



Submission to the

**Senate Legal and Constitutional  
Affairs References Committee**

Inquiry into

**Australia's agreement with  
Malaysia in relation to asylum  
seekers**

submitted by

**Amnesty International Australia**

13 September 2011

(...)



## About Amnesty International

Amnesty International is a worldwide movement of more than 3 million people across 160 countries working to promote the observance of all human rights enshrined in the Universal Declaration of Human Rights and other international standards. Amnesty International undertakes research and action focused on preventing abuses of human rights, including rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination.

Protecting the rights of refugees and asylum seekers is an essential component of Amnesty International's global work. We aim to contribute to the worldwide observance of human rights as set out in the Universal Declaration of Human Rights, the 1951 UN Convention of the Status of Refugees ("Refugee Convention") and other internationally recognised standards. Amnesty International works to prevent human rights violations that cause refugees to flee their homes. At the same time, we oppose the forcible return of any individual to a country where it is probable that he or she would face serious human rights abuse.

## Background

On 7 May 2011, the Australian Government announced it had reached a 'transfer arrangement' with the Malaysian Government whereby Australia will send up to 800 asylum seekers who arrive in Australia by boat to Malaysia for refugee status determination (the Arrangement). In return, Australia will resettle 4,000 refugees currently residing in Malaysia over four years<sup>1</sup>. Australia will fully fund the Arrangement.

On 25 July 2011, the Minister for Immigration and Citizenship and the Malaysian Minister of Home Affairs signed the Arrangement in Kuala Lumpur and the details were released publicly.

The full text of the Arrangement is available online at <http://www.minister.immi.gov.au/media/media-releases/pdf/20110725-arrangement-malaysia-aust.pdf>.

The operational guidelines are available online at <http://www.immi.gov.au/managing-australias-borders/border-security/pdf/operational-guidelines-transfers-resettlement.pdf>.

On 17 August 2011, the Senate referred the Arrangement to the Senate Legal and Constitutional Affairs References Committee for inquiry and report<sup>2</sup>.

On 31 August 2011, the High Court ruled that it was unlawful to send asylum seekers to Malaysia under section 198A of the Migration Act 1958 and ordered the Minister for Immigration and Citizenship and his department to restrain from sending the asylum seekers to Malaysia.

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<sup>1</sup> Minister for Immigration and Citizenship, 7 May 2011, The regional cooperation framework, media release, available online at <http://www.minister.immi.gov.au/media/cb/2011/cb165079.htm>.

<sup>2</sup> Australian Parliament, Senate Legal and Constitutional Affairs References Committee, *Australia's agreement with Malaysia in relation to asylum seekers: Terms of Reference*, available at [http://www.aph.gov.au/senate/committee/legcon\\_ctte/malaysia\\_agreement/tor.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/malaysia_agreement/tor.htm).



## Amnesty International position

Amnesty International continues to express its serious opposition to this arrangement because it undermines the fundamental right to seek asylum, breaches Australia's international obligations to asylum seekers and puts the people transferred to Malaysia at risk of human rights abuse.

Amnesty International supports the increased intake of 4,000 refugees from Malaysia to be resettled in Australia, however, does not agree that this should come at the expense of the right to seek asylum in Australia. While increasing resettlement numbers directly from Malaysia is a welcome move, there is no need for Australia to link this increase with the expulsion of 800 asylum seekers who have arrived here by boat.

The Australian Government's justification for the Malaysia transfer arrangement is to break the people smuggling trade and to prevent tragic accidents, such as the incident on 15 December 2010 when a vessel, later known as SIEV 221, foundered on rocks at Rocky Point on Christmas Island resulting in the deaths of fifty people<sup>3</sup>.

Amnesty International acknowledges that people smuggling is a crime and accepts that governments must take measures to reduce incidents of unauthorised immigration. However, the organisation firmly believes that to effectively reduce incidents of people smuggling, in a manner both durable and humane, Australia must address the reasons that force asylum seekers onto boats.

Amnesty International believes the only way of preventing asylum seekers and refugees from attempting dangerous boat journeys to Australia in search of safety is to provide them with viable alternatives. If the Australian Government is serious about pioneering regional solutions to these issues, it must do so in a principled manner. This includes building the capacity of Australia's neighbours to protect refugees and encouraging respect in those countries for their human rights. Drastic improvements must also be made to the registration and resettlement processes to give asylum seekers more hope that their claims are being considered in a transparent and timely manner.

