



Refugee Council
of Australia

SUBMISSION TO THE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE INQUIRY INTO AUSTRALIA'S AGREEMENT WITH MALAYSIA IN RELATION TO ASYLUM SEEKERS

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees and the organisations and individuals who support them. It has more than 150 organisational and 550 individual members. RCOA promotes the adoption of flexible, humane and practical policies towards refugees and asylum seekers both within Australia and internationally through conducting research, advocacy, policy analysis and community education. RCOA consults regularly with its members and refugee community leaders, and this submission is informed by their views.

RCOA welcomes the opportunity to contribute to the inquiry into Australia's agreement with Malaysia in relation to asylum seekers. We have strongly advocated for the development of a more effective regional framework to better address the protection needs of refugee and we have applauded the Australian Government's efforts to advance this through the Bali Process. The arrangement with Malaysia, however, does not represent a constructive approach to addressing the considerable protection challenges in the Asia-Pacific region. As detailed in this submission, not only will the arrangement seriously undermine protection principles, it will also be counterproductive to the development of regional cooperation on protection issues.

RCOA was deeply disappointed by the Australian Government's decision to pursue legislative amendments to facilitate the arrangement with Malaysia, despite the High Court of Australia finding that legal safeguards to ensure adequate protection of asylum seekers transferred to Malaysia are not in place. We urge the Government not to proceed with the transfer of asylum seekers to Malaysia and instead explore the more constructive policy alternatives outlined in this submission.

1. Pre-transfer screening processes

- 1.1. RCOA remains very concerned about the lack of information provided by the Government on pre-transfer screening processes for asylum seekers subject to the arrangement. Numerous questions about these processes remain unanswered: whether asylum seekers subject to transfer will have access to independent legal advice; who will conduct pre-transfer assessments; what criteria will be used to determine eligibility for or exemption from transfer; and what mechanisms will be in place to ensure independent oversight and monitoring of decisions to transfer, including mechanisms for appeal.
- 1.2. Failure to implement appropriate pre-screening processes would seriously undermine the integrity of the arrangement and could expose vulnerable groups to further risk. As such, it is imperative that decision-making process be subject to independent oversight and that all asylum seekers subject to transfer have access to legal advice and mechanisms for appeal. However, the fact that transfers, as stipulated in the

operational guidelines, are ideally to take place within 72 hours of arrival in Australia suggests that any envisaged mechanisms for review or oversight are likely to be superficial at best.

- 1.3. Of particular concern is the potential for vulnerable persons to be transferred to a situation where their safety cannot be assured or where adequate protection and assistance may not be available. Beyond the broad stipulation in the arrangement that “special procedures” will be developed to deal with the needs of vulnerable cases, very little information has been provided about pre-transfer processes for vulnerable groups. There is a need for further clarification as to the procedures and criteria used to assess vulnerability and potential exemption from transfer.
- 1.4. One group which may be at serious risk under the arrangement is stateless persons. While the arrangement sets out a process whereby “Australian authorities will consider a transferee’s broader claims to protection under other human rights conventions”, further clarity is needed regarding the conventions and determination procedures used to make these assessments. In particular, RCOA is concerned that Australia does not yet have a functional statelessness status determination process, thus it is unclear how such determinations will be made. Given that stateless persons, due to their lack of citizenship, generally have few or no opportunities for voluntary repatriation, RCOA is concerned that stateless transferees – particularly those found not to be refugees – may remain in Malaysia indefinitely without adequate protection or assistance.
- 1.5. It is understood that the Government’s hesitation to release further information on exemptions may stem from fears that this could result in exempt groups being targeted by people smugglers. However, the fact that the Government has itself identified this risk highlights the ill-considered nature of the arrangement. An approach to addressing irregular movement which may necessitate the erosion of protection standards, particularly for vulnerable groups, is simply unacceptable.

