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EXECUTIVE SUMMARY

Regional Responsibility Sharing

- Australia cannot use responsibility sharing arrangements such as the proposed Arrangement with Malaysia to 'contract out' of its international legal obligations.
- In order to lawfully transfer a refugee or asylum seeker to another country, Australia must ensure that its obligations under the Refugee Convention will be fulfilled in that country.
- Accession to the Refugee Convention is important. It represents a binding commitment to respect and implement the provisions of that treaty.
- The destination country must also respect the rights of refugees in practice.
- Malaysia is not a party to the Refugee Convention or its Protocol, nor does it have any provision in domestic law for the protection of refugees.
- There is extensive evidence that Malaysia does not observe the rights of refugees and asylum seekers in practice.

Constraints on Lawful Responsibility Sharing – Australia's Obligations

Non-refoulement

- Australia has undertaken to respect the principle of *non-refoulement* under the Refugee Convention and numerous other human rights instruments.
- The principle of *non-refoulement* requires countries to protect individuals from both direct and indirect *refoulement*. This includes ensuring that persons are not removed to countries in which they are at risk of *refoulement*.
- The lack of assessment by Australia of individuals' protection claims prior to transfer means that Australia risks breaching its *non-refoulement* obligations by removing individuals who may be at risk of harm in Malaysia.
- There is no guarantee under the Arrangement or Malaysian domestic law that asylum seekers or refugees will be protected from *refoulement* from Malaysia.
- Reliance on the UNHCR to conduct refugee status determination in Malaysia is not sufficient to guard against *refoulement* given the UNHCR's lack of jurisdiction, insufficient resources and inability to grant a durable solution.

Other rights

- The Refugee Convention contains a wide range of other rights, some of which are applicable as soon as a refugee or asylum seeker is physically within Australia's territory.
- Australia has additional human rights obligations under a number of international human rights treaties and customary international law.
- Human rights organizations have documented the extensive ill-treatment of asylum seekers in Malaysia, including their uncertain legal status and lack of access to basic services.
- There are insufficient safeguards in the Arrangement to exclude the possibility of such ill-treatment, especially over the longer term.
- The assistance to be provided to persons transferred to Malaysia under the Arrangement falls considerably short of Australia's human rights obligations.

Additional Considerations in relation to Children

- Under the Convention on the Rights of the Child, Australia has undertaken to give primacy to the best of interests of the child in all actions concerning children and to ensure that children receive appropriate protection and humanitarian assistance.
- The stipulation in the Arrangement that special procedures for vulnerable cases 'will be developed' is an insufficient guarantee that Australia will meet its protection and human rights obligations towards unaccompanied minors.

1. Background: The Concept of Regional Responsibility Sharing

The current terms of section 198A of the *Migration Act 1958* (Cth) reflect international law enunciated in the Refugee Convention and Protocol[1] and confirmed by Conclusions of the Executive Committee of the programme of the United Nations High Commissioner for Refugees (UNHCR).[2] Under section 198A(3), as interpreted by the High Court, any country declared by Australia as one to which asylum seekers may be sent for processing must be legally bound by international law or its own domestic law to: provide access for asylum seekers to effective procedures for assessing their need for protection; provide protection for asylum seekers pending determination of their refugee status; and provide protection for persons given refugee status pending their voluntary return to their country of origin or their resettlement in another country. In addition to these criteria, the *Migration Act* requires that the country meet certain human rights standards in providing that protection.

On 25 July 2011, Australia and Malaysia signed an Arrangement whereby Australia undertook to resettle 4,000 UNHCR-recognized refugees from Malaysia, in exchange for Malaysia accepting 800 asylum seekers from Australia.[3] In concluding that Agreement, much emphasis was placed on the need for a regional framework and a 'regional approach to a regional problem'. Indeed, the Australian Prime Minister hailed the Malaysian deal as 'a genuine co-operation arrangement in our region under the Regional Co-operation Framework', distinguishing it from the 'unilateral' Pacific Solution—as though the mere fact that a policy involves a bilateral arrangement makes it an inherently positive one.