As one of the few countries in the Asia Pacific region to have signed the Refugee Convention, Australia should be leading by example and providing a positive example of how best to protect refugees.

## Research about Refugees in Malaysia

Amnesty International's opposition to the arrangement with Malaysia is based on research undertaken in 2009 and 2010 by Amnesty International into the treatment of asylum seekers and refugees in Malaysia.

Two reports in particular, [\*A Blow to humanity: torture by judicial caning in Malaysia\*](#), and [\*Abused and abandoned: refugees denied rights in Malaysia\*](#), document the systematic human rights abuses suffered by asylum seekers and refugees residing in Malaysia<sup>4</sup>.

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<sup>3</sup> Joint Select Committee on the Christmas Island Tragedy of 15 December 2010, 29 June 2011, Report, Chapter 3.51, available online at

[http://www.apf.gov.au/Senate/committee/christmas\\_island\\_ctte/christmas\\_island/report/index.htm](http://www.apf.gov.au/Senate/committee/christmas_island_ctte/christmas_island/report/index.htm).

<sup>4</sup> Amnesty International, 2010, *A Blow to humanity: torture by judicial caning in Malaysia*, available online at [http://www.amnesty.org.au/images/uploads/news/Malaysia\\_report.pdf](http://www.amnesty.org.au/images/uploads/news/Malaysia_report.pdf) and *Abused and abandoned: refugees denied rights in Malaysia*, available online at

[http://www.amnesty.org.au/images/uploads/ref/abused\\_and\\_abandoned-refugees\\_denied\\_rights\\_in\\_malaysia.pdf](http://www.amnesty.org.au/images/uploads/ref/abused_and_abandoned-refugees_denied_rights_in_malaysia.pdf)



Amnesty International's research indicates that Malaysia treats asylum seekers and refugees very poorly.

- **Malaysian law does not distinguish between illegal migrant workers and asylum seekers/refugees.**

There are approximately 92,000 refugees and asylum seekers currently living in Malaysia. Despite this, there is no legislative framework for dealing with refugees. They are often forced to join the 1 million undocumented migrant workers in the country working in dangerous and dirty jobs, subject to exploitation, and risking arrest by police and immigration officials.

Refugees and asylum seekers in Malaysia are not given any form of documentation that proves their legal right to remain in the country. The UN Refugee Agency (UNHCR) is mandated to issue refugee cards, however Amnesty International has found many cases where access to the UNHCR has been prevented and even where UN papers have been ignored by immigration officials. In 2010, government officials suggested that police and immigration agents would not arrest those with UNHCR cards, however despite these assurances, designated refugees are still routinely arrested and detained.

- **Asylum seekers and refugees in Malaysia are at risk of detention or arrest.** People in breach of Malaysia's immigration laws are detained in overcrowded centres then sentenced to jail and often caned. Often they are also forced to pay fines; they are then returned to detention and deported. In 2010, following 350 visits to detention centres, the UNHCR stated it was able to register almost 1800 individuals and release over 3,800 individuals.<sup>5</sup> This clearly demonstrates the gap between the official Malaysian government rhetoric that refugees will not be detained and what is actually happening in practice on the ground. While Amnesty International welcomes UNHCR's ability to get these individuals released we remain concerned that many other refugees may not have been identified and were subject to forced return.
- **Regular immigration raids and arrests** are carried out by state agents, and, controversially, by a volunteer citizens' police force, the People's Volunteer Corps (Ikatan Relawan Rakyat or RELA). These arrests have a veneer of legitimacy, as police and RELA agents are authorised to examine people's identification documents and investigate their immigration status. Amnesty International has found that during the immigration raids, police and RELA employ violent tactics to extort money or to intimidate and harass asylum seekers and refugees. These raids often lead to arrest, detention and other penalties for immigration offences.
- **Refugees and asylum seekers in Malaysia are subject to ill-treatment in Malaysian detention centres and jails.** Amnesty International's investigations into asylum seekers and refugees in Malaysia found that conditions inside detention centres in Malaysia were overcrowded, dirty and violent.<sup>6</sup> Reports of insufficient food, poor nutrition, poor sanitation and physical abuse persist.

<sup>5</sup> UNHCR Global Report 2010, online at <http://www.unhcr.org/4dfdbf5516.html>.

