

SENATE SUBMISSION: RESPONSE TO QUESTION ON NOTICE

Canberra ACT 0200 Australia

Julie Dennett
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs

Via email:<LegConSen@aph.gov.au

Dear Secretary

Response to Question on Notice

Please find enclosed our response to Question on Notice from Senator Cash.

Yours sincerely

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**What do you believe are the key protections of the refugee convention?
Are these protections enshrined in the Malaysian agreement?**

The authors have prepared a response to the question taken on notice.

It is important that the Committee notes the authors make no claims to be international law experts and the Committee may wish to seek supporting information from other academic expert witnesses, for example Professor Jane McAdam.

However we have prepared an answer nominating what we believe to be the key protections in the 1951 Convention relating to the Status of Refugees and subsequent Protocol, and we have considered if we believe these protections are enshrined in the Malaysian agreement.

States take their obligations under international law from both the international Treaties and Conventions that bind them and the international guidelines that are developed by international organisations and committees. These guidelines are known as softlaw. These instruments are developed to assist states to implement treaties and conventions in a consistent manner and can be used to expand development of new structures and policies¹.

The Office of the High Commissioner developed guidelines relating to procedures and criteria for determining refugee status in 1979². The resulting handbook makes it clear that the responsibility for processing claims (determining refugee status) lay not with the UNHCR but with the contracting state where the refugee applied for protection.

UNHCR's Guidelines on policies and procedures for unaccompanied minors³ address specifically the needs of children falling under the Convention.

Whilst the authors maintain that any attempts to deny asylum seekers the right to make a claim in Australia would be a breach of our obligations, we are aware that states who are signatory do not necessarily comply with all aspects of the Convention.

However we have no doubt that a state which is not a signatory cannot be expected to provide the protections outlined within the Convention relating to the Status of Refugees and 1967 Protocol (the Convention).

¹ Chinkin, C.M, The Challenge of Soft Law; Development and change in International Law, [1988] International and Comparative Law Quarterly

² UNHCR Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the status of Refugees; re-edited Geneva 1992

³ UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children seeking Asylum (1977)

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What are the key protections of the 1951 Convention relating to the Status of Refugees and 1967 Protocol

First the Convention sets out the definition of the term refugee (Article 1) which includes;

1. The reasons for persecution
2. When refugee status comes to an end
3. When a refugee may be excluded from protection

The Convention then lays out the standards for treatment of refugees. Article 31 contains the provisions that contracting states must not impose a penalty on a refugee who has entered the territory without authorisation. In addition, states are to ensure this clause applies to a refugee prior to their status being regularised. This then includes asylum seekers who are in the process of determination. It has been argued that penalties imposed on asylum seekers such as detention and refusal to process claims are in breach of article 31. This is because an obligation under the convention cannot be avoided by assuming someone is not a refugee or by denying them the right to seek asylum. It is important to note that a person is not made a refugee once they meet the definition. Fulfilling the criteria laid out in article 1 enables a person to be recognised by the State as a refugee⁴. This is recognition of their refugee status that existed prior to processing.

In addition, the Convention provides for contracting states to select areas they wish to formally exclude from their agreement (article 42 reservations). However there are provisions which cannot be excluded, which have become the absolute bottom line protections under the Convention. These are:

- article 1 definition;
- article 3 contracting states must not discriminate against refugees on the grounds of race, religion or country of origin
- article 4 refugees shall have rights equal to nationals of the contracting state with respect to freedom to practice religion including religious education
- article 16(1) the right to access the courts of law
- article 33 non refoulement,
- articles 36 -46 inclusive procedural.

⁴ Goodwin-Gill, G.S, Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection. UNHCR Global Consultations, 2000.

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The remaining provisions outline a series of rights that are designed to place a refugee on equal footing with a national or migrant (alien) of the contracting state. These include:

- Access to public housing (article 21), public education (article 22), and public relief (article 23),
- Access to rights under labour legislation and social security provided for in states where nationals have access to these provisions under legislation (article 24).
- Freedom of movement within the territory (article 26) issue of travel documents that allow travel outside of the territory (article 28).
- Equal treatment accorded to aliens generally, except where the Convention contains more favourable provisions, (article 7).
- Rights related to personal status such as those attached to marriage (article 12) provided that the right would be recognised by the law of the state if that person was not a refugee.
- Equal treatment as nationals with regard to artistic rights and industrial property rights under (article 14,)
- Equal treatment as nationals with regard to the right of association (article 15)
- Equal treatment as nationals with regard to access to courts, legal assistance and exemption from cautio judicatum solvi (article 16)
- Employment under equal conditions as nationals (unless restrictions are in place for employment and wage earning of aliens to protect the local economy). If this is the case then the Convention provides conditions for the restrictive measures to be lifted (article 17) and for self employment (article 18)
- No penalties imposed because of illegal entry or presence and unrestricted movements or if restriction of movement is necessary, this is only until status regularised (article 31)