While the Preamble to the Refugee Convention recognizes the need for 'international co-operation' to respond to what is clearly an international problem, in our view great care needs to be taken to ensure that 'co-operation' does not operate as a facade behind which violations of international law are permitted to take place.

This is particularly salient when one considers the experience of other regions in the world which have instituted responsibility sharing arrangements. Burden sharing arrangements in regions such as North America and Europe might be considered optimum or best practice schemes, given that they involve responsibility sharing between States which are all parties to the Refugee Convention, with reasonably

[1] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 and Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

[2] See for example, Executive Committee Conclusion No 85 (XlIX), 'International Protection' (1998), para (aa): 'as regards the return to a third country of an asylum-seeker whose claim has yet to be determined from the territory of the country where the claim has been submitted, including pursuant to bilateral or multilateral readmission agreements, it should be established that the third country will treat the asylum-seeker (asylum-seekers) in accordance with accepted international standards, will ensure effective protection against *refoulement*, and will provide the asylum-seeker (asylum-seekers) with the possibility to seek and enjoy asylum.' See also UNHCR Executive Committee, Conclusion No 58 (XL), 'Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection' (1989) para f(ii).

[3] Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement (25 July 2011) http://www.minister.immi.gov.au/media/media-releases/_pdf/20110725-arrangement-malaysia-aust.pdf.

comparable domestic systems of refugee law, and similar (if not identical) international human rights obligations.

country New Zealand, or any other country with a strong human rights record, the deterrent effect would not exist. The Australian government argues that the reason for the Arrangement is that it will ensure that 800 people will 'go to the back of the queue.' This fails to recognize that the lack of protection in Malaysia is a reason for people to move on to Australia in the first place, and that a 'queue' is a heartless and inappropriate analogy for circumstances in which the right to seek asylum is not recognized and asylum seekers are subjected to detention for attempting to earn a living.

Although the Arrangement has two positive features—it represents an opportunity to engage with Malaysia to improve the circumstances of asylum seekers and refugees there, and it creates an additional 4,000 resettlement places in Australia for refugees—these do not outweigh the lack of legal safeguards and protection outcomes for the 800 asylum seekers sent to Malaysia.

2. Is Responsibility Sharing Lawful?

Section 198A(3) of the *Migration Act* currently provides that the Minister may 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.

A wide range of well-respected scholars and experts in international refugee law have emphasized the importance of States involved in any regional arrangement being parties to the Refugee Convention. This is because accession to the Refugee Convention matters: it represents a binding commitment by a State to respect the provisions of the Convention and to implement those provisions in practice. Accession to the Refugee Convention also involves a binding commitment to co-operate with the UNHCR (article 35), which gives the UNHCR a degree of leverage it might otherwise not have. In addition, accession to the Refugee Convention includes the compulsory obligation to submit to the jurisdiction of the International Court of Justice in relation to 'any dispute between parties to the Convention' (article 38). This cannot be derogated from. Hence, acceding to the Convention means submitting to another form of supervision. By removing a refugee to a State that is not a party to the Refugee Convention, the possibility of any formal compulsory supervision is precluded, arguably reducing the scope of refugee protection.[10]

The only recognized exception to the requirement that the destination State is a party to the Refugee Convention is where 'the third state has developed a practice akin to the 1951 Convention and/or its 1967 Protocol'[11]—in other words, a system of refugee protection in domestic law notwithstanding the absence of an international legal obligation.

The High Court of Australia held in its judgment in *M70* that in order for the Minister to declare a country safe under section 198A(3) of the *Migration Act*, the destination State must be bound by international or domestic law to do the various things set out in section 198A(3).[12] The court's ruling recognizes that to ensure refugee and asylum seeker rights are enjoyed in practice, at a minimum a legal framework for the protection of those rights is required.