<sup>6</sup> Amnesty International, *Abused and Abandoned: Refugees Denied Rights in Malaysia* (June 2010), available online at <http://www.amnesty.org/en/library/asset/ASA28/010/2010/en/2791c659-7e4d-4922-87e0-940faf54b92c/asa280102010en.pdf>. *A Blow to Humanity: Torture by Judicial Caning in Malaysia* (December 2010) available online at [http://www.amnesty.org.uk/uploads/documents/doc\\_21090.pdf](http://www.amnesty.org.uk/uploads/documents/doc_21090.pdf).



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- **Malaysian authorities practice caning.** In 2002, the Malaysian Government passed a law endorsing caning as a form of punishment for immigration violations. With no option but to violate immigration laws (such as having to work), asylum seeker and refugees in Malaysia risk being caned. Caning is considered 'cruel, inhuman and degrading punishment' by the United Nations.
- **Refugees and asylum-seekers in Malaysia are vulnerable to abuse** and violence in their homes, in public and at their places of work. As refugees and asylum seekers are considered illegal migrants they have no rights and little protection. Many asylum seekers are reluctant to report injustice to police as it could result in their arrest and caning for breaching immigration laws.

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## Key Issues of Concern

Amnesty International considers the arrangement with Malaysia to be problematic for a number of reasons, both in principle and in the practical implementation of the policy.

- **Malaysia is not a signatory to the United Nations Refugee Convention or Protocol.** Neither is it party to many other human rights treaties, including the UN



Convention Against Torture. There is no legal framework in Malaysia guaranteeing the protection of the asylum seekers who will be transferred.

- **The Malaysian Government is not committed to protecting refugees.** Assurances from the Malaysian Government about human rights are in no way a substitute for protections provided under international treaties.
- **Malaysia has a record of human rights abuse.** Amnesty International reports recent human rights abuses in Malaysia, including arbitrary arrests and detentions, deaths in custody, highly restricted freedom of expression and executions under the death penalty<sup>7</sup>.
- **There is no legislative framework for dealing with refugees in Malaysia.** As Refugee Status Determination (RSD) is undertaken by UNHCR, asylum seekers and refugees do not have access to courts or tribunals where they can challenge decisions made about their status.
- **The High Court has ruled the arrangement with Malaysia is unlawful.** The High Court found that the Minister does not have the power to send people to Malaysia because Malaysia does not have adequate protections in place for refugees. Furthermore, the Arrangement is also unlawful because the Minister has a duty of care to unaccompanied minors as their legal guardian.
- **Vulnerable people would be transferred to Malaysia under the Arrangement.** The Arrangement clearly outlines in Section 2.1.2 (b) that the International Organisation for Migration will complete health assessments and identify vulnerable Transferees. Further, the Arrangement indicates that 'special procedures' to deal with the 'special needs of vulnerable cases including unaccompanied minors' have yet to be developed and agreed to by the Australian and Malaysian Governments. If the Government decides to send children on a case-by-case basis, it will be a clear indication that the conditions they expect asylum seekers to face in Malaysia are poor.

In fact, conditions for asylum seekers and refugees in Malaysia are so poor that the Government had to include measures in the Arrangement that aim to mitigate the risk of human rights abuse, torture and other ill treatment. Amnesty International is not convinced that the safeguards are sufficient to ensure adequate human rights protection over a prolonged period. Even if the safeguards put in place do function as intended, the 800 transferred to Malaysia will be considerably better off than other refugees in Malaysia, creating an inherently unfair, two-tiered system.

- **Only non-refoulement is guaranteed under the Arrangement.** While defending the arrangement during the High Court, Australia's Solicitor General made it clear that the MOU signed with the Malaysian Government only ensured that the 800 asylum seekers transferred would not be refouled. The protection of other human rights could not be guaranteed. Despite the Australian Government's continual assurances that people transferred would not be subjected to mistreatment or corporal punishment such as caning, the Solicitor General's remarks confirm that no such guarantees are certain.
- **What does the guarantee of "self reliance" actually entail?** While Article 17 of the Refugee Convention outlines the right to wage-earning employment, it is still unclear whether or not the references to self reliance in the Arrangement actually amount to a legal right to work, or if it simply means the Malaysian authorities will turn a blind eye to

<sup>7</sup> Amnesty International, State of the World's Human Rights Report 2010, pp. 217-219, available online at <http://thereport.amnesty.org/>.



refugees working in the “informal sector”. Amnesty International has previously documented serious human rights abuses faced by those working in the informal sector.<sup>8</sup> Those caught working in the informal sector can be subject not only to Malaysia’s strict immigration laws but also various other Malaysian laws often making UNHCR’s ability to access these individuals, once detained, extremely difficult.