Obligations can extend beyond those afforded to nationals or aliens, for example if refugees need administrative assistance for access to documentation from the authorities of a foreign country the States should arrange assistance to liaise with the international authority and

- deliver the documents or certifications
- recognise the documents or certifications
- charge only moderate fees for the service

The need to facilitate a durable solution for refugees is included in Article 34 which provides for the assimilation and naturalisation of refugees.

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Are these Protections enshrined in the Arrangement?

The Arrangement provides for Australia to transfer certain persons seeking international protection to Malaysia for refugee status determination. It specifically states that the Arrangement 'represents a record of the Participants intentions and political commitments but is not legally binding on the Participants'. Clause 12 allows for the changing nature of domestic laws, rules, regulations and national policies in force in each country 'from time to time' and obligations under international law, to affect the way operations may be carried out.

This indicates that both governments are aware that a non binding understanding between two governments, which affects people over long periods of time may not be able to be upheld.

The Arrangement includes Annex A; *Operation guidelines for support of transfers and resettlement*.

[Clause 4 1 a)] specifies that those who will be transferred are those that have travelled irregularly by sea to Australia or were intercepted at sea in the course of trying to reach Australia by irregular means. This combined with [clause 4.1 (b)] in Annexure A; relates to article 31 of the Convention which specifies that States should not impose penalties on refugees who enter a country 'illegally'.

This principle has been one which States have regularly 'ignored or read down'⁵, but the punitive nature of these provisions will result in those found to be refugees that have family in Australia prevented from joining them for a minimum of four years. This includes unaccompanied minors⁶.

[Clause 8, 2] refers to special procedures which are yet to be developed and agreed to by the Participants that will deal with the special needs of vulnerable cases including unaccompanied minors. Although the Convention does not address children specifically, guidelines have been developed to assist states interpreting the Convention when dealing with unaccompanied children seeking asylum.

It is of concern that [Clause 8, 2] does not mention international standards or human rights provisions and is unclear as to when or how the procedures are to be developed.

[Clause 9. 3] includes the commitment by Australia to a pre-screening assessment mechanism that 'is in accordance with international standards before the transfer is effected.'

⁵ Crock, M Seeking Asylum Alone - A study of Australian law policy and practice regarding unaccompanied and separated children., 2006.

⁶ It is not clear if the arrangement would prevent the split family provisions within the humanitarian program applying to anyone in this situation, however the introduction of temporary protection visas for asylum seekers in Australia would extend separation.

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Sections D, E and F of Article 1 of the Convention contain provisions which exclude a person from recognition of refugee status. They include:

1. Persons already receiving United Nations protection or assistance from an agency other than UNHCR
2. Persons not considered to be in need of international protection
3. Persons considered not to be deserving of international protection due to war crimes or crimes, crimes against peace or humanity, serious non political crime or acts contrary to the purposes and principles of the United Nations.

We are unsure if the pre screening assessment mechanism is to identify these issues or is aimed at identifying health or other concerns or to screen those who would face persecution in Malaysia. Annexure A appears to indicate that the initial 'handling' in Australia is aimed at identifying those Malaysia would consider prohibited immigrants or terrorists.

The evidence provided by DIAC indicates a pre-screening process. It appears highly unlikely that this would relate to the Refugees Convention, as the government has been clear that no asylum claims are addressed in Australia under this arrangement. As it stands there is no indication of what international standards this clause refers to.

[Clause 10] The Government of Malaysia will provide those transferred under the arrangement the opportunity to have claims considered by UNHCR. The Malaysian government will, with some reservations, respect the principle of non-refoulement provided for in article 33 of the Convention.

This includes facilitating a lawful presence in Malaysia whilst protection claims are assessed and recognised refugees await resettlement. It is important to note that this acknowledgement of non-refoulement by the Malaysian government is restricted under the arrangement to transferees and those refugees awaiting re-settlement in Australia. It does not apply to all refugees and asylum seekers present in Malaysia now or in the future.

Annexure provides the standards of treatment that transferees will be eligible for under [Clause 10] of the arrangement.

