THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: SW:lb:HumanRights:573713
Direct line: 9926 0202

14 September 2011

Ms Julie Dennett
Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO BOX 6100
Parliament House
CANBERRA ACT 2600

Email: legcon.senate@aph.gov.au

Dear Ms Dennett

Inquiry into the Agreement between Australia and Malaysia on the transfer of asylum seekers to Malaysia

The Law Society's Human Rights Committee (Committee) has responsibility to consider and monitor Australia's obligations under international law in respect of human rights; to consider reform proposals and draft legislation with respect to issues of human rights; and to advise the Law Society on any proposed changes. The Committee is a long-established committee of the Society, comprised of experienced and specialist practitioners drawn from the ranks of the Society's members who act for the various stakeholders in all areas of human rights law in this State.

The Committee welcomes the opportunity to make submissions to the Senate Committee Inquiry into the Malaysian transfer Agreement (Agreement). In the absence of detail regarding the implementation of the Agreement these submissions are limited to issues relating to Australia's international obligations towards asylum seekers and other matters that may otherwise arise with respect to children and unaccompanied minors. The Committee is mindful that amendments to the *Migration Act 1958* (Cth) (Act) are currently being considered to overcome the recent decision of the High Court in *Plaintiff M70/2011 v Minister for Immigration and Citizenship and Plaintiff N106 v Minister for Immigration and Citizenship* [2011] HCA 32. These submissions are made with the expectation that an amended Act, read as a whole, would continue to serve a purpose of responding to Australia's obligations under the Convention Relating to the Status of Refugees (Convention)[1].

On 25 July 2011, the Governments of Australia and Malaysia signed an "arrangement" providing for the transfer to Malaysia of persons seeking protection under the Convention in exchange for the Australian Government receiving persons who have been determined to be refugees by the United Nations High Commissioner for Refugees (UNHCR) in Malaysia. The Committee

[1] See comments of Kiefel J in *M70* at [212] referring to the decision of the High Court in *M61/2010E v The Commonwealth* [2010] HCA 41

recognises the legitimate concerns of the government with respect to the 'people smuggling' trade and the associated dangers for asylum seekers who arrive by sea, however, views the Agreement as capable of breaching Australia's international obligations and placing at risk of harm those who seek to engage those obligations. Observing the needs, rights and protection of this group must outweigh the method of deterrence being adopted.

The High Court decision.

On 31 August 2011, the High Court of Australia in *Plaintiff M70/2011 v Minister for Immigration and Citizenship and Plaintiff N106 v Minister for Immigration and Citizenship* [2011] HCA 32 (High Court decision) by a majority of 6:1 held that the terms of the existing s.198A of the Act did not allow the Minister for Immigration and Citizenship to declare a country to which asylum seekers could be taken for processing unless that country was legally bound by international law or domestic law to:

- provide access for asylum seekers to effective procedures for assessing their need for protection; and
- provide protection for persons seeking asylum, pending determination of their refugee status; and
- provide protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
- meet relevant human rights standards in providing that protection.

It is common ground that Malaysia is not a signatory to the Convention and does not recognise the status of refugees in its domestic laws. The challenge before the High Court was ultimately decided on the proper statutory interpretation of s.198A of the Act and the assessment made by the Minister as to whether or not Malaysia met the relevant requirements. After finding that the s.198 (3) (a) criteria were jurisdictional facts, the Court held that the "facts necessary to making a valid declaration under s.198A (3) (a) were not and could not be established"[2]. While the Committee accepts that it may be possible for the Act to be amended so as to allow the Agreement to proceed, it views the transfer of asylum seekers to Malaysia as undesirable and capable of leading to breaches of Australia's international obligations.

Australia's international obligations

Australia's obligation of non-refoulement under Article 33 is arguably the most fundamental to be found within the Convention. It requires the Contracting State to refrain from expelling or returning a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened" for one of the five reasons as set out under the Convention. The Committee recognises that the obligations under the Convention do not necessarily impose a duty to assess claims and may well permit removal to a non-contracting country. In *Patto v MIMIA* [2000] FCA 1554 at [37], his Honour French J, as he then was, summarised the obligation in the following terms:

> "*1. Return of the person to the third country will not contravene Article 33 where the person has a right of residence in that country and is not subject to Convention harms therein.*

[2] see paragraph [135] per Gummow, Hayne, Crennan, and Bell JJ

2. Return of the person to the third country will not contravene Article 33, whether or not the person has right of residence in that country, if that country is a party to the Convention and can be expected to honour its obligations thereunder.

3. Return of the person to a third country will not contravene Article 33 notwithstanding that the person has no right of residence in that country and that the country is not a party to the Convention, provided that it can be expected, nevertheless, to afford the person claiming asylum effective protection against threats to his life or freedom for a Convention reason."

