Australian Human Rights Commission

everyone, everywhere, everyday

Inquiry into Australia's agreement with Malaysia in relation to asylum seekers

Australian Human Rights Commission's response to questions on notice

September 2011

Australian Human Rights Commission
ABN 47 996 232 602

Level 3
175 Pitt Street
Sydney NSW 2000

GPO Box 5218
Sydney NSW 2001

General enquiries 1300 369 711
Complaints infoline 1300 656 419
TTY 1800 620 241
www.humanrights.gov.au

On 27 September 2011, four questions on notice were put to the Australian Human Rights Commission by the Senate Legal and Constitutional Affairs References Committee as part of its inquiry into Australia's agreement with Malaysia in relation to asylum seekers. The Commission's answers to those questions are set out below.

1. **I refer to clause 16 of the Malaysia–Australia Transfer Arrangement which states: "*This Arrangement represents a record of the Participants' intentions and political commitments but it is not legally binding on the Participants*".**

   What are the implications of the Transfer Arrangement not being legally binding on Malaysia in guaranteeing that the human rights of asylum seekers transferred under this agreement are actually protected?

The arrangement between the Government of Australia and the Government of Malaysia on transfer and resettlement (the arrangement) states that 'it is not legally binding on the Participants'.[1] The effect of this statement is that there is no legal requirement on the Malaysian Government to safeguard the rights of people transferred under the arrangement in the ways that it has undertaken to. There would also appear to be no effective, enforceable remedy for people transferred to Malaysia in the event that the rights afforded to them under the arrangement are breached.

The Commission notes the Australian Government's position that it is not necessary for two sovereign nations to enter into a formal, binding treaty in order to come to an agreement which they will respect.[2] The Commission is not suggesting any intention on the part of the Malaysian Government to deliberately contravene the arrangement. However, in the Commission's view, recourse to a court or other competent, independent and impartial authority is vital for the protection of a person's rights.

The High Court of Australia's decision in *Plaintiff M70/2011 and Plaintiff M106/2011 v Minister for Immigration and Citizenship*[3] to invalidate the arrangement was based on the requirement that the criteria set out in s 198A(3)(a)(i)-(iv) of the *Migration Act 1958* (Cth) must be provided by a third-country to which Australia intends to transfer asylum seekers as a matter of objective fact[4] and as a matter of law.[5] The absence of a legally binding arrangement between Australia and Malaysia was one factor which contributed to the Minister's jurisdictional error in concluding that Malaysia provides the access or protections referred to in s 198A(3)(a)(i)-(iii).[6]

2. **Has the Human Rights Commission sought legal advice in relation to the Transfer Agreement? If so, what was the nature of the advice sought? What was the advice received?**

The Commission did not seek external legal advice on the arrangement. However, the Commission briefed counsel to appear for it in its role as intervener before the High Court in *Plaintiff M106/2011 v Minister for Immigration and Citizenship*. The Commission's submissions to the High Court in this matter can be accessed from the High Court's website.[7]

3. **I refer to the statement at clause 6.1 of the Agreement which states that "The arrangement creates an increased and ongoing risk of breaches of Australia's international non-refoulment obligations. Upon what basis do**

you make this statement given that the government has stated on many occasions that the Agreement precludes the possibility of non-refoulment?

Paragraph 20 of the Commission's submission states:

> The arrangement creates an increased and ongoing risk of breaches of Australia's international *non-refoulement* obligations.

As stated in paragraph 22 of the Commission's submission, this is because the arrangement creates a situation in which Australia's non-refoulement obligations are 'passed on' to Malaysia. In other words, Australia places itself in a position in which it relies on Malaysia to comply with the *non-refoulement* obligations that are in fact owed to asylum seekers by Australia.

The Commission is not convinced that there are adequate safeguards to ensure that these obligations will be respected in Malaysia. Malaysia is not a signatory to the *Convention Relating to the Status of Refugees* (Refugee Convention),[8] *International Covenant on Civil and Political Rights*[9] or *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,[10] and consequently is not bound by the principle of *non-refoulement* under these treaties. Although the Government of Malaysia has agreed to respect the principle of *non-refoulement* in the arrangement, the arrangement is merely 'a record of the Participants' intentions and political commitments' and is not legally binding.[11] The Commission believes that the absence of a legally binding requirement to respect the principle of *non-refoulement* increases the risk that a person will be returned to his or her country of origin in breach of Australia's international obligations.

4. In the Commission's opinion does the UNHCR Convention provide a basic level of protection for people who are subject to it? What do you believe are the key protections of the UNHCR convention? Are these protections enshrined in the Malaysian Agreement?

The Refugee Convention provides a basic level of protection to refugees and asylum seekers in countries that have signed and ratified it.

The key relevant principle of the Refugee Convention is *non-refoulement.* Article 33(1) of the Refugee Convention sets out the principle of *non-refoulement*, stating:

> 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.

As noted in the Commission's answer to Question 3 above, Malaysia is not a signatory to the Refugee Convention and the Commission believes that there is a risk that people transferred to Malaysia may be returned to their countries of origin in breach of these obligations.

Countries that have signed and ratified the Refugee Convention are obliged to afford a range of other rights to refugees in their territory, beyond the principle of *non-refoulement*. For example, the Refugee Convention requires states to apply its provisions to refugees without discrimination as to race, religion or country of origin.[12]

The Refugee Convention also obliges states to protect the rights of refugees in their territory in relation to freedom of religion, access to courts of law, wage-earning employment, public primary education and freedom of movement.[13]

The Commission's concerns with regard to some of these rights are contained in section 8.3 of its submission.

---

[1] *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement*, clause 16. At http://www.minister.immi.gov.au/media/media-releases/_pdf/20110725-arrangement-malaysia-aust.pdf (viewed 28 September 2011).
[2] See, for example, the Hon Chris Bowen MP, Minister for Immigration and Citizenship, Interview with Fran Kelly, ABC Radio National Breakfast (20 September 2011). At http://www.chrisbowen.net/media-centre/allNews.do?newsId=4975 (viewed 29 September 2011).
[3] *Plaintiff M70/2011 and Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011). At http://www.austlii.edu.au/au/cases/cth/HCA/2011/32.html (viewed 28 September 2011).
[4] Section 198A(3)(a) of the *Migration Act 1958* (Cth) provides:

> (3) The Minister may:
>
> (a) declare in writing that a specified country:
>
> (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
>
> (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and
>
> (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
>
> (iv) meets relevant human rights standards in providing that protection.

[5] *Plaintiff M70/2011 and Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011), para 116 (Gummow, Hayne, Crennan and Bell JJ).
[6] Above, para 135.
[7] See http://www.hcourt.gov.au/assets/cases/m70-2011/M106-2011_HRC.pdf (viewed 28 September 2011).
[8] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) and *Protocol Relating to the Status of Refugees*, 606 UNTS 267 (entered into force 4 October 1967). Both at http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf (viewed 28 September 2011).
[9] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). At http://www2.ohchr.org/english/law/ccpr.htm (viewed 30 August 2011).
[10] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987). At http://www2.ohchr.org/english/law/cat.htm (viewed 29 September 2011).
[11] *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement*, note 1, clauses 10(2)(a) and 16.
[12] *Convention Relating to the Status of Refugees*, note 8, art 3.
[13] Above, arts 4, 16, 17, 22, 26.