**Submission to the**
**Senate Standing Committee on Legal and Constitutional Affairs**

# Inquiry into the agreement between Australia and Malaysia on the transfer of asylum seekers to Malaysia

**14 September 2011**

## INTRODUCTION

The Coalition for Asylum Seekers Refugees and Detainees [CARAD] welcomes the opportunity to respond to this Inquiry and will touch briefly on some of the terms of reference. We would also welcome an opportunity to appear before the Committee.

CARAD is a Perth based non-government agency established eleven years ago to provide settlement and related services to refugees who held a Temporary Protection Visa. We have provided advocacy and services for over 5,000 refugees and asylum seekers and rely on a strong network of trained volunteers. Since 2000 CARAD volunteers have also visited Immigration Detention Centres [IDCs] to provide support, friendship and advocacy, so over that period CARAD has developed a good idea of the conditions in which asylum seekers are detained. CARAD now holds a sizeable archive of documents, letters and reports related to IDC's throughout Australia as well as Nauru.

The current functions of CARAD include:

- agency of last resort for persons who have applied for protection and hold a bridging visa
- home tuition for school-children and for parents [State Govt. funded and supported]
- a range of practical supports for people with a refugee background
- a volunteer visiting, advocacy and referral service for asylum seekers in IDCs
- a UNVFTV funded social worker to identify victims of torture in remote IDCs

## OPPOSITION TO THE AGREEMENT

This submission is now being finalised the day after a disappointing and cynical announcement has been made by the Government in order to circumvent the recent decisions of the High Court. If the legislation is passed, countries other than Malaysia [including Papua New Guinea] will no doubt be approached to accommodate the policies of this Government. However the Inquiry is addressed to concerns to do with Malaysia. Although opposing the transfer from Australia of asylum seekers to Malaysia, CARAD



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believes that in any case the refugee and humanitarian intake numbers can be raised and welcomes the extra 1000 people to be taken from Malaysia.

1. CARAD unequivocally supports the decisions of the High Court related to upholding the obligation of on-shore claims processing and the protection of minors.

2. CARAD opposes the agreement with Malaysia. It is in our view a direct breach of the United Nations Convention Relating to the Status of Refugees [the Convention] and an abrogation of Australian human rights standards.

3. CARAD has not seen or heard any evidence that Malaysia is able to, or will, honour the terms of the agreement to ensure that the 'transferees' rights will be protected while living there. The arrangements cause us a great deal of disquiet.

4. CARAD claims that a case can be made that the transfer of asylum seekers to Malaysia is punitive and breaches Article 31 [1] of the Refugee Convention to which we are a signatory.

> *"The Contracting States shall not impose penalties,[our emphasis] on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay."*

## TERMS OF REFERENCE

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

As signatories to the Refugee Convention, Australia is obliged to test the claims of all individuals who arrive on our shores and ask for protection. The High Court confirmed this. The ongoing and cynical nature of the declaration of parts of Australia that are excised for the purposes of the Migration Act reveals that legislative amendments will be used by Governments to circumvent the basis of that obligation.

A similar argument can be made that obligations accepted as a signatory to the Convention on the Rights of the Child can also be circumvented.

Australia is not upholding our international human rights obligations; further, it is actively undermining them with this proposal. As one of the few signatories to the Refugee Convention in the Region the plan to send people to Malaysia, along with proposed transfers to Manus Island, does not deter desperate people but it does tell neighbouring countries that the Refugee Convention can be bent to certain ends. One only has to look at the DIAC figures on irregular arrivals to see that punitive measures such as mandatory detention and temporary protection visas did not stop the boats in the past. Why should they this time?

It is appalling that for the small numbers –compared to global flows – of asylum seekers who ask Australia for protection we can respond by establishing a unique trade in vulnerable people by the exchange of 800 individuals deemed 'bad' for 4000 deemed to be 'good'.

This decision constitutes a trade in people. The smugglers want money; the government wants political power.

To cite the Universal Declaration of Human Rights, Article 14(1)

"Everyone has the right to seek and to enjoy in other countries asylum from persecution."

As acknowledged in the OAU Convention, the Cartagena Declaration and the 1967 UN Declaration on Territorial Asylum, **granting asylum is a humanitarian and apolitical act.** [our emphasis] The word "*asylum*" is not defined in international law; but it has become an umbrella term for the sum total of protection provided by a country to refugees on its territory. Asylum means, at the very least, basic protection - i.e., no forcible return (*refoulement*) to the frontiers of territories where the refugee's life or freedom would be threatened - for a temporary period, with the possibility of staying in the host country until a solution outside that country can be found."