2. Implications of the arrangement for unaccompanied minors

- 2.1. As mentioned above, the agreement stipulates that “special procedures” will be developed to deal with the needs of vulnerable cases, including unaccompanied minors. However, it fails to clearly articulate what these procedures will be and how they will guarantee the safety of unaccompanied minors.
- 2.2. The United Nations High Commissioner for Refugees (UNHCR) recognises that unaccompanied minors need additional support during and after the refugee determination process. Under the arrangement, however, it is not made clear who will be responsible for representing an unaccompanied minor during refugee status determination procedures; signing documents on his/her behalf; acting as an advocate for the minor if problems arise in the refugee status determination process, particularly with regard to welfare or other issues; overseeing the care and management of the child; and ensuring that the child is not exposed to abuse or neglect.
- 2.3. The role of the Minister for Immigration and Citizenship as legal guardian of unaccompanied minors has long been a matter of concern for RCOA and its members. RCOA believes that there is a direct conflict of interest between the Minister’s guardianship obligations under the *Immigration (Guardianship of Children) Act 1946*, which require the Minister to act in the best interests of the child, and the Minister’s power to expel an unaccompanied minor to Malaysia under the arrangement. The

current delegation of guardianship does not ensure that the person who has responsibility for a child can act in an unfettered way in the child's best interests.

- 2.4. RCOA is particularly troubled by the Australian Government's proposed legislative amendments to reduce judicial review of the Minister's guardianship obligations. If the Government is of the view that the Minister's responsibilities under the *Migration Act 1958* override his or her responsibilities as legal guardian for unaccompanied minors¹, it is entirely unacceptable for the Minister to retain these guardianship obligations.
- 2.5. RCOA strongly maintains that the needs of unaccompanied minors can only be met where there is active oversight by an independent legal guardian, supplemented by a comprehensive program of care and protection. It is essential that a legal guardian (other than the Minister) be appointed for any unaccompanied minor subject to transfer under the arrangement, to oversee the child's welfare and advocate on his or her behalf. There must also be mechanisms in place to ensure that any child exposed to abuse or neglect will be provided with immediate protection and assistance.

3. Costs associated with the arrangement

- 3.1. The limited details published in relation to the arrangement signal that Australia will take sole responsibility for all of the costs (both direct and indirect) associated with this agreement. While the 2011-12 Australian Federal budget has allocated \$75.9 million over four years for the arrangement, the projected allocation does not take in to consideration the fluid nature of the transfer agreement. As the arrangement is open-ended, there are no boundaries to the overall costs. As the likelihood of third country resettlement is low, or at a minimum would take several years, the costs of providing support to transferees could greatly exceed the four-year projections.
- 3.2. RCOA rejects the assertion by the Australian Government that the cost of processing asylum seekers onshore, as opposed to pursuing the arrangement, would amount to \$4 billion. The current high costs of processing asylum applications onshore are not inevitable, but stem from the Government's current policy of indefinite mandatory detention. Reform of immigration detention practices would result in a dramatic reduction in processing costs.²

4. Post-transfer services and support

- 4.1. Information about the precise nature of post-transfer services and support remains vague at best. Based on the limited information available, however, RCOA is concerned that services and support for transferees – while they may be of a higher standard than those available to other refugees and asylum seekers residing in Malaysia – will not constitute an “adequate standard of treatment”, particularly when considered in relation to Australia's obligations under the Refugee Convention.
- 4.2. For example, the operational guidelines stipulate that transferees of school age will have access to private education (presumably at their own cost) or, where such arrangements are not available or affordable, to informal educational arrangements.

¹ As indicated by Minister Bowen in Gillard, J. & Bowen, M. (2011). *Joint Press Conference with Julia Gillard, Prime Minister of Australia and Chris Bowen MP, Minister for Immigration and Citizenship*. 12 September. Available at www.minister.immi.gov.au/media/cb/2011/cb171739.htm

² For further details, see RCOA's August 2011 submission to the Joint Select Committee Inquiry into Australia's Immigration Detention Network, available at www.refugeecouncil.org.au/resources/submissions/1108_JSC_Detention_sub.pdf

This is a far lower standard than that required by the Refugee Convention, which stipulates that refugees should have access to elementary education on the same basis as nationals. Additionally, the guidelines state that transferees will have access to basic medical care through private clinics but do not outline arrangements for those with complex health needs (including mental health needs).