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- **The Arrangement puts Australia at serious risk of breaching the fundamental principle of non-refoulement** which dictates that people cannot be sent to back to countries where they are at risk of persecution or torture. The Australian Human Rights Commission has indicated that “there is a risk that in sending asylum seekers to Malaysia, Australia could breach its non-refoulement obligations under other international treaties including the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child or the Convention against Torture”<sup>9</sup>.

Under the Arrangement, in certain circumstances, such as if a person transferred to Malaysia is found not to be a refugee, but has broader claims for protection, Australia will make ‘suitable alternative arrangements for the removal of the Transferee from Malaysia so as to ensure they are not refouled’. This implies that the person would be at risk of refoulement should they remain in Malaysia. Clauses 10 2. (a) and (b) indicate that the Malaysian Government will ‘respect the principle of non-refoulement’ except when a person is assessed as a ‘danger to the security of Malaysia’ or has been convicted of a ‘serious crime that constitutes a danger to the community of

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<sup>8</sup> See Amnesty International report “Trapped: The exploitation of migrant workers in Malaysia” <http://www.amnesty.org/en/library/asset/ASA28/002/2010/en/114eba25-6af5-4975-9ea3-02c22f6bdc5a/asa280022010en.pdf>

<sup>9</sup> Australian Human Rights Commission, 25 July 2011, Sending asylum seekers to Malaysia is not the answer to addressing people smuggling, available online at [http://www.hreoc.gov.au/about/media/media\\_releases/2011/61\\_11.html](http://www.hreoc.gov.au/about/media/media_releases/2011/61_11.html).



Malaysia'. Given there is no legal framework for dealing with refugees in Malaysia, a negative security assessment cannot be reviewed or challenged.

In addition to this, Amnesty International is gravely concerned about the fate of 16 asylum seekers from the Chinese Uighur minority who have been arrested in August 2011 by Malaysian authorities. Reports suggest the Uighurs may already have been deported to China where they would be at serious risk of persecution. Amnesty International has very real concerns for the safety of these asylum seekers given the level of repression that Uighurs face in China. If reports that Malaysia has deported the Uighurs to China are confirmed, then Malaysia is in flagrant breach of international law. Under the arrangement with Australia, Malaysia promised not to send back refugees. Given this latest worrying development, there are serious questions surrounding the Malaysian authorities' commitment to send asylum seekers back to countries where they are at risk of torture and persecution.

- **Asylum seekers transferred to Malaysia may end up in detention.** Amnesty International has previously documented a number of individuals who were detained, due to Malaysian officials not accepting or believing they were refugees, despite having UNHCR cards. Added to this, Amnesty International has grave concerns for stateless individuals who may be sent to Malaysia but who are not found by UNHCR to be refugees. If it is not possible for the Malaysian government to remove them there are grave concerns they will face indefinite detention in Malaysia, where a number of human rights abuses could occur. A number of stateless groups have reached Australia recently by boat and Australia has specific obligations to these individuals having signed both Statelessness Conventions.
- **The pre-departure guidelines are yet to be finalised.** Stateless individuals are just one group of vulnerable individuals that should be identified and not removed if Australia is to go ahead with the Arrangement. Amnesty International has grave concerns however that with only 72 hours set out in the arrangement to determine if someone is vulnerable, the potential for serious mistakes to be made is great. It is highly unlikely that a proper assessment of someone who has faced sexual violence, torture or is fleeing violence based on their sexuality can be made in such a short timeframe.
- **The Arrangement has too many loose ends.** Many questions remain about what the Government would do to monitor the human rights of those sent to Malaysia, as well as what measures the Government would take if those transferred *do* suffer abuse in Malaysia.
- **The Arrangement is not legally binding.** Clause 16 states that the arrangement 'represents a record of the Participant's intentions and political commitments but is not legally binding' on the Malaysian or Australian Governments. Amnesty International maintains that the Arrangement is not a substitute for protections offered through international legal instruments, nor is it sufficient to ensure the human rights of those transferred to Malaysia will be protected, particularly in light of Malaysia's poor human rights record.
- **A hotline is not sufficient to protect human rights.** Section 3.0 of the Arrangement explicitly states that the people transferred to Malaysia will be provided with 'immediate access to the UNHCR/IOM hotline so that their status as a Transferee can be confirmed'. This demonstrates the Government's lack of confidence that Malaysian authorities will respect the documentation given to transferees. Refugees previously interviewed by Amnesty International have highlighted difficulties they have had in reaching UNHCR on the hotline.