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[10] See generally Michelle Foster, 'TDfn,v, ' Elsewrally Mir for 31095

Malaysia is not a party to the Refugee Convention or its Protocol, or the main human rights treaties. Nor does it have any provision in domestic law for the protection of refugees; hence it cannot be said that it has established a de facto domestic system of refugee protection. As French CJ recognized, in order to ensure that human rights are enjoyed in practice over time, legal obligations to protect rights are vital.[13]

Legal obligations are necessary, but not on their own sufficient, for a country to be considered as a 'safe third country' for refugees or asylum seekers. While the legal framework in any given country is an important consideration when determining whether or not it is 'safe', it is also essential to assess how it treats people in practice.[14] Although the joint judgment in *M70* does not decide the extent to which section 198A(3) of the *Migration Act* requires the Minister to have regard to 'factual elements', nor the extent to which such factual elements might be reviewable by the court,[15] the concurring judgments written by French CJ and Kiefel J do address the importance of having regard to the facts on the ground.[16] As French CJ noted, '[c]onstitutional guarantees, protective domestic laws and international obligations are not always reflected in the practice of states'.[17]

As a matter of international law, in order to rely on another country's refugee protection mechanisms, that country must respect the rights of refugees and asylum seekers in practice. As stated by the eminent lawyers who adopted the Michigan Guidelines on Protection Elsewhere,

> Reliance on a protection elsewhere policy must be preceded by a good faith empirical assessment by the state which proposes to effect the transfer ('sending state') that refugees defined by Art. 1 will in practice enjoy the rights set by Arts. 2–34 of the Convention in the receiving state. Formal agreements and assurances are relevant to this inquiry, but do not amount to a sufficient basis for a lawful transfer under a protection elsewhere policy. A sending state must rather inform itself of all facts and decisions relevant to the availability of protection in the receiving state.[18]

In the case of the Arrangement between Australia and Malaysia, the reverse has occurred. In the face of the evidence that refugees and asylum seekers are *not* protected in Malaysia, the Australian government sought governmental assurances. As French CJ stated in *M70*, the Minister's affidavit indicated that he approached his task, in part, on the basis that Malaysia was 'keen to improve its treatment of refugees and asylum seekers', 'had made a significant conceptual shift in its thinking about how it wanted to treat refugees and asylum seekers', and 'had begun the process of improving the protection offered to such persons.'[19] This was the best the Minister could say about the situation in Malaysia—he could not, on the evidence presented to

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[13] *Ibid*, para 61, per French CJ.
[14] See Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, 2007) 394; *MSS* (n 6) paras 353–54.
[15] *M70* (n 9) para 124 per Gummow, Hayne, Crennan and Bell JJ.
[16] *Ibid*, para 67 per French CJ; para 245 per Kiefel J.
[17] *Ibid*, para 67, citing Foster (n 10) 243.
[18] Michigan Guidelines (n 11) para 3.
[19] *M70* (n 9) para 62 per French CJ.

him (by the Department of Foreign Affairs and Trade, for example), sincerely guarantee that Malaysia protects refugees and asylum seekers.

3. Constraints on Lawful Responsibility Sharing

In light of the fact that a State party to the Refugee Convention, such as Australia, cannot contract out of its legal obligations, we now turn to consider the content of those obligations and the manner in which such obligations operate as a constraint on any burden sharing agreement with countries in our region.

3.1 Article 33: Direct *Refoulement*

Australia must be satisfied that no asylum seeker transferred to Malaysia has a well-founded fear of persecution in Malaysia on any of the Refugee Convention grounds. Australia must also be satisfied that transfer will not result in breach of its obligations under other human rights treaties.

Blanket designations of particular countries as 'safe' are inconsistent with the principle of *non-refoulement*, which requires a case-by-case assessment that a particular country is safe for a particular individual.[20]

Without an individual assessment by Australia of asylum seekers to be sent to Malaysia, this cannot be guaranteed. The Arrangement provides only that Australia will put in place an 'appropriate pre-screening assessment mechanisms in accordance with international standards before a transfer is effected',[21] and the Operational Guidelines stipulate only the gathering of biodata, basic security checks and fitness to travel assessments.[22] The criteria for the assessment should be transparent and address all relevant country information. In the absence of a proper legal assessment of individuals' claims for protection, Australia risks breaching its *non-refoulement* obligations. Indeed, several of the plaintiffs in *M70* raised this very argument on the basis that they claimed to have a well founded fear of being persecuted in Malaysia on the grounds of their religion.