- 4.3. Also of concern are provisions relating to legal status and right of stay. The operational guidelines stipulate that transferees, rather than being granted a formal legal status, will be permitted to reside in Malaysia under an “exemption order”. For transferees found to be refugees, this tenuous and easily-revoked status can hardly be considered adequate, particularly given that they will likely reside in Malaysia for an extended period while awaiting resettlement. It remains unclear whether returnees will be issued identity papers or travel documents (as required by the Refugee Convention), or whether transferees who subsequently travel outside Malaysia will have right of return.
- 4.4. RCOA believes it is unacceptable for Australia to expel asylum seekers to Malaysia if it is known that the standards of treatment they will receive are below those required by international law, or lower than they would otherwise experience if they were permitted to remain in Australia.

5. Mechanisms for consideration of protection claims for and compliance with non-refoulement principles

- 5.1. Under the arrangement, it is assumed that UNHCR will undertake refugee status determination, registration and referrals for resettlement pursuant to its normal processes. RCOA is concerned, however, that UNHCR’s operations in Malaysia do not meet the standards necessary to ensure procedural fairness. This is in large part due to the limited resources available to UNHCR. At present, people who believe they have been treated unfairly by UNHCR in Malaysia have no means to seek an independent review of the decision and no external body to which they can appeal. Feedback from refugee communities residing in Malaysia has indicated that many are concerned about the lack of transparency in UNHCR’s decision-making processes and some feel that their needs are not properly considered by UNHCR, particularly as regards referral for resettlement.
- 5.2. Regarding non-refoulement obligations, RCOA is deeply concerned by the recent action of the Malaysian Government to expel a group of ethnic Uighurs to China in August 2011.³ The Malaysian Government not only deported the group but also refused to grant UNHCR access to both the group deported and to a group of Uighur people remaining in immigration detention, all of whom have applied to UNHCR for refugee status. In light of these developments, RCOA has little confidence in the assurances of the Malaysian Government that it will comply with non-refoulement principles.
- 5.3. Additionally, the operational guidelines do not include mechanisms for considering the protection claims of persons who fear persecution or other ill-treatment in Malaysia. To ensure that Australia complies with its own non-refoulement obligations, it is essential that pre-transfer processes include mechanisms for considering protection claims relating to Malaysia.

³ [no author] (2011). “Malaysia condemned for deporting Uighurs to China.” *My Sinchew*, 23 August. Available at www.mysinchew.com/node/62641

6. Practical implementation of the arrangement

- 6.1. Serious questions remain as to how the Australian Government will ensure that the arrangement will be effectively realised. The arrangement is not legally binding on either party and, to RCOA's knowledge, standards for pre-transfer assessments and post-transfer support will not be formally enshrined in law by either Australia or Malaysia. Neither the arrangement itself nor the operational guidelines stipulate a course of action should either party fail to uphold the specified standards, nor do they outline avenues for seeking recourse if transferees are subject to treatment which violates the arrangement. In light of Malaysia's poor human rights record and routine mistreatment of refugees and asylum seekers, RCOA finds it difficult to understand why such limited consideration has been given to these vital questions.
- 6.2. Furthermore, limited information has been provided regarding mechanisms to facilitate the practical implementation of the arrangement. There is no requirement in either the arrangement or its operational guidelines for training of immigration, law enforcement and other officials who may come into contact with transferees. It therefore remains unclear how the Australian and Malaysian Governments will ensure that transferees are treated in accordance with arrangement's provisions. Given that the arrangement itself is non-binding, strategies to ensure its effective implementation will be all the more crucial. The lack of detail provided about these strategies is therefore of serious concern.
- 6.3. In addition to strategies for implementation, mechanisms for independent oversight will be essential to ensure compliance with the arrangement. RCOA therefore welcomes the establishment of the Joint Committee and the Advisory Committee to monitor its implementation. RCOA is concerned, however, that the mandate and structure of the two committees may limit their effectiveness as monitoring bodies.
- 6.4. The structure of the Joint Committee is of particular concern. As stated in the operational guidelines, the membership of the Joint Committee is to consist of representatives of the Australian and Malaysian Governments, with representatives from UNHCR and the International Organization for Migration (IOM) to be coopted as required. This differs from the broader membership structure of the Advisory Committee, which provides scope for the inclusion of other representatives as agreed by the Australian and Malaysian Governments.
- 6.5. Given that the mandate of the Joint Committee is to oversight the day-to-day operational arrangements under the arrangement, it is crucial that its membership include independent representatives. There is an inherent conflict of interest in having the arrangement overseen solely by those agencies responsible for its implementation. For example, one of the responsibilities of the Joint Committee is to "address any concerns of transferees". If a transferee wishes to raise a concern about the actions of the Australian or Malaysian Governments, UNHCR or IOM, it is clearly problematic if the only body through which such concerns can be raised consists solely of representatives from these same agencies.
- 6.6. There is also a need for the monitoring bodies to have a specific mandate for investigating complaints about breaches of the arrangement's provisions. This should include mechanisms for bringing these breaches swiftly to the attention of the Australian Government, with a view to providing an appropriate remedy in a timely manner.

