Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

The Australia-Malaysia Agreement

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Who we are

Background

The Australian Lawyers Alliance is the only national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of individuals. We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. The Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

Corporate Structure

APLA Ltd, trading as the Australian Lawyers Alliance, is a company limited by guarantee with branches in every state and territory of Australia. We are governed by a board of directors made up of representatives from around the country. This board is known as the National Council. Our members elect one director per branch. Directors serve a two-year term, with half the branches holding an election each year. The Council meets four times each year to set the policy and strategic direction for the organisation. The members also elect a president-elect, who serves a one-year term in that role and then becomes National President in the following year. The members in each branch elect their own state/territory committees annually. The elected office-bearers are supported by ten paid staff who are based in Sydney.

Funding

Our main source of funds is membership fees, with additional income generated by our events such as conferences and seminars, as well as through sponsorship, advertising, donations, investments, and conference and seminar paper sales. We receive no government funding.

Programs

We take an active role in contributing to the development of policy and legislation that will affect the rights of individuals, especially the injured and those disadvantaged through the negligence of others. The Lawyers Alliance is a leading national provider of Continuing Legal Education/Continuing Professional Development, with some 25 conferences and seminars planned for 2008. We host a variety of Special Interest Groups (SIGs) to promote the development of expertise in particular areas. SIGs also provide a focus for education, exchange of information, development of materials, events and networking. They cover areas such as workers' compensation, public liability, motor vehicle accidents, professional negligence and women's justice. We also maintain a database of expert witnesses and services for the benefit of our members and their clients. Our bi-monthly magazine, Precedent, is essential reading for lawyers and other professionals keen to keep up to date with developments in personal injury, medical negligence, public interest and other, related areas of the law.

Summary of Recommendations

Offshore processing
The ALA submits that offshore processing should be abolished, and all asylum seekers should be processed on-shore, as quickly as possible, ensuring that asylum seekers are treated with dignity, respect, in the best interests of the child, with detention as a matter of last resort.

Malaysia's ratification of human rights laws
The ALA doubts the ability and political will of Malaysia to provide adequate human rights protections to any Transferee under the Agreement, especially given that Malaysia will not sign, let alone ratify, laws that constitute recognised customary international law.

International obligations to children
The ALA submits that the Agreement is in breach of Australia's obligations to children under international law.

The testing of guardianship
The ALA submits that the full extent of the Minister's duty of guardianship for unaccompanied minors has not been completely tested.

The nature of guardianship
The ALA submits that the duty of guardianship is fiduciary and its legal responsibility is non-delegable in nature. It will be virtually impossible to remove the duty of guardianship in the absence of appointing an alternative guardian for unaccompanied non-citizen children. Such attempts are likely to be struck down by the Courts for inconsistency with the common law duty of guardianship.

Liability for breach of guardianship
The ALA submits that the Australian Government may be liable to pay compensation for breach of guardianship for any and every individual that is or was an unaccompanied minor at time of arrival in Australia, and for any unaccompanied minor who is transferred under the Agreement.

Transfer of children
The ALA submits that the transfer of any child, regardless of whether they are accompanied or not, is in violation of international human rights obligations and would be likely to be struck down by the Courts, given the case law that references the *Convention on the Rights of the Child*. Therefore, if tested, it is possible that any transfers involving unaccompanied minors, would be subject to successful challenge in the Courts.

Character of Agreement potentially *ultra vires*
The ALA submits that the character of the Agreement is indicative of a delegated responsibility of guardianship or a relationship where Australia continues to be the trustee of all asylum seekers. The character of this Agreement may fall outside the powers of Parliament under section 51 of the *Constitution of Australia.*

Non-refoulement
The ALA submit that the principle of *non-refoulement* is fundamental and customary within international law. In the absence of access to judicial process and administrative review of applications for refugee status, the ALA is concerned that Clause 10 may be relied upon to deny refugee status to certain individuals.

Erosion of non-refoulement
The ALA submits that there is scope for the principle of non-refoulement to be eroded dramatically, as the laws relating to security in Malaysia area already in breach of international obligations.

Violation of non-refoulement
The ALA submits that in the absence of access to effective legal processes to review Clause 10 and 11, individuals that should not fall within the scope of Article 33(2) will be subject to forced “voluntary return”.

Such cases would be in violation of the fundamental principle of *non-refoulement,* and Australia would be implicit in these breaches.

Offshore processing as unlawful detention
The ALA submits that to send individuals seeking asylum, anywhere, in the form of offshore processing, constitutes a form of unlawful detention.

Liability to unlawful detention claims
The ALA submits that the Agreement is exposing the Australian Government to a future liability for unlawful detention claims if they were to deport individuals to Malaysia, which could rise further into the millions.

This is in addition to any current liability accumulating for unlawful detention of individuals who arrived in Australia after the signing of the Agreement.

This is in addition to the future liability of unlawful detention claims to be made by any individual currently kept in immigration detention in Australia.

Protections in Malaysia
The ALA submits that the protections available for asylum seekers of their human rights in Malaysia are severely limited, regardless of assurances that are made by Malaysia in a non-legally binding document.

UNHCR capacity
The ALA submit that the UNHCR is already stretched beyond its limits of capacity, and to seek the participation of the UNHCR in the Agreement to provide specialised resourcing to 800 transferees will hinder its resources from assisting a greater number of asylum seekers and refugees

Migrant workers in Malaysia
The ALA submit that if protections on migrant domestic workers are already lacking, and have been sufficient for Indonesia to suspend migration; the protections available for refugees and asylum seekers is dire.

An alternative to the Agreement
The ALA submits that an alternative to the Agreement would be establish partnerships with non-government organisations near conflict areas, to go closer to the source to provide effective legal assistance in an application for refugee status in Australia.

Uphold commitment to the 4,000
The ALA submits that Australia should uphold its commitment to accept 4,000 refugees from Malaysia over 4 years.

Introduction

The Australian Lawyers Alliance (**"the ALA"**) welcomes the opportunity to contribute a submission to the Senate Legal and Constitutional Affairs Committee on Australia's agreement with Malaysia in relation to asylum seekers (**"the Agreement"**).

We are especially concerned regarding the human rights of asylum seekers if they were to be transferred under the Agreement.

The ALA also welcomes the recent High Court decision, *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011).

While this Agreement was struck down, mainly on the grounds of the validity of the Minister's declaration under s198A of the *Migration Act 1958* (Cth); the ALA submit that this Agreement directly violates a number of other areas of domestic and international law.

The ALA remains concerned about potential implications and future actions of the Government in relation to the proposed Malaysian agreement.

