act 1946* (Cth), s 6.
- ⁹² *Immigration (Guardianship of Children) Act 1946* (Cth), s 4AAA; see also the Commission's submissions in the matter *Plaintiff M106/2011 v Minister for Immigration and Citizenship*, note 90, paras 18, 24, 25.
- ⁹³ *Sadiqi v Commonwealth of Australia (No 2)* [2009] FCA 1117, para 299.
- ⁹⁴ *Secretary, Department of Health and Community Services v JWB and 5MB (Marion's Case)* (1992) 175 CLR 218, 240; *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 184 (Lord Scarman), 200 (Lord Templeman).
- ⁹⁵ *Immigration (Guardianship of Children) Act 1946* (Cth), s 6A(1).
- ⁹⁶ *Immigration (Guardianship of Children) Act 1946* (Cth), s 6A(2).
- ⁹⁷ See the Commission's submissions in the matter *Plaintiff M106/2011 v Minister for Immigration and Citizenship*, note 90, paras 24-55.
- ⁹⁸ *Immigration (Guardianship of Children) Act 1946* (Cth), s 6A(4).
- ⁹⁹ *Convention on the Rights of the Child*, note 20, art 20(1).
- ¹⁰⁰ See para 55 in this submission.
- ¹⁰¹ See sections 6.1, 8.1, 8.3, 10.1 in this submission.

- ¹⁰² *Operational guidelines to support transfers and resettlement*, note 10, provisions 3.1 and 3.2.
- ¹⁰³ Above, provision 4.1.
- ¹⁰⁴ *Immigration (Guardianship of Children) Act 1946* (Cth), s 6.
- ¹⁰⁵ Agreed statement of facts of parties to *Plaintiff M70/2011 and Plaintiff M106/2011 v Minister for Immigration and Citizenship*, note 88, para 55.
- ¹⁰⁶ See, generally, *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement*, note 9; *Operational guidelines to support transfers and resettlement*, note 10.
- ¹⁰⁷ See para 24 in this submission.
- ¹⁰⁸ Agreed statement of facts of parties to *Plaintiff M70/2011 and Plaintiff M106/2011 v Minister for Immigration and Citizenship*, note 88, attachment 34, attachment C.
- ¹⁰⁹ See, for example, Prime Minister of Australia, *Moving Australia Forward* (Speech delivered at the Lowy Institute, Sydney, 6 July 2010), at <http://www.lowyinstitute.org/Publication.asp?pid=1328> (viewed 30 August 2011); Minister for Home Affairs, Minister for Foreign Affairs and Minister for Immigration and Citizenship, *Strengthening our Borders through Regional Cooperation* (2011), at <http://www.alp.org.au/federal-government/news/strengthening-our-borders-through-regional-co-oper/> (viewed 30 August 2011).
- ¹¹⁰ See further Refugee Council of Australia, *Regional Protection*, at <http://www.refugeecouncil.org.au/global/regional.php> (viewed 30 August 2011).
- ¹¹¹ Above.
- ¹¹² United Nations High Commissioner for Refugees, *Asylum Levels and Trends in Industrialized Countries 2010* (2011), table 3, at <http://www.unhcr.org/4e2d21c09.html> (viewed 30 August 2011).
- ¹¹³ 'Malaysia deal "much worse" than Pacific Solution', *ABC News* (26 May 2011), at <http://www.abc.net.au/news/2011-05-26/malaysia-deal-much-worse-than-pacific-solution/2733000> (viewed 30 August 2011); 'Malaysia solution worse than Pacific: Brennan', *AM* (10 August 2011), at <http://www.abc.net.au/am/content/2011/s3289684.htm> (viewed 30 August 2011); Commonwealth, *Parliamentary Debates*, House of Representatives, 30 May 2011, pp 4951-4952 (the Hon Andrew Wilkie, MP).
- ¹¹⁴ See *Memorandum of understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to and assessment of persons in Papua New Guinea, and related issues* (2011), at http://www.minister.immi.gov.au/media/media-releases/_pdf/20110819-aust-png-mou.pdf (viewed 30 August 2011).
- ¹¹⁵ See for example 'HREOC welcomes end of Pacific Solution', note 7; 'Australia's treatment of refugees still has a long way to go', note 7; "'Pacific Solution" still poses human rights risks', note 7; 'Human rights and offshore processing', note 4; *A last resort?*, note 1.
- ¹¹⁶ *Convention relating to the Status of Refugees*, note 29, art 33(1); *International Covenant on Civil and Political Rights*, note 20, arts 6 and 7; *Convention on the Rights of the Child*, note 20, arts 6 and 37; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, note 30, art 3.
- ¹¹⁷ See further 'Human rights and offshore processing', note 4, pp 47-48.
- ¹¹⁸ See K Bem, N Field, N Maclellan, S Meyer and T Morris, *A price too high: the cost of Australia's approach to asylum seekers* (2007), section 3.4, at <http://www.oxfam.org.au/resources/filestore/originals/OAus-PriceTooHighAsylumSeekers-0807.pdf> (viewed 30 August 2011); Edmund Rice Centre for Justice and Community Education, *Deported to Danger: A study of Australia's treatment of 40 rejected asylum seekers* (2004), at http://www.erc.org.au/index.php?module=documents&JAS_DocumentManager_op=downloadFile&JAS_File_id=208 (viewed 30 August 2011); Edmund Rice Centre for Justice and Community Education, *Deported to Danger II: The continuing study of Australia's treatment of rejected asylum seekers* (2006), at http://www.erc.org.au/index.php?module=documents&JAS_DocumentManager_op=downloadFile&JAS_File_id=153 (viewed 30 August 2011).
- ¹¹⁹ Above.
- ¹²⁰ *International Covenant on Civil and Political Rights*, note 20, art 9(1); *Convention on the Rights of the Child*, note 20, art 37(b).
- ¹²¹ *A price too high*, note 118, section 3.5.
- ¹²² *International Covenant on Civil and Political Rights*, note 20, arts 7 and 10; *Convention on the Rights of the Child*, note 20, art 37(c).