What is clear, however, is a requirement to ensure persons being transferred to a third country will not be at risk of refoulement from that third country or at risk of Convention related persecution in that third country. While the Committee notes the commitment of the respective Governments to treat transferees under the Agreement "with dignity and respect and in accordance with human rights standards"[3], this does not of itself discharge Australia's obligations under Article 33 of the Convention. What must follow, the Committee submits, is a duty to provide those subject to the Agreement an opportunity to raise claims of Convention related persecution against the third country and significantly for those claims to be assessed before any such transfer take place. The Committee is not aware that such an opportunity is currently being afforded.

A further requirement of the Convention is that a Contracting State shall not impose penalties on refugees on account of their unauthorised arrival[4]. Clause 4 of the Agreement identifies that the arrangement solely applies to those who have "traveled irregularly by sea to Australia" or "been intercepted at sea by the Australian authorities in the course or trying to reach Australia by irregular means". While it is uncertain whether the transfer would amount to a 'penalty' for the select group of asylum seekers, it does, at the very least place them in a position of great disadvantage and vulnerability. Those subject to the transfer will effectively be required to forfeit most benefits and privileges that they would have otherwise enjoyed within the territory of a Contracting State[5].

The High Court decision further highlighted that those being transferred under the Agreement will be subject to Malaysian law. This would include the possibility of being charged and prosecuted for the offences of illegal entry to and exit from the country, subject to the effect, if any, of the terms of an exemption issued by the Malaysian authorities. The Chief Justice noted that there is nothing on the face of the exemption order to protect the plaintiffs from being charged and prosecuted in a Malaysian court for an offence against s.6 of the Malaysian Immigration Act associated with their entry into Malaysia[6]. His Honour continued to state that there was no evidence available to the Minister of any legal protection against such eventualities in relation to "offshore entry persons"[7].

The safeguards under the Agreement for transferees to Malaysia include a commitment to respect the principle of non-refoulement[8], the lawful presence in Malaysia during the period where claims to protection are being considered[9] and a general commitment to treat transferees with "dignity and respect and in accordance with human rights standards"[10]. The Agreement further provides that the Government of Australia will cover costs relating to the "health and welfare (including education of minor children) of Transferees"[11]. In the absence of further detail

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[3] See Clause 8 of the Agreement
[4] See Article 31 of the Convention
[5] The Agreement does require the Malaysian authorities to adhere to the non-refoulement principle appearing in Article 33 of the Convention
[6] see paragraph [33]
[7] see paragraph [33]
[8] See Clause 10 of the Agreement.
[9] See Clause 10 of the Agreement
[10] See Clause 8 of the Agreement
[11] see Clause 9 of the Agreement

the Committee cannot comment on the practical implementations or the adequacy of the services.

A paper produced by Amnesty International titled "Abused and Abandoned – Refugees Denied Rights in Malaysia" dated June 2010 provides the following:

> "*Malaysia enforces its immigration laws and policies through extreme means. Regular immigration raids and arrests are carried out by state agents, and, more controversially, by a volunteer citizens' police force, the People's Volunteer Corps (Ikatan Relawan Rakyat or RELA). These arrests have a veneer of legitimacy, in that police and RELA agents are authorized by law to examine people's identification documents and investigate their immigration status. These raids also lead to arrest, detention and other penalties for immigration offences. For some this can lead to refoulement.*
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> *Raids can occur in any location and at any time. Refugees and asylum-seekers live with a perpetual fear of such raids and the consequences that flow from them. Amnesty International interviewed people arrested in raids at their homes, at the airport, at their workplaces, on the street and other locations. NGOs also raised cases of people being arrested even when they were trying to report mistreatment by employers and agents to the authorities.*
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> *Aside from routine raids, every couple of years the government announces large immigration crackdowns.*
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> *In late February 2010, a crackdown was publicly announced and an increase in arrests was seen, according to news reports. In late March, Amnesty International reported on some 140 migrant workers arrested in immigration sweeps, including refugees holding UNHCR cards.3*
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> *During these raids and immigration checks, questionable tactics are used and harassment, extortion and violence are commonplace. RELA's approach is particularly problematic, consisting of crude profiling based on apparent race or ethnicity, and a general attitude of "arrest now, investigate later".*
>
> *These largely untrained RELA agents frequently subject the people they arrest to humiliation, physical abuse, theft and extortion. Amnesty International heard many accounts that reinforced the conclusion that RELA agents are often more interested in illicit personal gain, through any means available to them, than in carrying out a legitimate immigration enforcement role.*"

What flows from the report, and of particular concern to the Committee, is the seeming inability to monitor or enforce the safeguards provided for within the Agreement, where, it appears abuses towards refugees are not necessarily sanctioned by the authorities or committed with their direct knowledge. It is unclear to the Committee whether the Malaysian authorities will adhere to all basic human rights standards such as allowing the transferees to openly practice their religion without fear of reprisal. It is well documented that while the Malaysian Constitution permits freedom of religion, Shiite Islam is considered deviant and not permitted to be spread[12]. Indeed, an act that could be considered a threat to the security of Malaysia may otherwise be a Convention reason for the grant of a Protection Visa in Australia. This raises a question as to whether or not it can be "expected" that Malaysia can afford "the person claiming asylum effective protection against his life or freedom for a Convention reason"[13]. In circumstances where a Contracting State is unable to "expect" the protection of asylum seekers in a non-Contracting State the Convention would be breached.