The Australian Lawyers Alliance will therefore provide comment on the following terms of reference:

(a) the consistency of the agreement to transfer asylum seekers to Malaysia with Australia's international obligations;

(b) the extent to which the above agreement complies with Australian human rights standards, as defined by law;

(c) the practical implementation of the agreement, including:
(i) oversight and monitoring,
(iv) access to independent legal advice and advocacy,
(v) implications for unaccompanied minors, in particular, whether there are any guarantees with respect to their treatment, and
(vi) the obligations of the Minister for Immigration and Citizenship (Mr Bowen) as the legal guardian of any unaccompanied minors arriving in Australia, and his duty of care to protect their best interests;

(d) the costs associated with the agreement;

(e) the potential liability of parties with respect to breaches of terms of the agreement or future litigation;

(f) the adequacy of services and support provided to asylum seekers transferred to Malaysia, particularly with respect to access to health and education,

industrial protections, accommodation and support for special needs and vulnerable groups;

(g) mechanisms to enable the consideration of claims for protection from Malaysia and compliance of these mechanisms with non-refoulement principles; and

(i) any other related matters.

Executive summary

The ALA support a policy of on-shore processing in accordance with Australia's human rights obligations.

We also submit that:

- International human rights obligations regarding children are customary in nature and provide explicit protections on children.
- Case law in Australia has focused on the importance of human rights law in regards to children.
- The Agreement itself implicitly and explicitly provides reference and recognition to the responsibility of the Australian Government regarding children.
- The duty of guardianship within the *Immigration (Guardianship of Children) Act 1946 (*Cth) cannot be easily transferred or revoked.
- The characterisation of the Agreement appears to deem the relationship between Australia and Malaysia as one of delegated responsibility, which may be *ultra vires* to the powers of Government under the Constitution.
- Some clauses within the Agreement are inherently discriminatory.
- Access to judicial review and legal representation is severely limited for asylum seekers on these issues, in Malaysia.
- The principle of *non-refoulement* is in danger of erosion
- There is scope for this Agreement to be struck down on the basis of unlawful detention.
- Current human rights protections within Malaysia are lacking.
- The UNHCR is already stretched beyond capacity in Malaysia.

Abolition of offshore processing

In recent times, there has been an increasing level of support for onshore processing.

However, on --- the Australian Government that it would effect legislative change in order to proceed with the Arrangement Between The Government of Australia and the Government of Malaysia on Transfer and Resettlement (**"the Agreement"**).

At the core of this issue, we submit that off-shore processing should be abolished, and people should be processed on-shore, in alternative community based arrangements, with access to work rights, rights to education and to pursue treatment of psychological trauma, rather than this being exacerbated by being locked up in a detention centre for an arbitrary period of time.

Offshore processing
The ALA submits that offshore processing should be abolished, and all asylum seekers should be processed on-shore, as quickly as possible, ensuring that asylum seekers are treated with dignity, respect, in the best interests of the child, with detention as a matter of last resort.

A. Human rights

In the High Court decision in *Plaintiff M70/2011 v Minister for Immigration and Citizenship/Plaintiff M106 of 2011 By His Litigation Guardian, Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (**"the recent High Court case"**), Justices Gummow, Hayne, Crennan and Bell held that Malaysia:

1. First, ***does not recognise the status of refugee in its domestic law*** *and* ***does not undertake any activities related to the reception, registration, documentation and status determination of asylum seekers and refugees****;*

2. *Second,* ***is not party to the Refugees Convention or the Refugees Protocol****; and*

3. *Third, has* ***made no legally binding arrangement with Australia*** *obliging it to accord the protections required by those instruments:*

   it was not open to the Minister to conclude that Malaysia provides the access of protections referred to in s198A(3)(a)(i).

While it has been suggested that legislative reform may remove obstacles to the Government's desire to pursue the Arrangement with Malaysia, the Australian Lawyers Alliance submits that such legislative reform would be in contravention of Australia's obligations under international law, and also other foundational points of Australian legislation and the common law.

While the recent High Court decision included Plaintiff M1060, an unaccompanied minor, the Court did not cover in detail the issues relating to unaccompanied minors and children in its judgment.

a. International human rights obligations

The Universal Declaration of Human Rights (**"UDHR"**), the *International Covenant of Civil and Political Rights* ("**ICCPR"**) and the *International Covenant on Economic, Social and Cultural Rights* ("**ICESCR"**) are well regarded as having achieved customary status in international law and collectively are known as the International Bill of Rights. While Australia has signed and ratified all of them, Malaysia has not signed either of the covenants[1], or the UN Refugee Convention.

Both Australia and Malaysia are signatories to the *Convention on the Rights of the Child*[2], however initially Malaysia had 12 reservations[3], and 5 are still standing[4]. These reservations relate to non-discrimination; name and nationality; freedom of thought, conscience and religion; free and compulsory education at primary level and torture and deprivation of liberty.

Malaysia's ratification of human rights laws
The ALA doubts the ability and political will of Malaysia to provide adequate human rights protections to any Transferee under the Agreement, especially given that Malaysia will not sign, let alone ratify, laws that constitute recognised customary international law.

Clause 12 of the Agreement provides:

1. *Operations under this Arrangement will be carried out in accordance with the domestic laws, rules, regulations and national policies from time to time in force in each country and* ***in accordance with the Participants' respective obligations under international law.***

Article 3(1) of the *Convention on the Rights of the Child* provides that:

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or*

[1] Malaysia has not signed ICCPR. See UN Treaty Collection, 'International Covenant of Civil and Political Rights'. Accessed 14 September 2011 at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en; Malaysia has not signed ICESCR. See UN Treaty Collection, 'International Covenant of Economic, Social and Cultural Rights'. Accessed 14 September 201 at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en

[2] Australia signed and ratified *The Convention of the Rights of the Child* in 1990. See UN Treaty Collection, 'Convention on the Rights of the Child'. Accessed 14 September 2011 at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en

[3] Aneeta Kulasegaran, 'Women's and Children's Rights – And the Protection Offered By Domestic Law', *Conference paper delivered September 1999.* Accessed 14 September 2011 at http://www.lawyerment.com.my/library/publi/fmly/review/d_5.shtml

[4] *The Government of Malaysia also declared that the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.* See Convention on the Rights of the Child, 20 November 1989, Malaysia, Reservation/Declaration Text (2010) Accessed 14 September 2011, http://www.icrc.org/ihl.nsf/NORM/37010C1779E7D1DCC1256402003FD475?OpenDocument

> *legislative bodies,* ***the best interests of the child shall be a primary consideration.***

Article 4 provides that:

> ***States Parties shall undertake all*** *appropriate legislative, administrative, and other* ***measures*** *for the* ***implementation of the rights recognized in the present Convention****.*

Article 12(2) of the Convention provides that:

> *The child shall* ***in particular be provided the opportunity to be heard in any judicial*** *and* ***administrative proceedings affecting the child,*** *either directly, or through a representative or an appropriate body,* ***in a manner consistent with the procedural rules of national law.***

These obligations stand as foundations upon which the Agreement should be considered, however many of the clauses within the Agreement are directly contrary to these obligations.