7. Resettlement

7.1. The strategic use of resettlement in regional contexts

- 7.1.1. A potentially positive aspect of the arrangement is the allocation of 4,000 extra places within Australia's resettlement program for refugees currently residing in Malaysia. For many years, RCOA has encouraged progressive increases in Australia's annual resettlement program. Not only does resettlement offer a vital protection outcome to refugees for whom no other solution is available, it can also be used strategically to achieve comprehensive solutions to refugee crises.
- 7.1.2. In a regional context, for example, resettlement can be used as a means of achieving greater balance in responsibilities for refugee protection. This can in turn create conditions more conducive for dialogue among states on building a favourable protection environment for refugees, unlocking other durable solutions (such as local integration or protection pending voluntary return) and forging comprehensive solutions to regional protection issues – including irregular movement and its associated risks.⁴
- 7.1.3. An increase in Australia's resettlement quota could act as an important demonstration of Australia's commitment to the equitable sharing of responsibility for refugee protection, paving the way for broader improvements in protection standards. While an increase in resettlement would in itself be positive, however, RCOA is concerned that the arrangement sets a number of problematic precedents which, in the long term, could undermine protection principles.

7.2. Ineffective use of resettlement as a strategic tool

- 7.2.1. RCOA does not believe that the arrangement represents an effective use of resettlement as a strategic tool. UNHCR defines the strategic use of resettlement as “the planned use of resettlement in a manner that maximizes the benefits, directly or indirectly, other than those received by the refugee being resettled”⁵. RCOA finds it difficult to see how resettlement under the arrangement will benefit either transferees or the thousands of other refugees and asylum seekers currently residing in Malaysia.
- 7.2.2. Under the arrangement, the responsibility for providing services and support to transferees will be overwhelmingly borne by the Australian Government, UNHCR and IOM. Beyond providing permission to remain in the country and complying with the principle of non-refoulement, the Malaysian Government has little responsibility for ensuring transferees receive appropriate protection and assistance. With the role of the Malaysian Government being so limited, it is unlikely that the arrangement will make any significant contribution to local capacity-building or promote a more positive approach to reception, registration and protection of refugees and asylum seekers.

7.3. Failure to adopt a protection-centred approach to resettlement

- 7.3.1. The arrangement with Malaysia undermines the principle that resettlement, while it can be used strategically, is first and foremost a mechanism for protection. UNHCR

⁴ For further details, see UNHCR (2010). “UNHCR Position Paper on the Strategic Use of Resettlement.” Annual Tripartite Consultations on Resettlement. Geneva: 6-8 July. Available at www.unhcr.org/refworld/docid/4c0d10ac2.html.

⁵ UNHCR (2003). The Strategic Use of Resettlement: A Discussion Paper Prepared by the Working Group on Resettlement. Available at www.unhcr.org/refworld/docid/41597a824.html; p. 2.

maintains that, even in cases where resettlement is used as a strategic tool, “the first purpose of resettlement must always be the provision of individual protection for those who cannot be provided secure asylum in a first asylum country”.⁶

- 7.3.2. The provisions of the arrangement, however, do not reflect this principle. The operational guidelines stipulate that the 4,000 persons resettled “must be able to establish they entered Malaysia and were registered by UNHCR prior to the date of signing of the Arrangement and have remained in Malaysia”. The resettlement allocation will not, therefore, include refugees who arrived in Malaysia after the arrangement was finalised or any of the 800 transferees – even if they are considered by UNHCR to be priority cases for resettlement.