**(c) the practical implementation of the agreement, including:**

**(i) oversight and monitoring,**

As there are 96,000 UNHCR accepted refugees and unknown numbers of asylum seekers in Malaysia, it is difficult to see how any oversight can be maintained for 800 individuals among them once they leave the centre to which they are to be taken. Apart from providing money to the Malaysian government to accept them, how can Australia be certain that there will be a transparent and fair system to monitor the progress of an individual claim? How can this Government establish procedures to ensure that people are not exploited at work, that they are not physically abused, that they have access to health care and that any children have access to a curriculum based education?

A member of the CARAD board who is also a member of the board of the Refugee Council recently travelled to Kuala Lumpur as part of a small delegation to assess how the needs of refugees are currently met.

Her comments about the UNHCR and the conclusions of the report show that it is highly unlikely that any effective monitoring and oversight can be established or maintained.

The UNHCR in KL is the third largest UN resettlement programme in the world and told us that they will continue to manage the 800 people transferred here as it does all others [in other words and before the signing, saying that there will not be any special consideration].

Approximately 10,000 refugees are resettled each year from Malaysia, most going to the USA. It was said that between 600 and 800 individuals daily come to the UNHCR office. Our observations were that just getting to an interview reinforces the powerlessness of refugees. They will not be seen without an appointment. There is no public transport so the only access is by taxi, the driver charging exorbitant fares. Then they wait, heat or rain, at a secured gate with a small bench, no rubbish bin, no water tap and no lavatory until a security guard lets them in.

Where they wait [overlooking the King's gardens] is dirty and squalid and does not meet any standard to protect the dignity of individuals or to offer them any respect.

The lengths of time to complete a Refugee Status Determination and the times between this, medical clearances and an offer of resettlement seems inordinately long.

Information from the UN to their clients about an expected end date or about the progress of the claim is not forthcoming [according to the refugees and advocates we met].

The implications of the length of time with no known end point seem to have a similar impact to those situations in Australian IDC where no end point is known viz. depression and other mental health consequences, self harm and suicide –and in Malaysia alcohol abuse.

People complained about what they say is poor interpreting and translating which they say can jeopardise or delay their claim.

We thought that at the least, more resources should be provided by Australia to the UNHCR.

The full report to CARAD members about the conditions for refugees who are currently there can be accessed at
http://www.carad.org.au/images/stories/RCOA_visit_to_Malaysia_11072011.pdf

**ii) pre-transfer arrangements, in particular, processes for assessing the vulnerability of asylum seekers,**

According to media reports, decisions about vulnerability will be made by DIAC officers and not by personnel with professional credentials as to these assessments. Not only unaccompanied minors, but children and their families, lone women, survivors of torture, people with chronic health problems and others are vulnerable. Immigration officials have no capacity to make these decisions that, if to be done, are the province of medical and child protection professionals.

**(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.**

The Minister for Immigration who is responsible for the detention, transfer and decisions as to refugee status of unaccompanied minors cannot uphold his statutory duties as guardian of unaccompanied minors. It is unacceptable and illogical because the two roles are in conflict and incompatible. How can the Minster responsible fro the detention of children also be their statutory protector?

If transfers of unaccompanied minors are contemplated then either another Minister should have guardianship, a Federal Commissioner for Children should be appointed, or one of the State Commissioners should be responsible for decisions about the appropriate protection of these children.

It is clear to CARAD and to refugee advocates generally that the practical arrangements for the men, women and children sent to Malaysia have not been thought through. The response is political, and not a demonstration of considered leadership to leading the region towards a satisfactory and much needed regional response to refugee flows throughout SE Asia and to compliance with the agreed Bali Process.

Although information from the Australian Government states that the 800 to be returned will have work rights it is now the case that Malaysia deals very harshly with workers and undocumented workers. An amnesty was implemented to start from early August for 2million undocumented workers; however, it is our understanding that the amnesty will not apply to refugees.

Any employment that refugees do have is usually exploitative with low pay,poor conditions, and is liable to being raided. Some people work for no wage but have shared accommodation and sometimes food provided, especially if working in restaurants.

A recent media release from a human rights agency in Malaysia [attachment 1] comments on the way in which recognised refugees were told they had to register as workers.

