RANN submission to SSCLCA re "Malaysian Agreement"

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Overview

The Refugee Action Network Newcastle (RANN) consists citizens concerned that Australia's treatment of asylum seekers serves the political ends of the major parties rather than the long term interests of Australia, and that it is unfair, cruel, needlessly expensive and fundamentally in breach of various international treaties Australia is a signatory to.

RANN welcomes the High Court ruling that the Malaysia solution is unlawful, however we offer this submission in the belief that the government will probably challenge or else seek to circumvent the ruling.

It is a puzzle as to why this inquiry is being held ***after*** the Agreement has been signed, rather than before.

The submission will address the Terms of Reference, but not in the order they were originally given.

Additional material post- High Court ruling against "Malaysia solution"

RANN urges both major parties to respect the ruling of the High Court. We are aghast that the government is seeking to introduce legislation to enable the transfer of irregular maritime arrivals to third countries for the processing of their asylum claims.

It is particularly disgraceful in our opinion that the government seeks to amend the Immigration (Guardianship of Children) Act to enable it to transfer minors to third countries.

These amendments are not motivated by a genuine concern to determine the border protection policy that it believes is in the best interests of the nation, but by shabby electoral politics.

RANN recommends the Inquiry take notice of the letter ACOSS wrote to all Federal MPs on Sept 11, http://acoss.org.au/images/uploads/ACOSS%20writes%20to%20MPs%20-%2011%20September%202011.pdf

(i) any other related matters.

Clause 16 states the Agreement is "not legally binding on the Participants". In that case, is it an Agreement at all?

The reference to "reasonably practicable" to resolving differences in Clause 18 is extraordinarily vague for something which is so significant. One wouldn't buy a car under such terms, let alone trade in human lives.

Malaysia has already violated the Agreement since it has been signed, by limiting agreed protections to two years, as well as specifying that those protections will be lost once the person is registered as a refugee by the United Nations.

This contradicts Clause 10.3 (a) that provides Transferees a "lawful presence" in Malaysia whilst they wait for resettlement. The UNHCR has previously stated that the right of lawful stay in Malaysia is one of five safeguards necessary to protect the rights of asylum seekers.

Who will pay for the security assessments of the 800?

Will security assessments acceptable to ASIO be completed prior to the arrival of the 4000 asylum seekers Australia has said it will take? Or will they have to be done again? So will these 4000 go straight into the community, or will they too be subject to detention?

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

The concept, that by forcing 800 asylum seekers away from Australia and into Malaysia will "break the people-smugglers' business model" is a pretext. RANN believes both major parties are creating an issue, "border control", to distract Australians so as to avoide being confronted on key issues, such as climate change.

The forcible transportation of asylum seekers to another country purely on the basis of their mode of arrival violates our obligations under the UNHCR refugee convention.

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

The High Court ruling may not be concerned with human rights standards, but certainly is definitive in finding against the Arrangement. The UNHCR says it is the sole assessor of refugees in Malaysia, and without legislative or administrative frameworks, asylum seekers have few if any rights in the country. Therefore it is impossible for the Agreement to uphold human rights standards at all, let alone under Australian law.

(d) the costs associated with the agreement.

Clause 9 is a blank cheque. There are no limits on what might be spent and in what way it might be spent. It does not specify how much over how long (see below for an estimate). It is hard to regard items 1(e) and 9(f) as financially responsible. Is 9(f) intended to allow the government to use Malaysia as an intermediary in indirectly bribing other nations to assume Australia's responsibility?

(h) a comparison of this agreement with other policy alternatives for processing irregular maritime arrivals;

There have been numerous submissions explaining the many benefits and lower costs of housing asylum seekers in the Australian community compared to offshore processing and mandatory detention.

Information from the Commonwealth library estimates the Agreement will $292 million over four years. That's a lot of money to pay to keep 800 people from directly reaching Australia- $365000 per asylum seeker.

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

i. oversight and monitoring,

This seems to rely on Clause 9.2, Australian Financial management procedures.
Is this legal under Malaysian law? Are processes remotely compatable?

The Operational Guidelines give this function to a Joint Committee with a membership that does not refer to Australian Financial management procedures. The terms of reference for it are extensive, and it is hard to see how one committee can span all of them. Just how the appropriate expenditure of funding will be determined or prioritised is not mentioned.

RANN does not find the proposed oversight and monitoring arrangements satisfactory.

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

There are no specific details in the Agreement on processes for assessing the vulnerability. Clause 8.2 states special procedures "will be developed".

RANN regards this as inadequate. A firm framework should be in place prior to the development of procedures, that guides the development of procedures.

In the Guidelines, items 3.4 and 3.5 contradict each other with respect to the assessment vulnerability:

> 3.4 states IOM will conduct an initial health assessment to guide medical support, and that medical care will be "basic", but
> 3.5 states IOM's initial health assessment will identify vulnerable cases at the outset, with referral to UNHCR and IOM.

In any case, UNHCR and IOM services- - from what evidence we have seen of conditions for asylum seekers in Malayasia- are virtually non-existent. There is no provision made for ***establishing*** such services.

iii. mechanisms for appeal of removal decisions

and

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

Clause 10.2(c) states Malaysia will discuss removal directly with the UNHCR, however Clause 11.2 states Australia will be involved and make alternative arrangements. This is purely in order for Malaysia to respect the principle of non-refoulement for Transferees.

RANN considers that it is unlikely that this nebulous "Agreement" would outweigh the standard processes and procedures as well as the law in Malaysia on this point.

It is Australia's responsibility to uphold the principle of non-refoulement, therefore if the issue of forced removal arises, it should be assessed on Australian territory first.

iv. access to independent legal advice and advocacy.

As implied above, it is not credible that Malaysia will create a legal system that is consistent with Australia's in order for Australia to vicariously uphold its responsibilities, and as well as that provide asylum seekers with access to advice and advocacy services. What organisation in Malaysia is capable of providing this? Or will it be outsourced to an Australia firm? Who?

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;

Neither document gives any focussed consideration to minors. The Minister is not exercising any duty of care when minors are subsumed under the definition of "transferee" and are supposed to be as per guideline 3.2 :self reliant.

The main attention given to minors is delegated to the non-existing UNHCR services for those minors who are identified as being "vulnerable" through IOM assessment (guideline 3.5(a)). That cannot be considered "care".

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

RANN recommends the possibility of having the two signatories from both governments charged with people-trafficking under international law.

(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;

There is no evidence that there are any services remotely adequate in these areas operating in Malaysia, and no indication of any firm arrangements that would guarantee they would be. Why should the existing "arrangements" of the UNHCR and IOM be changed just for 800 people for two years, when there have been 90,000 asylum seekers on the run, oppressed and beaten, for so many years there?

Conclusion

RANN recommends the Malaysia solution – and any similar arrangements involving other countries- be dropped.

RANN recommends all offshore processing cease, and asylum seekers be housed in the Australian community whilst they wait for their assessment and residency status to be finalised.