7.4. Framing of resettlement as the preferred solution

- 7.4.1. Finally, the arrangement appears to be based on the premise that resettlement is the preferred durable solution for refugees. Resettlement is a crucial solution in certain circumstances; however, with around 80,000 resettlement places available annually around the world, it is naïve to expect that resettlement can present a realistic solution for the majority of the world’s 15.4 million refugees. Indeed, UNHCR acknowledges that “even under the most ideal circumstances, only a minority of the world’s refugees can be expected to secure a durable solution through third country resettlement”.⁷
- 7.4.2. Furthermore, the prioritisation of resettlement as the preferred durable solution overlooks the importance of effective asylum procedures in resolving regional protection challenges. The primary driver of irregular movement in the Asia-Pacific region is the fear and insecurity faced by refugees and asylum seekers, stemming from their lack of legal status and untenable living conditions. The key to addressing irregular movement therefore lies in improving standards of reception, status determination and protection across the region. The arrangement with Malaysia, however, frames resettlement as the preferred solution for refugees with comparatively little consideration given to strategies for improving protection standards in Malaysia, let alone the region more broadly.
- 7.4.3. As such, while RCOA welcomes the increase to Australia’s resettlement program, we caution the Australian Government against adopting an approach to resettlement based on resolving domestic political concerns. We recommend the use of resettlement as a strategic tool only insofar as it maintains its primary focus on protection and is used in a way which maximises protection outcomes not only for those resettled, but also for other refugees and asylum seekers in the region.

8. Policy alternatives

8.1. The need for regional cooperation

- 8.1.1. As noted above, the key to addressing irregular movement lies in improving standards of protection for refugees and asylum seekers residing in the Asia-Pacific region. This will require constructive engagement with other governments in the region to broaden protection space and build lasting security for refugees and asylum seekers. It will also require Australia to demonstrate a strong commitment to sharing responsibility for refugee protection in an equitable manner.

⁶ UNHCR 2003, p. 3.

⁷ UNHCR 2003, p. 2.

- 8.1.2. The arrangement with Malaysia, however, focuses on addressing irregular movement only insofar as it relates to Australia's domestic concerns. In doing so, the arrangement sets a highly problematic precedent for future regional cooperation on refugee protection.
- 8.1.3. Policies which focus on shifting Australia's protection obligations elsewhere hardly set a constructive example for other countries in the region which have far less capacity to provide protection and assistance to refugees than Australia. Instead, they send a clear message to the region that the complex challenges of refugee protection in Asia are less important than domestic political considerations. It is particularly troubling when this message comes from one of the few countries in the region which is party to the Refugee Convention. The arrangement therefore not only undermines protection principles but will also hamper the development of regional cooperation and the implementation of urgently-needed reforms.

8.2. Offshore processing as a policy alternative

- 8.2.1. RCOA strongly opposes a return to Pacific Solution-style offshore processing arrangements on Nauru and Papua New Guinea's Manus Island. Previous experience has shown that this policy approach to be highly destructive to the wellbeing of asylum seekers and ineffective in resolving the complex protection challenges leading to irregular movement in the region.
- 8.2.2. In fact, many of the concerns raised in this submission in relation to the Malaysia arrangement – lack of transparency in decision-making and status determination, erosion of protection standards, inadequate support and services for persons in need of protection, inadequate mechanisms for oversight and review, failure to address the root causes of irregular movement, negative impact on opportunities for constructive regional cooperation, prioritisation of domestic concerns over protection outcomes – could equally apply to offshore processing.
- 8.2.3. Under the offshore processing arrangements in place under the Pacific Solution, access to legal advice was extremely limited and the credibility of refugee status determination procedures was highly questionable. Many asylum seekers whose claims for protection were rejected under offshore status determination processes experienced persecution or serious threats to their safety and security after returning to their countries of origin.⁸ As many as 20 of them are believed to have been killed.⁹
- 8.2.4. Asylum seekers affected by the Pacific Solution were detained in remote facilities for often lengthy periods (up to six years in some cases), to the serious detriment of their health, particularly mental health, and general wellbeing. Throughout the life of the Pacific Solution, there were multiple incidents of self-harm, 45 detainees engaged in a