The Agreement does not amount to acting in the 'best interests' of the child, as it will remove children from access to the opportunity to seek asylum in Australia, gain educational opportunities, and access to the full host of rights provided under the Convention on the Rights of the Child.

Most particularly, the Agreement does not equate with acting in the 'best interests' of the child, as it denies children legal access to having their claims for refugee determination processed in Australia. It also robs unaccompanied children of a legal guardian, and may as a result, expose them to sexual abuse, exploitation, violence, lack of educational opportunities, lack of legal redress and lack of access to medical care.

The Agreement does not amount to undertaking all measures for the implementation of the rights held within the *Convention on the Rights of the Child.*

International obligations to children
The ALA submits that the Agreement is in breach of Australia's obligations to children under international law.

b. Case law in Australia

Case law in Australia has been assessing the role of international law in the interpretation of Australian domestic law.

Justice North considered this in *X v Minister for Immigration and Multicultural Affairs* [1999] FCA 995; (1999) 92 FCR 524:

> *In Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh [1995] HCA 20; (1995) 183 CLR 273 at 287, Mason CJ and Deane J said that* ***"[i]f the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the***

> ***obligations which it imposes on Australia, then that construction should prevail****". This is despite the fact that a treaty may not necessarily have been given effect by specific legislation.*[5]

Justice North also said that:

> *Section 6 [of the Immigration (Guardianship of Children) Act 1946 (Cth)] was originally enacted in 1946, over twenty years after Australia had voted in favour of the Declaration of Geneva. The recognition of the rights of the child had gathered considerable momentum thereafter as is evidenced by the adoption of the Universal Declaration of Human Rights in 1948.*
>
> *Section 6 was* ***thus originally enacted when the recognition of the rights of the child was advanced. It should therefore be construed at least consistently with the recognition which those rights had achieved at the time of enactment.*** *Such an approach also speaks against a construction which involves procedural barriers against the enforcement of such of those rights as conferred by domestic law.*

Justice North also commented on the enshrining of human rights obligations within the role of guardian of the Minister for Immigration and Citizenship.

c. *Immigration (Guardianship of Children) Act 1946* (Cth)

In the wake of such case law, there is significant doubt that legislative change to the *Immigration (Guardianship of Children) Act 1946* (Cth) would be considered valid by the Courts.

Section 6 of the *Immigration (Guardianship of Children) Act 1946* (Cth) provides that:

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

The Minister's duty of guardianship was dealt with only briefly in the recent High Court case, as the broader issue of the unlawful nature of the Minister's declaration covered its impact on unaccompanied minors. This was acknowledged by the Court.[6]

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[5] *X v Minister for Immigration and Multicultural Affairs* [1999] FCA 995; (1999) 92 FCR 524, North J [49]

[6] *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011). Gummow, Hayne, Crennan and Bell JJ stated that:

The ***removal of*** *a person from Australia who is* ***a "non-citizen child"*** *within the meaning of the IGOC Act, or the taking of that child to another country pursuant to s198A,* ***cannot lawfully be effected without the consent in writing of the Minister.*** *The* ***decision to grant a consent of that kind*** *would be a decision under an enactment and* ***would therefore engage the provisions of the*** **Administrative**

The testing of guardianship
The ALA submits that the full extent of the Minister's duty of guardianship for unaccompanied minors has not been completely tested.

d. The nature of the guardianship duty

The duty of guardianship is fiduciary in nature and is based in the common law duty of guardianship. As Julie Taylor writes, 'courts have held that section 6 confers on the Minister 'all the usual incidents of guardianship'[7]. At common law, 'the broad notion of guardianship means 'the full range of rights and powers that can be exercised by an adult in respect of the welfare and upbringing of a child'[8]. Duties of a guardian include: 'to protect the child from harm; to provide for maintenance; to educate; to show affection and provide emotional support'[9]. In the *Convention on the Rights of the Child*, there are 11 references to State's duties in relation to protecting 'guardians'.

As recognised by the Court in *X v Minister for Immigration and Multicultural Affairs* [1999] FCA 995; (1999) 92 FCR 524, the guardian:

> *'must address the **basic human needs of a child**, that is to say, **food, housing, health and education.** Over the course of this century, attention to these needs has come to be recognised as a **fundamental human right of children**, including in various international instruments to which Australia is a party'*[10].

This has relevance to the Agreement in that all costs related to the health and welfare (including education of [**all**] minor children) will be met by the Government of Australia. This therefore appears to recognise the guardianship duty.

The Court also stated further that:

> *The **responsibilities of a guardian under s6** of the Act **include the responsibilities which are the subject of the Convention [of the Rights***

Decisions (Judicial Review) Act 1977 (Cth) *and, in particular, the provisions of that Act concerning the **giving of reasons as well as the availability of review** on any of the grounds stated in that Act.*

No consent in writing** having been given by the Minister under the IGOC Act....there **need be no further consideration of the questions presented** by the possible engagement of the* Administrative Decisions (Judicial Review) Act 1977 (Cth). ***Nor is it necessary to examine any wider question about the content or application of the Minister's duties as guardian.

[7] Julie Taylor, 'Guardianship of Child Asylum Seekers' (2006) 34 (1) *Federal Law Review* 185. Taylor references the following cases to support this assertion: *Odhimabo* [2002] FCAFC 194; (2002) 122 FCR 29, 45 – 46[86]; *X v Minister for Immigration and Multicultural Affairs* [1999] FCA 995; (1999) 92 FCR 524. This is consistent with previous decisions, in a different context, in *re Adoptions of S* (1977) 28 FLR 427; *Re Application of K* (1995) 36 NSWLR 477.
[8] Ibid.
[9] Antonio Buti, 'British Child Migration to Australia: History, Senate Inquiry and Responsibilities' (2002) 9(4) *Murdoch University Electronic Journal of Law,* [26].
[10] *X v Minister for Immigration and Multicultural Affairs* [1999] FCA 995; (1999) 92 FCR 524 [34]

> ***of the Child]**. They are **responsibilities concerned with according fundamental human rights to children**.... Once it is recognised that the rights with which s 6 is concerned are in the nature of fundamental human rights it becomes clear that **Parliament intended that if a non-citizen child were denied any of these fundamental rights, they would have access to the legal system with the minimum of formal hurdles'**[11].*

The transfer of children to Malaysia may ultimately bar them from accessing the Australian legal system for redress – for unlawful detention; for negligence; for breach of guardianship; and any other legal issue that may become apparent in their case.

e. Non-delegable responsibility

The duty of guardianship is fiduciary in nature and the ultimate legal responsibility has been described as non-delegable.

