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UNITED NATIONS ASSOCIATION OF AUSTRALIA INCORPORATED

SUBMISSION TO SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

AUSTRALIA'S AGREEMENT WITH MALAYSIA IN RELATION TO ASYLUM SEEKERS

1. BACKGROUND

1.1 UNAA is a non-government non-profit organisation which aims to promote awareness within Australia of the aims and work of the United Nations, and to encourage the Australian Government to fulfil its obligations as a member state of the United Nations.

1.2 This submission is presented on behalf of the Executive Committee of the United Nations Association of Australia (UNAA). It reflects the agreed policies of UNAA's Federal Council which represents members across Australia.

1.3 The submission places the issue in the current international context, and refers to the United Nations standards, as well as to the specific experience of Australia in its response to asylum seekers. In the concluding section there are several suggestions to the Senate Committee.

2 OVERALL CONTEXT

2.1 The increasing flow of people around the world as a result of poverty, famine, war, civil disturbance, and natural disasters, has posed a severe challenge to the international community in responding effectively to meet the humanitarian needs generated in many parts of the world. Some countries, especially in Africa and Europe, have been receiving large numbers of people seeking asylum. As a result they have had to ask for considerable aid from UN and other agencies.

2.2 In Australia's case, the flow of people has been related especially to wars in which Australia has been engaged (Iraq, Afghanistan) and unrest in areas closer to our shores (eg Burma, Sri Lanka). The absence of obvious points where such people can seek formal entry to Australia adds to the confusion about how to respond fairly and decently. The existence of large camps of

people in Malaysia in particular has increased the pressure for a solution to the problem.

2.3 A further important feature of the situation has been the increasing focus on people smugglers as a major cause for concern. Australian political leaders have made numerous statements to the effect that the 'pull' of a safe refuge in Australia has led to unscrupulous people exploiting vulnerable people and enticing them onto unsafe boats. Hence a strong emphasis in public policy debates on how to curb the people smugglers, and less emphasis on the 'push' factors that lead people to flee for their lives and seek asylum.

2.4 In this regard, there has been a recent publication that has analysed all arrivals and shown that policies adopted by all governments in the past decade have made little difference to the flow. John Menadue, Director of the Centre for Policy Development, in an article in *The Canberra Times* on 23 August, drew attention to the Centre's study ("A New Approach: Breaking the Stalemate on Refugees and Asylum Seekers"). "When we analyse the asylum-seeker flows to OECD nations in the years after 2001, the ebbs and flows to Australia largely match those to other OECD nations....the most significant factor in the number of asylum-seekers coming to Australia was the increase and decrease in global numbers".

3 PRINCIPLES

3.1 UNAA supports the principles enshrined in the various international instruments designed to codify and protect human rights. These include the Refugee Convention of 1951 and its 1967 Protocol. It is important to observe that in 2001 the States Parties (including Australia) to the Convention and the Protocol reaffirmed their commitment to these instruments. UNAA would like to see all member states of the United Nations become parties to the Convention (currently 147 States Parties).

3.2 The particular features of these instruments that are relevant to the Inquiry are (a) the definition of refugee which refers to someone unable or unwilling to return to their country of origin because of well-founded fear of persecution, (b) the requirement that refugees not be penalised for their illegal entry, and (c) the expectation that refugees will have access to courts, primary education, work, and appropriate documentation.

3.3 The role of the office of the UN High Commissioner for Refugees (UNHCR) includes promoting international instruments for the protection of refugees, and supervising their application. This means that the UNHCR views of the agreement between Australia and Malaysia are very significant in assessing whether the agreement is consistent with Australia's international obligations under the Refugee Convention.

4 AUSTRALIA'S DILEMMA

4.1 The Australian Government has sought a regional solution to the flow of people seeking asylum and assistance in our region. Despite some progress on this approach, notably at the Bali ministerial meeting in March 2011, the outcome so far has been patchy. The agreement with Malaysia can be seen as an example that could be used in other parts of the region..

4.2 On 25 July 2011 the Australian Prime Minister announced that the two Governments had signed an arrangement “to combat people smuggling and provide protection to an additional 4000 refugees”. Note the order of goals – stop smuggling, then protect people.

4.3 Part of the agreement was to allow an additional 1000 ‘genuine’ refugees (as assessed by UNHCR) from Malaysia into Australia each year for the next four years, increasing our refugee intake to 14,750 each year. This is, from UNAA’s point of view, a commendable decision, and will give those refugees new hope of a productive life in Australia.

4.4 The other aspect of the agreement was that 800 asylum seekers who have arrived by boat will be sent to Malaysia and not be processed in Australia. According to the Government, these people will “be treated with dignity and respect in accordance with human rights standards”. In addition, the Malaysian Government, whilst not a signatory to the Refugee Convention, had agreed to a key tenet of the Convention – non-refoulement – and will enable UNHCR to assess their claims.

4.5 UNHCR appears to have become uneasy about the agreement, and has chosen not to give public endorsement to it, preferring to monitor it and give advice along with the International Organisation for Migration (IOM). . This shows the risks that may arise in trying to ensure that the care and protection of asylum seekers in Malaysia is actually achieved. The experience to date has not been encouraging, given repeated stories of ill-treatment of asylum seekers there. The agreement between the two governments has also taken much of the credit away from the Australian Government’s decision to accept more refugees overall.

4.6 The High Court ruled on 31 August that the Government's agreement with the Malaysian Government was invalid as it would not protect asylum seekers as required under international law nor under the Malaysian domestic legal framework. This will require re-thinking of the agreement and will prevent its implementation indefinitely.

5 SUMMARY AND CONCLUSION

5.1 The challenge of the greatly increased flow of refugees around the world has affected many countries, including Australia. In recent times, the policy focus in Australia has shifted from humanitarian to border control concerns, despite the relatively small number of boat arrivals and the fact that most have turned out to be genuine refugees, and that many have taken up residence in Australian communities and are contributing well.

5.2 Australia, as one of the states parties to the Refugee Convention and its Protocol, appears to have compromised its international obligations by adopting an approach that penalises asylum seekers. Mandatory detention has become a source of real human suffering for those detained (especially children) and has undermined the sense of fair-play that most Australians claim is part of our tradition. UNAA is pleased that greater effort is being made to allow asylum seekers to live in community accommodation and to speed-up security checks, and believes this should be a priority of policy.

5.3 The agreement with Malaysia has the positive effect of increasing the number of refugees accepted each year by Australia, but this is to some extent undermined by the sending of asylum seekers to Malaysia where their care and protection are less easy to secure, despite the agreement. The reserve shown by UNHCR is an indication of the risks involved.

5.4 The UNAA Federal Council, at its meeting in August 2011, urged the Government to change its policy of mandatory detention of asylum seekers, in the light of the opinions of UNHCR and other UN bodies on this issue, and seek alternatives to long-term detention.

5.5 Off-shore processing is contrary to the spirit of the Refugee Convention, and not favoured by UNHCR. Accordingly UNAA would like a review of this approach with the aim of reinstating on-shore processing as the norm.

5.6 If the four-year agreement with Malaysia is to continue, UNAA believes it should be reviewed after one year to ensure that the guarantees given in the agreement are carried out. At the same time, Australia should seek to persuade Malaysia to become a signatory to the Refugee Convention.

5.7 The ruling of the High Court on 31 August gives the Australian Government the opportunity to re-assess its approach to the handling of asylum seekers, especially the use of off-shore processing. UNAA considers that such a review should give greater focus to the humanitarian imperatives of the situation.

Canberra
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