⁸ See Glendenning, P., Leavey, C., Hetherington, M., Britt, M. & Morris, P. (2004). *Deported to Danger: A study of Australia's treatment of 40 rejected asylum seekers*. Edmund Rice Centre for Justice and Community Education. Available at

www.erc.org.au/index.php?module=documents&JAS_DocumentManager_op=downloadFile&JAS_File_id=208;

and Glendenning, P., Leavey, C., Hetherington, M. & Britt, M. (2006). *Deported to Danger II: The continuing study of Australia's treatment of rejected asylum seekers*. Edmund Rice Centre for Justice and Community Education. Available at

www.erc.org.au/index.php?module=documents&JAS_DocumentManager_op=downloadFile&JAS_File_id=153

⁹ Banham, C. (2008). "Afghans sent home to die." *Sydney Morning Herald*, 27 October. Available at

www.smh.com.au/news/national/afghans-sent-home-to-die/2008/10/26/1224955853319.html

serious and debilitating hunger strike and dozens suffered from depression or experienced psychotic episodes.¹⁰

8.2.5. Offshore processing is also extremely costly. It is estimated that the cost of processing less than 1,700 asylum seekers under the Pacific Solution amounted to at least \$1 billion.¹¹

8.2.6. Finally, offshore processing does nothing to address the root cause of irregular movement in the region – that is, the fear and insecurity faced by refugees and asylum seekers residing in Asia. Instead, much like the arrangement with Malaysia, it focuses on addressing irregular movement only insofar as it relates to Australia's domestic concerns. As such, a return to offshore processing would have the same negative impact on opportunities for regional cooperation as the current arrangement with Malaysia.

8.3. Towards a regional protection framework

8.3.1. RCOA therefore urges the Government not to proceed with the transfer of asylum seekers to Malaysia and instead focus on developing a sustainable regional protection framework in the Asia-Pacific. This would be a far more humane, effective and constructive approach to addressing regional protection challenges. RCOA encourages the Government to consider the practical strategies it can adopt to support incremental improvements in protection standards in Malaysia and across the region more broadly.

8.3.2. In relation to Malaysia, Australia should focus on supporting short-term reforms to address the most pressing issues faced by refugees and asylum seekers currently residing in Malaysia. Feedback from RCOA's networks in Malaysia has indicated that the recognition of some form of legal status (even on a long-term temporary basis) and permission to work would go a long way to resolving the fear and insecurity currently faced by refugees and asylum seekers in Malaysia.

8.3.3. The Malaysian Government's recent 6P registration process has been promoted as a positive step forward in regularising the status of undocumented migrants in Malaysia. For refugees, however, the process was a source of considerable anxiety. Many refugees were given less than 24 hours' notice to register and had little information about the whole process. It is understood that many refugees, after filling out registration forms, received a notification suggesting that they would be required to return to their home country. While regularising the status of refugees and asylum seekers would be an essential step forward in improving protection standards in Malaysia, it is clear that a more constructive approach is needed. The Australian Government should consider how it can inform and support this approach.

8.3.4. The pressing issues faced by refugees and asylum seekers in Malaysia – namely, lack of legal status and untenable living conditions – are also experienced by refugees and asylum seekers residing in many other Asia-Pacific nations. The Australian Government should therefore consider how it can support reforms in the region more broadly. This could include the provision of financial assistance and constructive engagement with

¹⁰ Bem, K., Field, N., Maclellan, N., Meyer, S. & Morris, T. (2007). *A Price Too High: The cost of Australia's approach to asylum seekers*. Published by A Just Australia, Oxfam Australia and Oxfam Novib, available at pandora.nla.gov.au/pan/76526/20070910-1523/www.oxfam.org.au/media/files/APriceTooHigh.pdf

¹¹ Bem et al 2007.

other governments to build local capacity and heighten awareness of protection issues.