- **The Arrangement effectively undermines the right to seek asylum in Australia.** Under international law, all asylum seekers who arrive in Australia, *regardless of mode of arrival*, must have their claims for protection assessed and if found to be genuine refugees, offered protection. The Government's arrangement with Malaysia essentially means it is acceptable to arrive in Malaysia and seek asylum, but doing the same in Australia is subject to mode of arrival (i.e. arriving by plane to seek asylum is allowed, but arriving by boat and seeking asylum is not). More asylum seekers arrive in Australia by plane each year than by boat<sup>10</sup>.
- **The concept of a 'queue' is misrepresented.** People arriving by boat are misunderstood to be 'jumping the queue'. Refugees leave their country to survive. For 99% of people who need protection seeking asylum in another country is their only choice. Resettlement through the UNHCR in no way resembles a queue and, in any case, is only available for a very small group. The resettlement program exists to support the asylum system, not to replace or distort it. Those transferred to Malaysia will have little hope of being resettled in another country.
- **The Arrangement is expensive.** At an estimated cost of \$292 million over four years, this policy is clearly not cost effective. Amnesty International encourages the Committee to investigate the relative costs of the Arrangement in comparison with processing asylum seekers onshore.

## Further issues to consider

- As demonstrated above, the arrangement with Malaysia will not provide sufficient protection to asylum seekers removed to Malaysia and effectively undermines the fundamental human right to seek asylum.
- Amnesty International asserts that seeking asylum in Australia is legal, regardless of mode of arrival.
- The UNHCR reports that Australia receives only 2 per cent of the industrialised world's asylum claims.<sup>11</sup> This relatively small proportion of refugees arriving does not justify subverting the right to seek asylum.
- Sending people to Malaysia is a dangerous experiment with the human rights of some of the world's most vulnerable people. Trading asylum seekers and refugees sets a dangerous precedent in the Asia-Pacific region.
- The Government should put significant thought, effort and investment into developing refugee protection framework across the Asia Pacific region that strengthens international refugee standards, rather than seeking to outsource its commitments and warehouse asylum seekers in a third country.
- Punishing asylum seekers and refugees will do little to stop people smugglers.

## Conclusion

Amnesty International considers the Arrangement with Malaysia to be contrary to Australia's international obligations to provide protection to asylum seekers and refugees. Amnesty

<sup>10</sup> Phillips, J., Parliamentary Library Background Note, 14 January 2011, *Asylum seekers and refugees: what are the facts?*, available online at <http://www.aph.gov.au/library/pubs/bn/sp/AsylumFacts.pdf>, p. 6-7.

<sup>11</sup> UNHCR - Asylum Levels and Trends in Industrialised Countries 2010, Table 3, Page 9, available online at <http://www.unhcr.org/4d8c5b109.html>.



International believes the Government should abandon the Malaysia arrangement and pursue humane, durable solutions that ensure Australia fulfils its international obligations.

## **Recommendations**

- Amnesty International recommends that all asylum seekers arriving in Australia, in or outside of the migration zone, and regardless of mode of arrival, should be able to seek asylum.
- All asylum seekers and refugees should be processed on the Australian mainland.
- A regional protection framework should be developed that strengthens international conventions and establishes international standards for dealing with refugees.



**Attachment A**

**Australia's Arrangement with Malaysia in relation to asylum seekers**

**Terms of Reference<sup>12</sup>**

Australia's agreement with Malaysia in relation to asylum seekers, with particular reference to:

- (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,
  - (ii) pre-transfer arrangements, in particular, processes for assessing the vulnerability of asylum seekers,
  - (iii) mechanisms for appeal of removal decisions,
  - (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;
- (h) a comparison of this agreement with other policy alternatives for processing irregular maritime arrivals; and
- (i) any other related matters.

The Australia-Malaysia transfer arrangement is available online.

**See:** [Arrangement between the Government of Australia and the Government of Malaysia on transfer and resettlement](#)

<sup>12</sup> Australian Parliament, Senate Legal and Constitutional Affairs References Committee, *Australia's agreement with Malaysia in relation to asylum seekers: Terms of Reference*, available at [http://www.aph.gov.au/senate/committee/legcon\\_ctte/malaysia\\_agreement/tor.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/malaysia_agreement/tor.htm).