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Annex A Operational Guidelines to support transfers and resettlement

The Operational guidelines provide further clarification regarding processes in place for asylum seekers and refugees transferred under the Arrangement.

Asylum seekers:

Item 2.2.2 a), 2.2.2 b) allows asylum seekers to remain in Malaysia under an exemption or whilst they access the UNHCR and make their asylum claim.

Item 2.2.2 c) allows them access to self reliance opportunities (this appears to refer to work rights).

Recognised refugees

Item 2.3.1 a), 2.3.1 b) Refugees who are permitted to remain in Malaysia will not be liable to be detained and arrested. They will continue to be allowed to work.

All transferees

As Annexure A moves from those recognised as refugees back to the heading Transferees during temporary stay in Malaysia in Item 3, we presume this includes both asylum seekers and recognised refugees.

Item 3.0 details that they will receive adequate treatment including access to support mechanisms that other asylum seekers and refugees receive currently in the community. If detained, the time period will be limited and aimed at completing health and security checks.

Item 3.1 details that transferees will be allowed to live in private accommodation they can find in the community, but will not be provided or assisted with housing other than short term accommodation (one month).

Item 3.2 indicates transferees will be encouraged to work and will have no access to support payment other than IOM allowance provided for one month.

Item 3.3 provides for minors to access private education if it is available or affordable or informal education organised by IOM.

Item 3.4 Access to health will be in accordance with arrangements UNHCR has with some private clinics and private hospitals.

Item 3.5 Vulnerable transferees include children and/or those who have suffered torture and trauma. They will be provided access to existing UNHCR services.

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It is important to note that the limited rights listed above will be paid for by the Australian government [Clause 9]. This includes all costs related to refugee registration, status determination and appeal, health, welfare and safety net costs and education of minors. The Australian government's agreement to pay for all these costs is a clear indication that these are to be delivered in a private arrangement by IOM, UNHCR and Non Government Organisations.

Conclusion

The Arrangement offers inadequate protection for recognised refugees. Whilst it is clear that Australian funding may provide access to some forms of health, education and accommodation for refugees in Malaysia it is unclear for what length of time these are to be funded.

It seems unlikely that Malaysia would continue to grant support to transferred asylum seekers and refugees without continued financial support from the Australian government.

The rights protected from reservation within the Convention are not wholly addressed within the Arrangement. Those that are not addressed are:

- article 3 contracting states must not discriminate against refugees on the grounds of race, religion or country of origin;
- article 4 refugees shall have rights equal to nationals of the contracting state with respect to freedom to practice religion including religious education;
- article 16(1) the right to access the courts of law;
- articles 36 -46 procedural.

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Comparison of rights under the Convention and limited rights provided under the Arrangement

The rights protected within the Convention which are not addressed are presented in the table below.

UN CONVENTION	Article	ARRANGEMENT	Clause /ITEM
Refugee determination	1	Annexe A 2.2.2(a)	
Freedom from Discrimination on grounds of religion or country of origin	3		
Religious freedom	4		
Access to the courts of law	16(1)		
Access to legal assistance	16		
Non-refoulement	33	Restricted to refugees and asylum seekers under the arrangement.	Clause 10
Public housing	21	Private housing/Short term IOM	ITEM3.2
Public education	22	Minors allowed access to private education if affordable (UNHCR or NGO or refugee funded) or informal education provided by IOM.	Annexe A ITEM 3.3
Public relief	23	No access to social security IOM may provide financial assistance for one month	ITEM 3. 2.1 c)
Freedom of movement within the territory	26	Detention limited to health and security checks for asylum seekers. No specifics about movement within the rest of the territory.	
Issue of travel documents to allow movement outside of territory	28	Permitted to remain in Malaysia under exemption order not liable to detention or arrest	Annexe A ITEM 2.2.2 b) 2.3.1 a)
Equal treatment accorded to aliens generally except where the convention has more favourable provisions	7		
Right of association	15		
Employment under the same conditions as nationals	17	Transferees encouraged to become self reliant through employment. Ongoing access to self reliance measures	ITEM 3. 2.1 a), 2.3.1 b)
Right to self employment	18		
No penalties imposed because of illegal entry or presence and unrestricted movements or if restricted this is only until status regularised	31	Permitted to remain in Malaysia under exemption order, not liable to arrest and detention Detainees held only for health and security checks	Clause 2.2.2 b), 2.31 ITEM 3.0
Assimilation and naturalisation	34		