At present, the Agreement can be seen to do one of two things:

1. Provide an absolution of guardianship; or a

2. Delegation of the powers and functions of guardianship.

The ALA contends that it is questionable as to whether the legal responsibility of the duty of guardianship can be delegated at all; whether the Agreement appears to delegate some of the functions that are the ultimate legal responsibility of the Minister for Immigration and Citizenship; and whether this is a lawful delegation under the powers granted by the Constitution.

This has been seen in its operation with the States and Territories, in that:

> ***Although the Minister can delegate** 'powers and functions' of guardianship to State authorities under the Immigration (GOC) Act, **there is no explicit power to delegate legal responsibility for the proper performance of guardianship duties**...*
>
> *The lack of specificity as to who is legally responsible for which powers and functions in respect of which child suggests that the **Minister retains ultimate legal responsibility, as guardian, to ensure that the functions are properly fulfilled**. That is, **delegation of 'powers and functions' under the Immigration (GOC) Act** arguably **does not absolve the Minister of any breach of duty by the delegated authority**. Indeed, it has been accepted that the **Minister remained responsible as guardian**, **despite delegation of powers** to State and Territory authorities in relation to lawful child migrants.*[12]

To remove by legislation the duty of guardianship, leaves the legislation open to challenge on the basis that it is an attempt to derogate from the inherent duty of guardianship.

[11] Ibid [43]

[12] Taylor, above n 7.

The nature of guardianship
The ALA submits that the duty of guardianship is fiduciary and its legal responsibility is non-delegable in nature. It will be virtually impossible to remove the duty of guardianship in the absence of appointing an alternative guardian for unaccompanied non-citizen children. Such attempts are likely to be struck down by the Courts for inconsistency with the common law duty of guardianship.

f. Breach of guardianship

There is an inherent conflict between the Minister's role as guardian and the Minister's role in administering the *Migration Act.*

The responsibility of the Minister of Immigration and Citizenship has been previously recognised personally by Mr Bowen.

Currently, there is scope for the development of precedent surrounding the liability of the Minister for Immigration to compensation claims for breach of guardianship. In 2011, a class action was lodged for breach of guardianship in relation to British migrant children in the 1940s.

The claimants allege that they suffered physical and sexual abuse that has had severe consequences for years after. The claimants also contend that the Commonwealth was the legal guardian of the children and had a non-delegable duty to exercise reasonable care for their safety and welfare.[13]

The outcome of this case could set a precedent regarding breach of guardianship by the Minister for Immigration, and the use of class actions to remedy the breach. This would open up the Commonwealth to compensation claims to be made by every individual that is or was an unaccompanied minor at time of arrival.

Liability for breach of guardianship
The ALA submits that the Australian Government may be liable to pay compensation for breach of guardianship for any and every individual that is or was an unaccompanied minor at time of arrival in Australia, and for any unaccompanied minor who is transferred under the Agreement.

g. The Agreement and Children

The Agreement refers to children, therefore indicating a recognition on the Australian Government's part of its responsibility for children.
The character of the Agreement therefore reveals an intent to make attempts to protect and cater for children.

[13] *Giles & Anor v Commonwealth of Australia & Ors* [2011] NSWSC 582

Clause 8(2) provides:

> *Special procedures will be developed and agreed to by the Participants to deal with the **special needs of vulnerable cases including unaccompanied minors.***

Similarly, Clause 9 provides that:
*The Government of Australia will meet **all costs** that arise under this Arrangement in relation to the following:*
(c) *Costs related to the health and welfare (including education of **minor children**) of Transferees in accordance with UNHCR's model of assistance in Malaysia.*

(d) *Additional "safety net" costs related to meeting any special welfare needs of Transferees (**especially vulnerable cases**) drawing also on the services of IOM as necessary.*

Clause 13(1) provides:

> *The Participants will establish a Joint Committee with responsibilities including management of transfer arrangements, oversight of the **welfare of Transferees, ensuring funding** is expended appropriately, **engaging** with service providers, obtaining statistical and other information on refugee status determinations and protection obligations assessments, addressing **any concerns of Transferees** and refugees and ongoing development of special procedures to deal with **vulnerable cases.***

These clauses provide explicit and implicit reference to the needs of children, and therefore provide recognition of the legal obligations of the Australian Government under domestic and international law. However, the Government's ultimate legal responsibility cannot be delegated.

Transfer of children
The ALA submits that the transfer of any child, regardless of whether they are accompanied or not, is in violation of international human rights obligations and would be likely to be struck down by the Courts, given the case law that references the *Convention on the Rights of the Child*. Therefore, if tested, it is possible that any transfers involving unaccompanied minors, would be subject to successful challenge in the Courts.

h. Partial delegation of power and responsibility

The ALA submit that the characterisation of the Agreement is such that the Australian Government is appearing to delegate its guardianship powers and functions, but that this is only a partial delegation, as the Australian government will continue to cover 'all costs that arise under this Arrangement'[14], and therefore retain absolute responsibility.

The continued involvement of Australia in the processing of asylum seekers and refugees in Malaysia indicates that Australia has not absolved itself of responsibility.

[14] *Arrangement Between The Government of Australia and the Government of Malaysia on Transfer and Resettlement* (2011), Clause 9.

It appears that the guardianship duty granted under section 6 of the *Immigration (Guardianship of Children) Act 1946* (Cth), has been extended beyond Australian physical boundaries, to continue to function inside another state. This is an abrogation of state sovereignty, and may be *ultra vires* the powers granted to the Executive under the Constitution.

Similarly, other powers granted within the Agreement appear to delegate functions to Malaysia, while still retaining the Australian Government's interest and financial investment in the individuals' welfare. This is regardless of individual's status as a minor or as an adult.

The powers granted in Clause 13(2) provide that representatives of the Department of Immigration and Citizenship are to participate in the Joint Committee. The Joint Committee will be involved in 'management... oversight of welfare... ensuring funding... engaging with service providers... obtaining statistical and other information... addressing concerns and developing special procedures'[15].

Clause 13(3) also provides for the establishment of an Advisory Committee to provide advice to the respective Governments. This will be comprised of members from the Government of Australia.[16]

The ultimate powers of deferral to the Government of Australia granted in Clause 11(2) regarding any proposed forced return, indicate a relationship where Australia has the final word in decision making, and that **indicates a relationship where Australia is still the trustee of all of these Transferee's interests, even though it appears it has delegated power to Malaysia.**

Mr Bowen has previously commented:

> *Under Malaysian law, and as reflected by this agreement, people transferred from Australia to Malaysia **would be exempt from the Immigration Act** and therefore would be under the care of the Malaysian government, and then through that process as they're released into the community, receive the support and care of the UNHCR and the IOM **with the assistance of Australia** and appropriate support would be in place for individuals.*[17]

To purposefully exempt individuals who are non-citizens from the Migration Act that was purposefully created for their inclusion, and to deport them to another nation is to undermine the intention, not only of the Migration Act, and also the scope of the migration power within the Constitution.