¹²³ J Hole, 'Lawyer recounts his visit to Manus Island detention facility', *PM* (6 May 2011), at <http://www.abc.net.au/pm/content/2011/s3210109.htm> (viewed 9 September 2011).

¹²⁴ H Rubin, *Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (20 May 2006), at www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-07/migration_unauthorised_arrivals/submissions/sub110.pdf (viewed 31 August 2011).

¹²⁵ See *International Covenant on Economic, Social and Cultural Rights*, note 65, art 12; *Convention on the Rights of the Child*, note 20, art 24.

¹²⁶ *A price too high*, note 118, section 3.2

¹²⁷ *International Covenant on Civil and Political Rights*, note 20, art 9(4); *Convention on the Rights of the Child*, note 20, art 37(d).

¹²⁸ See *Convention on the Rights of the Child*, above, arts 6, 8(1), 10(1) and 37(a) and (b); *Convention relating to the Status of Refugees*, note 29, art 33(1).

¹²⁹ *Convention on the Rights of the Child*, above, art 37(b).

¹³⁰ See further *A last resort?*, note 1, Recommendation 5 and part 17.4.9.

¹³¹ *A price too high*, note 118, section 3.1.

¹³² Above.

¹³³ Above.

¹³⁴ Above, section 3.3.

¹³⁵ Susan Metcalfe, refugee advocate and then PhD candidate, quoted in above, part 3.1.

¹³⁶ See, for example, *A last resort?*, note 1, chapter 16; Human Rights and Equal Opportunity Commission, *Temporary Protection Visas: operation and impacts*, at http://www.humanrights.gov.au/racial_discrimination/forum/Erace/tpvs/tpvs.html#3 (viewed 30 August 2011); Human Rights and Equal Opportunity Commission, *Temporary Protection Visas and race discrimination law*, at http://www.humanrights.gov.au/racial_discrimination/forum/Erace/tpvs/legal.html (viewed 30 August 2011).

¹³⁷ See J Phillips, *Parliamentary Library Research Note no 51 2003-04: Temporary Protection Visas*, endnotes 9 and 10, at <http://www.aph.gov.au/library/pubs/rn/2003-04/04rn51.htm> (viewed 30 August 2011).

¹³⁸ Minister for Immigration and Citizenship, *Refugee Policy Under The Rudd Government – The First Year* (Speech delivered to the Refugee Council of Australia, Sydney, 17 November 2008), at <http://www.minister.immi.gov.au/media/speeches/2008/ce081117.htm> (viewed 30 August 2011).