As a matter of international law, Australia has voluntarily undertak the absia,

have access to protection on these grounds in Malaysia. This is why the Arrangement provides for the transfer elsewhere for people with a complementary protection need.[23] It is very unclear where they would go.

3.2 Article 33: Indirect *Refoulement*

The obligation to respect the principle of *non-refoulement* is not confined to the question whether transferred asylum seekers will be persecuted in Malaysia. Rather, as the House of Lords has noted,

> '[f]or a country to return a refugee to a state from which he will then be returned by the government of that state to a territory where his life or freedom will be threatened will be as much a breach of Article 33 as if the first country had itself returned him there direct. This is the effect of Article 33.[24]

This means that Australia must ensure that asylum seekers will not be sent back to their country of persecution by Malaysia, which necessarily requires that they have access to an adequate procedure for determining their eligibility for refugee status.

As mentioned above, Malaysia has no guarantee in domestic law that asylum seekers (or indeed recognized refugees) will be protected from *refoulement*. Nor does the Arrangement with Australia require such legislative protection. The Arrangement states that Malaysia will 'respect the principle of non-refoulement',[25] but this undertaking is in a non-binding political agreement.

A minimum requirement for a sending State to be assured that the principle of indirect *non-refoulement* will be respected in the State of transfer is that the latter State 'grants the person access to fair and efficient procedures for the determination of refugee status.'[26] As the European Court of Human Rights held in *MSS v Belgium*, '[w]hen they apply the Dublin Regulation, therefore, the states must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin.'[27]

Malaysia does not have a domestic refugee status determination procedure in place. At the grace of the Malaysian government, UNHCR is permitted to conduct refugee status determination in Malaysia. UNHCR is not a State, does not have jurisdiction over Malaysian territory, and does not have the same resources available to it as a country like Australia, which has a highly sophisticated refugee status determination system in place with both merits and judicial review. While Malaysia permits UNHCR to determine refugee status, UNHCR does not have the ability to grant durable solutions or guarantee that people will not be expelled from Malaysia, since ultimately, Malaysia exercises jurisdiction over asylum seekers in its territory and could decide to expel them. This is undoubtedly one reason UNHCR has stated that

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[23] Clause 11(2).
[24] *R (ex parte Adan) v Secretary of State for the Home Department* (2001) 2 WLR 143, 165.
[25] Clause 10(2).
[26] Lisbon Expert Roundtable (n 11) para15f; Michigan Guidelines (n 11) 211.
[27] *MSS* (n 6) 342.

its ‘preference has always been an arrangement which would enable all asylum-seekers arriving by boat into Australian territory to be processed in Australia.’[28]

Furthermore, putting the onus on to UNHCR represents an abrogation of Australia’s responsibilities as a country with the ability and resources to conduct refugee status determination (and which has one of the most sophisticated systems in the world for doing so). UNHCR is not a State and cannot be expected to replicate the complex decision-making models—including review processes—which States can construct. Its envisaged role is only to conduct refugee status determination in circumstances where States themselves are unable to do so.

As the High Court observed in *Plaintiff M70*,

> A country ‘provides access’ to effective procedures for assessing the need for protection of persons seeking asylum of the kind described in s 198A(3)(a)(i) if its domestic law provides for such procedures or if it is bound, as a matter of international obligation, to allow some third party (such as the United Nations High Commissioner for Refugees—‘UNHCR’) to undertake such procedures or to do so itself. A country does not provide access to effective procedures if, having no obligation to provide the procedures, all that is seen is that it has permitted a body such as UNHCR to undertake that body’s own procedures for assessing the needs for protection of persons seeking asylum.[29]

Asylum seekers in Malaysia do not have access to the same degree of merits or judicial review as they would if their claims were processed in Australia.[30] Therefore, there is a risk that refugees will not be recognized as such and will be subject to *refoulement*.