The continued involvement of the Australian Government in the oversight of migration policies in another nation indicates the Government's awareness and knowledge that the purpose of the Agreement – to process individuals offshore away from Australian legal processes – is unlawful. If it were lawful to deport asylum

[15] Ibid. Clause 13(1)
[16] Ibid. Clause 13(4)(a)
[17] Chris Bowen, quoted in Amber Jamieson, 'Who's the guardian of unaccompanied minors sent from Oz?' *Crikey,* 8 August 2011. Accessed 14 September 2011 at http://www.crikey.com.au/2011/08/08/crikey-clarifier-whos-the-guardian-of-unaccompanied-minors-sent-from-oz/

seekers to another country, the Government would do it, with no continued involvement proposed.

The continued involvement of the Australian Government indicates that there are legal responsibilities that the Government is aware that it cannot avoid.

It is not possible for the Australian government to be a trustee of individuals' interests while they are housed in another nation. It is not possible for Australia to perform its human rights obligations via farming individuals to another nation, and retaining residual and ultimate responsibility, while stripping individuals of access to Australian courts. It is not possible for the Executive to administrate what should be domestic programs in another country so as to avoid legal claims that are valid under Australian law.

Character of Agreement potentially *ultra vires*

The ALA submits that the character of the Agreement is indicative of a delegated responsibility of guardianship or a relationship where Australia continues to be the trustee of all asylum seekers. The character of this Agreement may fall outside the powers of Parliament under section 51 of the *Constitution of Australia.*

i. Fear of discrimination in the transfer

Clause 4 of the Agreement provides the terms for which Transferees will and will not be transferred to Malaysia for processing.

A significant gap in Clause 4(2), covering those who will not be transferred, is the particular omission of persons who would be subject to discrimination or fear of persecution.

For example, in Malaysia, homosexuality is a crime under the s377 of the *Malaysian Penal Code: Unnatural Offences*. It carries a penalty of up to 20 years imprisonment, caning or a fine[18]. Individuals convicted may be subject and may also be punishable in *sharia* law courts.

Recently, the Senate Constitutional and Legal Affairs Committee recommended that amendments to the *Extradition and Mutual Assistance in Criminal Matters Amendment Legislation Bill* be passed. Division 2 of Part 3 of Schedule 2 of the Amendment, 'will require Australia to refuse to extradite a person if he or she may be punished, or discriminated against upon surrender, on the basis of his or her sex or sexual orientation'[19].

To allow such punishment of someone seeking asylum, but to prevent such punishment of someone who is liable to be extradited, does not make sense in Australian law. It amounts to an inconsistency, and to discriminatory legislative reform.

[18] Sodomy Laws, 'Malaysia' http://www.sodomylaws.org/world/malaysia/malaysia.htm

[19] Australian Government, *Explanatory Memorandum to the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill,* at 11.

j. Discrimination by means of arrival

Clause 4(1) provides that:

1. *Subject to Clause 4(2), the Transferees to be transferred to Malaysia are those persons who, after the date of signing of this Arrangement who*

a) have:

i) ***Travelled irregularly by sea to Australia**; or*

ii) *Been intercepted at sea by the Australian authorities in the course of trying to reach Australia by irregular means; and*

b) Who:

i) the Government of Australia determines should be transferred to Malaysia;

ii) Under Australian law, may be transferred to a declared country for processing or taken to a place outside Australia or removed from Australia; and the Government of Malaysia provides consent and approval for the transfer.

The difference in the treatment of those who arrive by sea to Australia and those who arrive by plane, is inherently discriminatory. This appears to be in violation of article 14 of the *International Covenant of Civil and Political Rights,* which provides:

> *All persons shall be equal before the courts and tribunals.*

Currently, the small minority arrive by sea, as opposed to by air. The problem with this distinction has been commented on by the High Court, which ruled in 2010 that persons processed in offshore locations such as Christmas Island still are entitled to access to the courts.

It is possible that the courts may extend this ruling to the provisions of this Agreement.

B. Non-refoulement and access to legal redress

The ALA is concerned that there will be outright breach of the principle of *non-refoulement* in the absence of domestic laws and access to judicial processes in Malaysia regarding the Refugee Convention, and in particular, how this operates in relation to Clause 10(2)(b).

Non-refoulement

The ALA submit that the principle of *non-refoulement* is fundamental and customary within international law. In the absence of access to judicial process and administrative review of applications for refugee status, the ALA is concerned that Clause 10 may be relied upon to deny refugee status to certain individuals.

Article 33 of the *Refugee Convention* provides:

> *1. **No Contracting State shall expel or retur**n ("refouler**") a refugee** in any manner whatsoever to the frontiers of territories where his life or freedom*

would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

*2. The **benefit** of the present provision **may not**, however, **be claimed by a refugee** whom there are r**easonable grounds for regarding as a danger to the security of the country** in which he is, or who, **having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country**.*

The principle of *non-refoulement* is so fundamental that no reservations or derogations may be made to it. It provides that no one shall expel or return ("*refouler*") a refugee against his or her will, in any manner whatsoever, to a territory where he or she fears threats to life or freedom.[20]

In 2001, States parties issued a Declaration reaffirming their commitment to the 1951 Convention and the 1967 Protocol, and they recognized in particular that the core principle of *non-refoulement* is embedded in customary international law.[21]

Article 33 of the *Refugee Convention* appears to have been replicated in Clause 10(2)(b)(i) and (ii), which provides that:

*(2)(b) The benefit of **non-refoulement may not be claimed by a Transferee** who is a **refugee** where there are:*

*i) **reasonable grounds for regarding** [the individual] **as a danger to the security of Malaysia**; or*

ii) *[The individual] has been **convicted** by a final judgment **of a particularly serious crime** that **constitutes a danger to the community of Malaysia**[22].*

a. Reasonable grounds

The test of 'reasonableness' is usually determined in a court. However, a person in this situation would not have access to judicial review in respect of a decision, given that Malaysia does not have domestic laws ratifying the Refugee Convention.

The issue is that, under this Agreement, what constitutes reasonable grounds will be arbitrarily determined.

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[20] Officer of the United National High Commissioner for Refugees, 'Introductory Note by the Office of the United National High Commissioner for Refugees', *The Refugee Convention,* 3. Accessed 14 September 2011 at http://www.unhcr.org/3b66c2aa10.html

[21] Ibid 4. Declaration of States parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Ministerial Meeting of States Parties, Geneva, Switzerland, 12-13 December 2001, UN Doc. HCR/MMSP/2001/09, 16 January 2002. The Declaration was welcomed by the UN General Assembly in resolution A/RES/57/187, para. 4, adopted on 18 December 2001.