¹³⁹ Minister for Immigration and Citizenship, *Address to the 2008 National Members' Conference of the Migration Review Tribunal and Refugee Review Tribunal* (Speech delivered in Melbourne, 29 February 2008), at

<http://www.minister.immi.gov.au/media/speeches/2008/ce08-29022008.htm> (viewed 30 August 2011).

¹⁴⁰ Minister for Immigration and Citizenship, *Budget 2008-09 – Rudd Government scraps Temporary Protection visas* (Media release, 13 May 2008), at <http://www.minister.immi.gov.au/media/media-releases/2008/ce05-buget-08.htm> (viewed 30 August 2011).

¹⁴¹ See

http://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&lang=en (viewed 30 August 2011).

¹⁴² See *Memorandum of understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to and assessment of persons in Papua New Guinea, and related issues*, note 114, clause 12.

¹⁴³ Nauru acceded to the Refugee Convention on 28 June 2011. See

http://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&lang=en (viewed 30 August 2011).

¹⁴⁴ Commonwealth, *Official Committee Hansard: Senate Legal and Constitutional Affairs Legislation Committee – Estimates* (23 May 2011), p 16 (Andrew Metcalfe, Secretary, Department of Immigration and Citizenship). At <http://www.aph.gov.au/hansard/senate/commttee/s39.pdf> (viewed 8 August 2011).

¹⁴⁵ *Asylum levels and trends in industrialized countries 2010* (2011), note 112, table 3.

¹⁴⁶ *New Directions in Detention*, note 21.

¹⁴⁷ *Migration Act 1958* (Cth), ss 46A(1), 46A(2), 195A(1), 195A(2).

¹⁴⁸ *Migration Act 1958* (Cth), s 197AB.

¹⁴⁹ As of 29 June 2011, 513, or 58%, of children in immigration detention had been moved out of secure immigration detention facilities and into community detention. By 27 July 2011, 735 children had been moved in community detention. Minister for Immigration and Citizenship, 'Government meets commitment on Community Detention' (Media release, 29 June 2011), at <http://www.minister.immi.gov.au/media/cb/2011/cb167699.htm> (viewed 8 August 2011); Minister for Immigration and Citizenship, Doorstop Interview (Darwin, 29 June 2011), at <http://www.minister.immi.gov.au/media/cb/2011/cb167721.htm> (viewed 8 August 2011); Department of Immigration and Citizenship's answers to questions on notice, received by the Joint Select Committee on Australia's Immigration Detention Network 10 August 2011, question 42, at <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=87cfa861-917b-4c85-bbda-29013c9e73df> (viewed 30 August 2011).

¹⁵⁰ See Term of Reference (d) of this Inquiry, at http://www.aph.gov.au/senate/committee/legcon_ctte/malaysia_agreement/tor.htm (viewed 30 August 2011); *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement*, note 9, clause 9(1). Note the comparatively low costs of community-based alternatives: in Canada, providing for asylum seekers living in the community has been costed at \$10-12 per person per day, compared with \$179 for detention. Costs calculated in Canadian dollars. In Australia, the Community Assistance Support program, a service for certain vulnerable asylum seekers living in the community, has been costed at a minimum of \$38 per day, as opposed to a minimum of \$125 per day for detention. See United Nations High Commissioner for Refugees, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, p 60, at <http://www.unhcr.org/refworld/docid/4dc935fd2.html> (viewed 8 August 2011); International Detention Coalition and La Trobe Refugee Research Centre, *There are Alternatives: A handbook for preventing unnecessary immigration detention* (2011), box 12, at <http://idcoalition.org/cap/handbook/> (viewed 8 August 2011).

¹⁵¹ Recent research indicates that less than 10% of asylum applicants abscond when released to proper supervision and facilities, or, in other words, 90% of asylum applicants comply with their conditions of release. See *Back to Basics*, above, Executive Summary; *There are alternatives*, above, box 12.

¹⁵² See *There are Alternatives*, above, pp 16-17, 51-52.

¹⁵³ See, generally, above.

¹⁵⁴ For further information on community-based alternatives, see paras 87-89 in this submission.

¹⁵⁵ See para 7 in this submission.