- 8.3.5. Short-term objectives for reform could include granting legal status to refugees and asylum seekers, affording right of stay, protection against arrest, detention and deportation and permission to work; and providing adequate support to ensure that the basic needs of refugees and asylum seekers are met, through providing educational opportunities and ensuring access to health care services. These initial measures could provide a stepping stone to more comprehensive, longer-term reforms, such as developing domestic asylum legislation and procedures for refugee status determination, and seeking opportunities for durable solutions.
- 8.3.6. To facilitate these and other reforms, RCOA supports the proposal to establish a support office to advance the development of a regional protection framework. The functions of this office could include facilitating the sharing of information, resources and expertise; providing operational and technical support with refugee status determination, case management and resettlement; providing training, capacity-building and mentoring opportunities; and providing a channel for ongoing dialogue on protection issues.
- 8.3.7. In addition to supporting reform in other countries, the Australian Government should also consider the strategies it can adopt to contribute to protection outcomes for refugees and demonstrate its genuine commitment to the equitable sharing of responsibility. These could include progressively increasing its resettlement quota, considering strategies for using resettlement as a strategic protection tool and lobbying other resettlement states to consider the needs of refugees residing in Asia. As the Chair of UNHCR's Working Group on Resettlement for 2011-12, Australia is in a strong position to argue the case for increased resettlement out of Asia.
- 8.3.8. Australia must also be prepared to lead by example through modelling the protection-centred practices it wishes to see replicated throughout the region. This would necessitate reviewing policies and practices (such as indefinite mandatory detention) which undermine protection principles and avoiding any policy approaches based on shifting Australia's responsibilities elsewhere.
- 8.3.9. RCOA's 2011-12 submission on the Refugee and Humanitarian Program¹² contains further information and recommendations on developing a sustainable regional protection framework in the Asia-Pacific. We encourage the Government to adopt these recommendations in full.

9. Conclusion and recommendations

- 9.1. In view of the serious concerns discussed in this submission, RCOA strongly urges the Australia Government not to proceed with the transfer of asylum seekers to Malaysia and instead focus on developing a sustainable regional protection framework in the Asia-Pacific.

Recommendation 1:

RCOA recommends that the Australian Government should not proceed with the transfer of asylum seekers to Malaysia.

¹² Available at www.refugeecouncil.org.au/resources/intakesub/2011-12_IntakeSub.pdf; see Section 4.

Recommendation 2:

RCOA recommends that the Australian Government should abandon the reinstatement of offshore processing of asylum claims.

Recommendation 3:

RCOA recommends that the Australian Government actively encourage and support the Malaysian Government to:

- a) Develop procedures for registration of refugees and asylum seekers, with a view to granting legal status affording right of stay and protection against arrest, detention and deportation.
- b) Address living conditions faced by refugees and asylum seekers, particularly through providing permission to work.

Recommendation 4:

RCOA recommends that the Australian Government work towards the development of a sustainable regional protection framework through:

- a) Adopting the recommendations set out in Section 4 of RCOA's 2011-12 submission on the Refugee and Humanitarian Program.
- b) Supporting the establishment of a Regional Support Office to advance the development of a regional protection framework.

- 9.2. Regardless of whether the Australian Government proceeds with the arrangement, there is an urgent need to address the conflict of interest between the Minister's obligations as guardian of unaccompanied minors and his powers to expel asylum seekers under the *Migration Act*. It is essential that the Minister be replaced as guardian by a person independent of the Australian Government who can act solely in the best interests of the child.

Recommendation 5:

RCOA recommends that the Immigration (Guardianship of Children) Act 1946 be amended to:

- a) Repeal the Minister for Immigration and Citizenship's guardianship obligations with respect to unaccompanied minors.
- b) In place of the Minister, assign an independent guardian for unaccompanied minors.

- 9.3. If the Australian Government chooses to proceed with the arrangement, it is essential that immediate action be taken to mitigate as far as possible the negative impacts of the arrangement on asylum seekers subject to transfer.

Recommendation 6:

RCOA recommends that the Australian Government, if it proceeds with the transfer of asylum seekers in Malaysia, should:

- a) Provide immediate clarification as to the nature of pre-transfer assessment processes, with specific reference to decision-making processes, criteria used to assess eligibility for exemption from transfer, access to legal advice and mechanisms for oversight and monitoring, including mechanisms for appeal.
- b) Provide further detail on the nature of post-transfer services and support, with specific reference to "self-reliance opportunities", education, health care, legal status and issuing identity and travel documents.
- c) Provide immediate clarification as to strategies for ensuring the practical implementation of the arrangement, including training for relevant personnel and procedures should the arrangement be breached, including avenues for seeking recourse.

- d) *Expand the membership of the Joint Committee to include representatives independent of the Australian and Malaysian Governments, UNHCR and IOM.*
- e) *Expand the mandate of the Joint Committee and/or the Advisory Committee to include powers to investigate complaints relating to breaches of the arrangement.*