[22] *Arrangement Between The Government of Australia and the Government of Malaysia on Transfer and Resettlement* (2011) Clause 10(2)(b)(i)and (ii)

b. Security

Laws relating to security in Malaysia are particularly harsh. Malaysia's 50 year old *Internal Security Act* (ISA) permits indefinite detention without charge or trial of any person deemed by officials to be a threat to national security.

Arbitrary detention is in violation of article 9 of both the *Universal Declaration of Human Rights* and the *International Covenant of Civil and Political Rights.* Detention without trial is also in violation of article 9, 14, 15 of the *International Covenant of Civil and Political Rights,* and is in violation of articles 10 and 11 of the *Universal Declaration of Human Rights.*

The United Nations Working Group on Arbitrary Detention visited Malaysia in June 2010 and were 'seriously concerned by laws permitting preventive detention, that that Malaysian authorities resort to the Emergency (Public Order and Crime Prevention) Ordinance, even when the alleged crimes, such as stealing, fighting, or involvement in organised crime, fall under the purview of Malaysia's penal code'[23].

Malaysia therefore already has significant restrictions on and breaches of human rights with its laws relating to security, and given that the ISA predated to colonial times, there is also a large amount of precedent in domestic law supporting such breaches.

In Malaysia in 2011, UNHCR has projected its aspirational key performance indicator to provide legal counsel to 500 asylum seekers and refugees charged with immigration offences in court[24]. Other aspirational targets set are far in excess of its achievable mandate in Malaysia in 2010.

Given that there are over 90,000 refugees and asylum seekers currently in Malaysia,[25] the scope for UNHCR to provide effective legal representation is absolutely deficit. Simple maths equates this as less than 0.5% of individuals.

Similarly, at no place within the Agreement does the Australian Government commit to providing for the costs of any form of legal representation which a Transferee may require on Transfer.

Erosion of non-refoulement
The ALA submits that there is scope for the principle of non-refoulement to be eroded dramatically, as the laws relating to security in Malaysia area already in breach of international obligations.

c. 'Particularly serious crimes'

In the case of *IH (s.72; 'Particularly Serious Crime') Eritrea* [2009] UKAIT 00012, the UK Asylum and Immigration Tribunal assessed Article 33(2) of the *Refugee*

[23] Human Rights Watch, 'World Report 2011 - Malaysia'. Accessed 14 September 2011 at http://www.hrw.org/en/world-report-2011/malaysia
[24] UNHCR, 'Malaysia'. http://www.unhcr.org/pages/49e4884c6.html
[25] Ibid.

Convention, and stated that analysis of what constitutes a 'particularly serious crime' has one autonomous, true, meaning. It is not up to national courts to determine it by reference to their existing legislation. Instead, the term:

> *must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose (see Art 31(1) of the Vienna Convention on the Law of Treaties (1980) (Cmnd 7964)).*[26]

While the definition of 'particularly serious crime' could be referred to the International Court of Justice, this is a remote reality.

> ***In practice it is left to national courts**, faced with a material disagreement on an issue of interpretation, **to resolve it**. But in doing so it must search, **untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning**.*[27]

While Malaysia was a signatory to the Vienna Convention in 1994[28], in the absence of Malaysia being a signatory to the Refugee Convention, and ratifying it through domestic legislation that recognises the Refugee Convention, **it is impossible for an individual to be given standing for such an issue to be considered by the courts of Malaysia.**

d. Accessing legal representation and redress

Even if transferees in Malaysia were able to access the courts on the issue of 'reasonable grounds', it is questionable as to what access they will have to effective legal representation, in the criminal justice system, and at all. Clause 9 does not cover legal costs.

Similarly, if an individual were to be **charged** with a particularly serious crime in Malaysia, (therefore, **if convicted**, activating lack of access to protection of *non-refoulement* under Clause 10(2)(b)(ii)) it is questionable as to what access to effective legal representation they will have to defend their presumed innocence in the Malaysian criminal justice system, or access to appeal.

This Agreement is effectively undermining an individual's right to presumed innocence; and equality before the courts.

The Australian Government, through effecting the transfer of an individual to Malaysia is effectively stripping that individual of rights to seek legal redress. Article 14 of the *International Covenant of Civil and Political Rights* provides that:

> *All persons shall be equal before the courts and tribunals.*

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[26] *IH (s.72; 'Particularly Serious Crime') Eritrea* [2009] UKAIT 00012, [at p 28]
[27] Ibid. See, *R v SSHD ex p Adan and Aitseguer [2001] 2 AC 477 Lord Steyn* at p517
[28] See UN Treaty Collection, 'Vienna Convention'. Accessed 14 September 2011 at http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=UNTSONLINE&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en

Those who arrive by sea, gain no standing in Australian courts and only limited standing in Malaysia, with limited access to legal representation such as the UNHCR's strained resources can provide.

There is therefore scope for erosion of the principle of *non-refoulement,* as there is no consideration possible for judicial review of determinations under Clause 10(2)(b)(i) and (ii), and definition of what Malaysia constitutes 'particularly serious crimes' in relation to refugee law.

These are areas that require access to judicial review and rigorous legal representation. Essentially, poor legal representation and access to the courts will increase the loopholes available to push individuals to be forced to "voluntarily return".

The ALA is therefore concerned regarding the practical operation of Clause 11 (Return of Transferees), in the absence of access to judicial review, it is liable to abuse and legal loopholes. Clause 11 provides that:

> *In relation to the return of a Transferee* ***found not*** *to be a refugee:*
>
> *a) Voluntary return is the preferred option;*
>
> *b) Where the transferee does not agree to return to their country of origin voluntarily,* ***forced returns may be necessary****.*

e. The use of force

The ALA is concerned regarding the use of force in such contexts, especially given that there has been report of police abuse. In 2010, Malaysian police restricted the right to peaceful assembly, and on several occasions used excessive force to break up unlicensed events. [29]

f. The need for appeal

Even in the Australian context, where we have established administrative processes, numerous departments, NGOs, Tribunals, Ombudsmans and the Courts, **we still sometimes get it wrong**. Many refugee determinations travel all the way to the Federal Court and deportation orders are overturned.

Violation of non-refoulement

The ALA submits that in the absence of access to effective legal processes to review Clause 10 and 11, individuals that should not fall within the scope of Article 33(2) will be subject to forced "voluntary return".

Such cases would be in violation of the fundamental principle of *non-refoulement*, and Australia would be implicit in these breaches.

[29] Human Rights Watch, above n 23.

C. Unlawful detention

In landing on Australian soil, an individual's right to make an asylum claim is activated, and the opportunity similarly activates for that individual to be entitled to seek appeal in Australian legal processes.