Although neither the Refugee Convention nor its Protocol formally stipulates procedures for refugee status determination, ‘their object and purpose of protection and assurance of fundamental rights and freedoms for refugees without discrimination, argue strongly for the adoption of such effective internal measures.’[31] This has been supported by the Executive Committee of UNHCR, of which Australia is a member, which has recommended that refugee status determination procedures satisfy the following basic requirements:

(i) The competent official (e.g. immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting state, should have clear instructions for dealing with cases which might be within the purview of the relevant international instruments. He should be required to act in accordance with the

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[28] UNHCR Statement on the Australia–Malaysia Arrangement’ (25 July 2011).
[29] *M70* (n 9) para 125, per Gummow, Hayne, Crennan and Bell JJ.
[30] The High Court made clear in *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of*

When s 198A(3)(a) speaks of a country that provides access and protections it uses language that directs attention to the kinds of obligation that Australia and other signatories have undertaken under the Refugees Convention and the Refugees Protocol. Reference has already been made to the non-refoulement obligation imposed by Art 33(1) of the Refugees Convention. But signatories undertake other obligations. Those obligations include:

– to apply the provisions of the Convention to refugees without discrimination as to race, religion or country of origin;

– to accord to refugees within a signatory's territory treatment at least as favourable as that accorded to its nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children;

– to accord to a refugee free access to the courts of law;

– to accord to refugees lawfully staying in its territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances as regards the right to engage in wage-earning employment;

– to accord to refugees the same treatment as is accorded to nationals with respect to elementary education; and

– to accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

The extent to which obligations beyond the obligation of non-refoulement (and the obligations under Art 31 of the Refugees Convention concerning refugees unlawfully in the country of refuge) apply to persons who claim to be

in accordance with human rights standards',[35] and that they will enjoy standards of treatment consistent with those set out in the Operation Guidelines at Annex A',[36] the Operational Guidelines do not include any reference to human rights. Instead, they list forms of assistance that will be provided to those transferred to Malaysia which will obviously help to 'fulfil' certain human rights, but without any mechanisms to ensure these rights are 'respected' and 'protected'.[37] These forms of assistance include:

- provision of accommodation by the International Organization for Migration (IOM) for approximately one month after arrival;[38]
- support payment to cover living costs for first month;[39]
- access to self reliance opportunities including employment;[40]
- access to private or information education for school age children;[41]
- access to basic health care under UNHCR and IOM arrangements;[42]
- access to UNHCR's arrangements for supporting vulnerable persons.

Much of the assistance provided for by the Guidelines is to be delivered by UNHCR or IOM. Indeed, the Arrangement was concluded 'on the basis that UNHCR and International Organization for Migration (IOM) can fulfil the roles and functions envisaged in the Operational Guidelines'.[43] The resources of these organizations, particularly UNHCR, are extremely limited.

This list of entitlements falls considerably short of Australia's human rights obligations under international law. To the extent that the assistance stipulated in the Guidelines *does* fulfil particular human rights obligations, no provision is made for how Australia or Malaysia will monito

Convention on the Rights of the Child in relation to child asylum seekers and refugees. The Best Interest Assessment ('BIA') and Best Interest Determination ('BID') should be carried out by individuals with some expertise in child protection or welfare needs. The aim of the BIA/BID process is to ensure that there is a comprehensive review of a child's individual situation and needs, and to enable the child's views to be heard and protection gaps to be identified. It is not clear that a BIA or BID takes place before children are removed pursuant to the Arrangement.

In General Comment No 6 on Treatment of Unaccompanied and Separated Children Outside their Country of Origin, the Committee on the Rights of the Child recognized a broad *non-refoulement* norm whenever 'irreparable harm' may occur to a child. This includes protection arising under article 6 of the Convention on the Rights of the Child, which concerns the life, survival and *development* of the child. The Committee set out a number of protection criteria which must be fulfilled, including the appointment of a guardian, access to education and so on.[53] As the Australian Human Rights Commission submitted in its intervention in *M106*, there is simply not enough detail in the Arrangement with Malaysia to ensure that Australia meets its protection obligations towards unaccompanied minors.[54] It does not appear that unaccompanied minors will have guardian in Malaysia and it is not clear how their vulnerability will be addressed.