> According to information received from refugees who had registered, they received a slips called *"Slip Pendaftaran PATI"* which had another statement: " Tujuan: Pulang Ke Negara Asal" (Purpose: Return to Home Country). This return slip has created a host of uncertainties and fears among the refugees that they could now be deported to their country of origin despite the fact they are recognized as refugees by UNHCR.

**(d) the costs associated with the agreement**;

There is currently no cost to Malaysia for refugees as 90% are self funded; the other 10% of services and funding is provided through UNHCR, donations [e.g. Taiwan, the Czech Republic, Buddhists, .Baptists and Catholics, and NGOs].

The costs to Australia will be astronomical. In the end it must be less costly to Australia to accept asylum seekers and process their claims here.

**(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**

As argued above, it is difficult to believe that any adequate monitoring can be provided by the Australian Government to ensure that the rights of the 800 people sent to Malaysia can be protected and their needs met.

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

In the media release below it is pointed out that 11 ethnic Uighers found by UNHCR to need protection, were re-fouled back to China from Malaysia. It is assumed that they practise Islam, and so the discussion of assurances that Muslims in Malaysia will be safe do not appear to be founded. As a non signatory to the Refugee Convention, Malaysia is not bound by any principles accepted by signatories to the Convention; however, non refoulement is a principle of international customary law.

# Press Statement.

**Tenaganita**
**August 24, 2011**

## INCREASE PROTECTION OF REFUGEES; NOT IRRELEVANT, POORLY PLANNED AMNESTY PROGRAM

Refugees with UNHCR cards were informed through their organizations, two days ago that they needed to get registered into the biometric system at Putrajaya Immigration office. Thousands of people – elderly, ill, young children, mothers with babies stood for hours in a cramped place, waited only to be told that they had to come the next day as the Immigration department could only register up to 2500 persons a day.

This registration exercise further reinforces how inefficient, and unplanned the process of the amnesty program has been since it began in July. The sporadic decision made without clear information provided to refugee communities has created anxieties with the refugee community on how the 6P amnesty program will be used and implemented for them.

The amnesty program was originally intended for the undocumented workers. The Home Ministry, then suddenly decided that it would also be for documented workers without any clear explanation. Now, overnight refugees are told that they had to get registered without a clear deadline.

According to information received from refugees who had registered, they received a slips called *"Slip Pendaftaran PATI"* which had another statement: " Tujuan: Pulang Ke Negara Asal" (Purpose: Return to Home Country). This return slip has created a host of uncertainties and fears among the refugees that they could now be deported to their country of origin despite the fact they are recognized as refugees by UNHCR.

This situation and development comes a day after Malaysia was condemned for refouling 11 Uighurs back to China, who is known to be tortured and persecuted for being members of the ethnic Uighur group. This statement in the return slip is a clear violation of the principle of non-refoulement in Article 33 (1) of the 1951 Refugee Convention which states that: "No Contracting State shall expel or return ('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."

We are deeply concerned that there is also no clear direction from UNHCR as to why that "Tujuan:" is on the slip. The UNHCR when contacted this morning said they are still trying to verify this statement.

This whole registration of refugees under the 6P program should immediately be halted. The 6P program does not relate to refugees. They are NOT migrant workers and thus should be treated under a different framework. One dimension of the 6P program is deportation which cannot be applied to refugees. The lack of information and lack of consultation on the process of how the registration will impact on refugees has only resulted in increasing the anxiety and stress on the refugee population. Even UNHCR as the lead agency, is unclear and not able to provide proper information to the refugee community.

The organization is equally concerned with the large number of persons of concern, about 20,000 – 30,000 who are awaiting registration from UNHCR. The absence of a UNHCR card does not mean their lives in their home country are in any less of a threat, nor are they any less of a refugee. They in fact have a heightened level of vulnerability because they've not been included in UNHCR's system yet and neither are they undocumented workers. Will this 6P exercise exacerbate their vulnerabilities and increase their risk to deportation and consequent persecution?

The Home Ministry must be more responsible and make clear decisions that are transparent and accountable. However, this whole amnesty program has been riddled with questions and uncertainties. The Ministry has only given responses that reflect arrogance of power and not good governance. The same sporadic decisions are now reflected in the registration of refugees with no consultation, planning and processes set in place.

The registration exercise under the 6P program must be discontinued. The Home Ministry must make public and clarify the objectives, procedures and policy for the registration of refugees and

how will it impact on their continued stay in the country; what will be the new opportunities and benefits for the refugee community; and how will it impact on their resettlement process. If there is any form of registration by the government, it must be to increase the protection of the rights of refugees.

— ENDS —