Regardless of whether individuals are placed in immigration detention before or after their removal to Malaysia, **the act of forcing individuals to board a boat or plane to Malaysia from Australia, amounts to a denial of activation of this legal right.** The constraint within the vehicle itself deporting them amounts to unlawful detention, aside from any unlawful detention that may also occur while they are before, during or after transit.

This is an abuse of due process, an abuse of the powers of the Executive and a denial of the rights of asylum seekers to freedom of movement and liberty.

Offshore processing as unlawful detention
The ALA submits that to send individuals seeking asylum, anywhere, in the form of offshore processing, constitutes a form of unlawful detention.

The High Court of Australia has held that it is a fundamental principle of Australia's constitutional law that the executive may not interfere with the liberty of an individual without valid authorisation.[30]

In *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 528-529, Justice Deane explained:

> *The **common law of Australia knows no lettre de cachet or executive warrant** pursuant **to which either citizen or alien can be deprived of his freedom by mere administrative decision or action.** Any officer of the Commonwealth Executive who, without judicial warrant, purports to authorize or enforce the detention in custody of another person is acting lawfully only to the extent that his conduct is justified by clear statutory mandate. ... It cannot be too strongly stressed that **these basic matters are not the stuff of empty rhetoric**. **They are the very fabric of the freedom under the law which is the prima facie right of every citizen and alien in this land.** They **represent a bulwark against tyranny.** (cited in Ruddock v Taylor (2005) 222 CLR 612 per McHugh J at [120] and Kirby J at [138].)*

As Justice Kirby stated in *Ruddock v Taylor* (2005) 222 CLR 612 at [140], 'wrongful imprisonment is a tort of strict liability'. A plaintiff is entitled to damages to remedy the action, and wrongful imprisonment actions are able to access the full range of general damages, and exemplary damages.

[30] Mark A Robinson, 'Damages in Flase Imprisonment Matters' (2008). Accessed 14 September 2011 at http://www.robinson.com.au/monoartpapers/papers/MAR%20Damages%20in%20False%20Imprisonment%20Matters-as%20Delivered%2022%20February%202008.pdf

Comparator amounts for false imprisonment suggested *Thompson; Hsu v Commissioner of Police of the Metropolis* [1998] QB 498 (Lord Woolf MR, Auld LJ and Sir Brian Neill), where the Court stated that:

> *In a straightforward case of wrongful arrest and imprisonment, the starting point is likely to be about £500 for the first hour during which the plaintiff has been deprived of his or her liberty. After the first hour, an additional sum is to be awarded, but that sum should be on a reducing scale.... a plaintiff who has been wrongly kept in custody for twenty dour hours should for this alone normally be regarded as entitled to an award of about £3,000. For subsequent days, the daily rate will be on a progressively reducing scale.*

In a rough conversion made as at 18 February 2008, this would be equivalent to AUD **$6,441.89** for the first day.[31]

There have been a number of immigration detention review reports tabled in Parliament by the Commonwealth Ombudsman. There were 346 reports tabled in Parliament as at 13 February 2008.. Many of these reports identify false imprisonment issues and make non-binding recommendations for payment of compensation.[32]

Liability to unlawful detention claims

The ALA submits that the Agreement is exposing the Australian Government to a future liability for unlawful detention claims if they were to deport individuals to Malaysia, which could rise further into the millions.

This is in addition to any current liability accumulating for unlawful detention of individuals who arrived in Australia after the signing of the Agreement.

This is in addition to the future liability of unlawful detention claims to be made by any individual currently kept in immigration detention in Australia.

D. Context within Malaysia

Malaysia hosts some 90,000 refugees and asylum-seekers, of whom 92 per cent are from Myanmar. Other significant refugee populations in the country originate from Afghanistan, Iraq, Somalia and Sri Lanka.[33]

a. Treatment of asylum seekers

Human Rights Watch has openly condemned Malaysia's commitment to human rights.

Human Rights Watch reports:

[31] Ibid. 7
[32] Ibid. 3
[33] UNHCR, above n 24.

> *Malaysia* ***cannot present itself as a responsible member of the international community while continuing to refuse to ratify core UN treaties****, including, the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and the Convention Against Torture, as the* United Nations Working Group on Arbitrary Detention (WGAD) *has recommended. It* ***cannot continue to argue that the Universal Declaration of Human Rights, which is widely acknowledged to be customary international law, is not legally binding unless it is consistent with Malaysia's own constitution.***[34]

UNHCR reports that:

> *There is currently no legislative or administrative framework for dealing with refugees. This challenging protection environment makes it difficult for UNHCR to fulfil its mandate in the country, which has some 3 million migrants, 1.5 million of whom are considered undocumented migrants.*
>
> *By law,* ***refugees are not differentiated from undocumented migrants.*** *They are therefore* ***vulnerable to arrest for immigration offences*** *and* ***may be subject to detention, prosecution, whipping and deportation****. In the absence of a national administrative framework, UNHCR conducts all activities related to the reception, registration, documentation and status determination of asylum-seekers and refugees. Since refugees and asylum-seekers have no access to sustainable livelihoods or formal education, UNHCR runs a limited number of humanitarian support programmes for them, in cooperation with NGO partners.*
>
> ***Local integration is not considered a viable option by the Malaysian authorities*** *for the majority of refugees.*

The UNHCR Annual Report on Malaysia also stated that: 'although there were some positive developments in 2010, the Government is hesitating to put into place policies that could provide more consistent protection for people of concern to UNHCR. The lack of a domestic legal and administrative framework for the protection of refugees remains the main challenge.'[35]

Protections in Malaysia
The ALA submits that the protections available for asylum seekers of their human rights in Malaysia are severely limited, regardless of assurances that are made by Malaysia in a non-legally binding document.

b. Capacity of UNHCR

Even a cursory glance at the website detailing UNHCR's country profile of Malaysia indicates an organisation that is already stretched beyond capacity. Projected estimates for 2011 of total persons of concern to UNHCR in Malaysia was estimated

[34] Human Rights Watch, 'Malaysia Profile'. http://www.hrw.org/asia/malaysia
[35] UNHCR, 'Global Report 2010' (2011), 269. Accessed 14 September 2011 at http://www.unhcr.org/4dfdbf5516.html

at 201, 300. UNHCR's projected estimates purported that it could assist 95,000 – and these figures would relate to any form of assistance.[36]

The UNHCR 2010 Global Report in reference to Malaysia assessed its capacity further:

> *A significant rise in the number of people of concern has led to a gap between the needs of the population and the resources available to address them. As a result,* ***at least 15,000*** *asylum-seekers* ***were not registered****. In addition, the* ***backlog for refugee status determinations remains at over 11,000 people****, and for* ***best interest determinations at more than 1,000 unaccompanied children. Only 800 best interest determinations were processed.***
>
> *Furthermore,* ***more than 5,000 people remained in need of resettlement.*** *Lack of resources also prevented the expansion of* ***health services*** *beyond the existing two clinics, which* ***serve 16,000 of the 90,000 persons of concern****. Some* ***800 refugees in need of surgical interventions were prioritized*** *for assistance, although the* ***actual needs went beyond 2,000 people****. It was possible to* ***assist NGO partners to provide education for only 1,000 refugee children****, while the* ***total number*** *of* ***school-aged children stood at more than 13,000.***
>
> *Finally, funding constraints meant that* ***microcredit and skills training were provided for less than 500 people, although tens of thousands were in need*** *of them.*[37]

The main objectives and targets determined by the UNHCR for 2011 included figures such as:

- *Basic and general medical care to be provided for over* ***90,000*** *persons of concern nationwide. [16,000 provided for in 2010]*
- *Best Interest Determination procedures to be applied in the case of* ***2,000*** *unaccompanied minors.* [800 processed in 2010]
- *Legal counsel is to be provided to* ***500*** *asylum-seekers and refugees charged with immigration offences in court.*
- *At least* ***3,000*** *children of primary-school age are able to access learning opportunities.* [Fewer than 1,000 out of 13,000 children received education in 2010].
- *Community health education is provided for* ***81,000*** *persons.*[38]

Given the gross differences between these projected estimates and what UNHCR could realistically achieve in 2010, it is obvious that UNHCR is under severe pressure

[36] UNHCR, above n 24.
[37] UNHCR, above n 35, 267 & 270
[38] UNHCR, above n 24.

to provide assistance to thousands of individuals it simply does not have the capacity to provide.

Given that planning estimates provide that there will be over 201, 300 persons that the UNHCR estimates will be in need of assistance (and this does not include unregistered persons), these numbers indicate the limit of assistance that UNHCR can provide.

This is within the context of UNHCR viewing that:

> *With no foreseeable shift in the level of Government engagement, UNHCR will continue to implement its international mandate to protect and assist refugees while seeking durable solutions for them...* ***The Malaysian Government is not expected to take significant steps to establish a legal and administrative framework for refugees****.*
>
> ***As the Government is likely to maintain its immigration policy****, frequent immigration raids are expected to continue. Protection interventions will be required to secure the release from detention of approximately 1,000 persons of concern per year.* [39]

The ALA also wishes to point out that 'UNHCR's preference has always been an arrangement which would enable all asylum-seekers arriving by boat into Australian territory to be processed in Australia.'[40]

> **UNHCR capacity**
> The ALA submit that the UNHCR is already stretched beyond its limits of capacity, and to seek the participation of the UNHCR in the Agreement to provide specialised resourcing to 800 transferees will hinder its resources from assisting a greater number of asylum seekers and refugees

c. Treatment of migrant domestic workers

As a comparator, the laws surrounding the treatment of Malaysia's migrant domestic workers – which number approximately 300,000 – also still lack important protections. As Human Rights Watch reports:

> *Domestic workers are excluded from key protections under Malaysia's Employment Act, including limits on working hours, public holidays, a mandatory day off per week, annual and sick leave, maternity protections, and fair termination of contracts...*
>
> *In 2009, Indonesia suspended migration of domestic workers to Malaysia until a 2006 Memorandum of Understanding could be revised with stronger protections for workers*[41].

[39] Ibid.
[40] UNHCR, 'Response to Australia-Malaysia Agreement', *Media Release,* http://www.unhcr.org/4e2d21c09.html
[41] Human Rights Watch, above n 23.

Migrant workers in Malaysia
The ALA submit that if protections on migrant domestic workers are already lacking, and have been sufficient for Indonesia to suspend migration; the protections available for refugees and asylum seekers is dire.

E. An effective alternative

The ALA submits that an alternative to the current Agreement would be for the Australian Government to establish partnerships with non-government organisations near conflict areas, to assist individuals to make an effective application for refugee status in Australia.

For example, given that 96% of the refugee population in Malaysia originate from Burma, it would make more rational sense to target refugee camps on the Thai-Burma border more directly, and increase the number of available spaces within our humanitarian intake.

Such programs could also include opportunities for training of young law graduates in migration law, therefore providing greater scope for social justice based employment opportunities for young Australians.

A large number of people seeking resettlement currently in Malaysia are from ethnic minorities that have been persecuted in Burma. Going closer to the source would be more advantageous – the dangerous of people smuggling and fear of persecution does not just happen across the ocean from Malaysia to Australia. The dangers facing communities and families trying to escape persecution happen continuously as they attempt to flee persecution.

People who have arrived in Malaysia would have arrived via boat, or overland. Many of them may have transitioned through common points and patterns of migration.

Providing a greater number of intakes directly from refugee camps, that are close to conflict zones, and providing effective legal representation and advice in individual's applications, would be more beneficial.

Individuals that are based in refugee camps will not have an awareness of the legal subtleties within their story, and which facts to emphasise, in order for their claims to be processed successfully.

Providing options for people to receive legal advice, to be clients of registered Australian migration agents, closer to conflict zones, may be a more legally creative option to boost our humanitarian intake.

This kind of policy is a movement away from the 'deterrent effect' that has been sought for decades in Australian migration policy - and provides a more realistic appraisal of migration patterns.

An alternative to the Agreement
The ALA submits that an alternative to the Agreement would be establish partnerships with non-government organisations near conflict areas, to go closer to the source to provide effective legal assistance in an application for refugee status in Australia.

This should be done in conjunction with upholding Clause 7, which provides that the Government of Australia will resettle 4,000 persons over 4 years, even if the Government of Australia does not seek to transfer 800 Transferees to Malaysia.

Uphold commitment to the 4,000
The ALA submits that Australia should uphold its commitment to accept 4,000 refugees from Malaysia over 4 years.

Conclusion

The ALA is concerned as the Agreement with Malaysia is not legally binding; the power of its enforceability is extremely questionable, and it has not been incorporated into the domestic law of either State. Furthermore, it is questionable as to what extent any future modifications of the Agreement will be transparent to the public.

Mr Bowen expressed his regret at the recent High Court decision, as the Agreement was designed to 'break the people smuggler's model'. However, the ALA submits that increasing Australia's refugee intake will be more advantageous in providing hope to a larger number of people. Deterrence does not work when people are attempting to flee persecution.

The ALA calls on the Australian Government to renew its commitment to human rights on the issue of asylum seekers. This issue provides a unique opportunity for the Australian Government to make history in Australia in abolishing offshore processing of asylum seekers, and the establishment of a new, more compassionate approach to the migration issue, that is not mired in the politicising of human suffering.

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