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[12] see for example http://www.nytimes.com/2011/01/28/world/asia/28iht-malay28.html?pagewanted=all and http://www.dailytimes.com.pk/default.asp?page=2011\03\10\story_10-3-2011_pg4_2

[13] Patto v MIMIA [2000] FCA 1554 at [37]

To ensure compliance with international obligations, asylum seekers should only be transferred in circumstances where their protection is expected and can be monitored and reasonably enforced.

Unaccompanied minors and children

The Agreement provides that it is the Australian Government who determines those to be transferred to Malaysia[14], and that there will be "appropriate pre-screening assessment mechanisms in accordance with international standards before a transfer is effected"[15]. It does not disclose what factors are to be taken into account in the making of the decision, nor does it exclude unaccompanied minors from being subject to the transfer. The Agreement states that *"[s]*pecial procedures will be developed and agreed to by the Participants to deal with the special needs of vulnerable cases including unaccompanied minor"[16].

While sections of the Act allowing for the transfer do not discriminate between adult and minor[17], the Minister does possess a special duty of care to unaccompanied minors arising under the *Immigration (Guardianship of Children) Act 1946* (Cth) (IGOC Act). Section 6 of the ICOG Act relevantly provides:

> "*The Minister shall be the guardian of the person, and of the estate in Australia, of every non-citizen child who arrives in Australia after the commencement of this Act to the exclusion of the parents and every other guardian of the child, and shall have, as guardian, the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have, until the child reaches the age of 18 years or leaves Australia permanently, or until the provisions of this Act cease to apply to and in relation to the child, whichever first happens.*"

In *X v Minister for Immigration and Multicultural Affairs* [1999] FCA 995, his Honour North J gave consideration to the legal concept of guardianship. At [33]-[34] his Honour states:

> "*The legal concept of guardianship has long encompassed the full range of rights, powers and duties that can be exercised by an adult in respect of a child: Dickey Family Law (3rd Ed) (1997), 263.*
>
> *The guardian must therefore address the basic human needs of a child, that is to say, food, housing, health and education. Over the course of this century, attention to these needs has come to be recognised as a fundamental human right of children, including in various international instruments to which Australia is a party.*"

With respect to the responsibilities arising under the ICOG Act his Honour continues[18]:

> "*The responsibilities of a guardian under s 6 of the Act include the responsibilities which are the subject of the Convention[19]. They are responsibilities concerned with according fundamental human rights to children.*"

It is understood that a child has a fundamental human right to enjoy special protection and be provided opportunities and facilities to enable them to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity[20]. Decisions with respect to the transfer of all children to Malaysia requires the best

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[14] see Clause 4(1)(b)(i) of the Agreement
[15] see Clause 9(3) of the Agreement
[16] see Clause 8 to the Agreement
[17] see section 198A of the Act
[18] at [43]
[19] His Honour referring to the Convention on the Rights of the Child (the 'CRC')
[20] Declaration of the Rights of the Child (1959) – Principle 2

interest of the child to be a primary consideration[21] and the basic concern for the Minister as legal guardian of unaccompanied minors[22]. While accepting that the question of what is in the 'best interest of the child' is one for the determination of the Minister, in the knowledge of the reduced rights and heightened risks associated with the transfer, the Committee considers that such decisions should not be made lightly.

The UNHCR paper 'Determining the Best Interest of the Child'[23] identifies that the best interest of the child is rarely determined by a single, overriding factor. The following are considered to be relevant:

- Views of the child;
- Views of family members and others close to the child;
- Safety as a priority;
- Importance of the family and of close relationships;
- Nurturing the development needs of the child; and
- Balancing best interests of the child with rights of others

With respect to the 'safe environment' question, the UNHCR identifies that 'past harm' and the 'ability to monitor' the child become relevant considerations. Likewise, when considering the 'development and identity needs' of the child, emotional needs and mental health considerations are required. In the Committee's respectful submission, any decision made with respect to children, including unaccompanied minors, should be made with the best interest of the child as a primary consideration.

A further difficulty which may present from the Agreement is the perceived conflict that arises for the Minister in his duties as Minister for Immigration and Citizenship and 'guardian' to unaccompanied minors. This can be particularly so when the government's policy towards asylum seekers is not necessarily in line with the best interest of the unaccompanied minor. Steps towards minimising the potential conflict may require the Minister to seek independent and expert opinion regarding issues of mental health, development and safety before any decision is made with respect to a minor under the Agreement. Otherwise, it may be prudent for the responsibility of advocating for the best interest of the child to be transferred to an independent guardian.

Thank you again for the opportunity to comment.

Yours sincerely

Stuart Westgarth
President

[21] see article 3 of the CRC
[22] see article 18 of the CRC
[23] UNHCR 'Determining the Best Interests of the Child', May 2008.