To return children to a situation where they are not assured of even the basic guarantees for refugees, let alone a durable solution, will impact adversely on them. We note that in the EU, under article 6 of the Dublin II Regulation,[55] unaccompanied minors are permitted to reunite with family members legally staying in one of the other EU Member States, and that in the absence of such family members, the State responsible for hearing the child's claim to asylum is the State in which the claim is *lodged*. In other words, the legal position in comparable countries is that unaccompanied minors should not be sent to the back of a so-called 'queue' on the basis that they have arrived without a visa. Rather, they are entitled to be treated with the compassion and concern that their status as children—extremely vulnerable children—demands.

5. Conclusion

It is clear that the Arrangement between Australia and Malaysia is driven by domestic political considerations and not by international legal principle or ethical considerations. The argument that the Agreement will save lives at sea is a smokescreen. Asylum seekers will continue to make dangerous journeys because they are desperate, but the Australian government hopes these journeys will not be to Australian shores. There are other, less punitive ways in which the Australian

[53] Committee on the Rights of the Child, 'General Comment No 6', UN Doc CRC/GC/2005/6 (1 September 2005).
[54] Submissions on behalf of the Australian Human Rights Commission (intervening), para 60: http://www.hcourt.gov.au/assets/cases/m70-2011/M106-2011_HRC.pdf.
[55] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National, OJ L 50 (25 February 2003), 1–10. There is currently a proposal to amend Dublin II and to incorporate the best interests principle.

government could implement measures to improve conditions and processing in the region which could lessen the need for these dangerous journeys.

The Arrangement shows a remarkable level of ignorance about the way forced displacement occurs in practice. It is farcical to assume that Australia can smash the people smugglers' 'business model'. Neither Australia, nor any other State, can alone stall the operation of smugglers who are tapping into human suffering and desperation. Pouring similar amounts of resources into root causes of movement, conditions for asylum seekers in the region broadly, and encouraging our neighbours to implement international legal standards and domestic safeguards for protection would be a far more productive exercise. But perhaps with a policy of mandatory detention and appalling conditions of treatment well-documented in countless international and national reports, Australia has outsmarted itself. Pot, kettle and black are three words that spring to mind.

We would strongly urge the Committee to re-read the many recommendations made by previous inquiries into refugee issues in Australia. Rather than spending countless hours yet again retracing the same material in a slightly different guise, taking note of submissions and recommendations made by experts in the field over many years might lead to an alternative strategy which actually produces humane, principled and efficient outcomes.

Finally, the arguments in the submission should in no way be misconstrued as suggestion that the alternatives offered by the Coalition are preferable. They are not. The Howard government systemically violated international refugee and human rights law through an asylum policy focused on deterrence, interdiction, and penalization, rather than the rights and needs of refugees and asylum seekers, as many of us have written elsewhere.[56] The reintroduction of the Pacific Solution and related policies would once again raise serious human rights concerns and the extent to which Australia is implementing its treaty obligations in good faith.

[56] See eg Penelope Mathew, 'Australian Refugee Protection in the Wake of the Tampa' (2002) 96 American Journal of International Law 661; Mary Crock, 'In The Wake Of The Tampa: Conflicting Visions Of International Refugee Law in the Management of Refugee Flows' (2003) 2 Pacific Rim Journal of Law and Policy 49; Savitri Taylor, 'The Pacific Solution or A Pacific Nightmare: The Difference between Burden Shifting and Responsibility Sharing' (2005) 6 Asian-Pacific Law and Policy Journal 1; Angus Francis, 'Bringing Protection Home: Healing the Schism between International Obligations and National Safeguards created by Extraterritorial Processing' (2008) 20 International Journal of Refugee Law 253; Jane McAdam and Kate Pur