

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
AUSTRALIAN HUMAN RIGHTS COMMISSION

Question No. 3

Senator Brandis asked the following question at the hearing on 18 October 2011:

Senator BRANDIS: Did you write to the Attorney, or any other minister for that matter, or did you have a meeting with the Attorney or any other minister as the Australian Human Rights Commission and say, 'Well, it is our view that the policy of your government is not a rights-respecting policy'?

Ms Branson: I cannot identify a meeting with the Attorney. Normally on an issue of that kind—although the Attorney would have been alerted if I was speaking to another minister—I would have sought to speak with the minister for immigration. In this case I did not meet with him personally, as I have indicated. I think it likely that I wrote to him but certainly we made public statements and I think issued press releases to that effect.

Senator BRANDIS: Could you please take this on notice. What I would like to see is the correspondence. You said you wrote to him.

Ms Branson: I said I think I probably did.

Senator BRANDIS: Can you produce to the committee please the correspondence from the Human Rights Commission to either the Attorney or to the minister for immigration in which the Human Rights Commission's concerns about the so-called Malaysia solution were expressed to the government?

Ms Branson: I will take that on notice.

Senator BRANDIS: Thank you.

The answer to the honourable senator's question is as follows:

The President of the Australian Human Rights Commission, Catherine Branson QC, wrote to the Minister for Immigration and Citizenship to express concern about third country transfer arrangements on 26 August 2011. A copy of the letter is attached.

The Commission also issued a number of media statements regarding third-country processing arrangements:

Government should not revive Malaysian agreement (12 September 2011): at
www.humanrights.gov.au/about/media/media_releases/2011/81_11.html

Commission warns against revisiting aspects of 'Pacific Solution' (22 August 2011): at
www.humanrights.gov.au/about/media/media_releases/2011/75_11.html

Sending asylum seekers to Malaysia is not the answer to addressing people smuggling (25 July 2011): at
www.humanrights.gov.au/about/media/media_releases/2011/61_11.html



**Australian
Human Rights
Commission**

everyone, everywhere, everyday

**President
Human Rights Commissioner
The Hon Catherine Branson QC**

26 August 2011

The Hon Chris Bowen MP
Minister for Immigration and Citizenship
PO Box 25
BELCONNEN ACT 2616

By email: minister@immi.gov.au

Dear Minister

Concerns regarding third country transfer arrangements

I am writing to express my concerns regarding the human rights implications of the third country transfer arrangements that have recently been agreed between the Australian Government and the governments of Malaysia and Papua New Guinea respectively, as well as the current conditions of detention for people subject to third country transfer.

I am also seriously troubled by two matters that affect the human rights of some people in immigration detention in Australia: the situation of people who have received adverse security assessments from ASIO; and the situation of people who are stateless. I will address these issues in a separate letter also under today's date.

Conditions of detention for people subject to third country transfer

I have concerns about the conditions of detention on Christmas Island for people subject to third country transfer.

First, I am concerned that this group, which includes children, is being subjected to mandatory immigration detention despite the fact that this is not required in excised offshore places under the *Migration Act 1958* (Cth). Further, the group is facing an indefinite period in detention, with no certainty as to their fate. These circumstances could lead to breaches of human rights under both the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention on the Rights of the Child* (CRC).

Second, if this group is to be detained, I am concerned that some among the group are not detained in the least restrictive environment appropriate to their circumstances, as required under the Australian Government's *New Directions in Detention* policy. It is of particular concern that families with children and unaccompanied minors are detained in the secure Bravo compound at the Phosphate Hill immigration detention facility rather than in the Construction Camp, a less restrictive facility which the Commission understands is empty. I also understand

that unaccompanied minors are detained in the Lilac compound at North-West Point Immigration Detention Centre.

In the Commission's view, the classification of the Bravo and Lilac compounds as Alternative Places of Detention is misleading and inappropriate. Both look and feel like Immigration Detention Centres, and in practice have been operated as such for the past year or two. In the Commission's view, the detention of families and unaccompanied minors in these environments undermines the Australian Government's commitment that children and their family members will not be detained in Immigration Detention Centres. I urge you to move the families and unaccompanied minors – along with any other vulnerable individuals – in this group to a more appropriate location.

Of further concern is that, as yet, educational opportunities have not been made available to children among this group. I encourage you to ensure that these are provided as soon as possible, preferably outside the detention environment.

I am particularly concerned that people in detention on Christmas Island subject to third country transfer have very limited access to communication facilities and news from the outside world. In my understanding, they are not permitted to use the internet or to watch television. Further, apart from the facilitation of an 'alive' call on arrival, they have only been provided with access to a telephone if they make a request to speak with a specific legal representative or with Legal Aid. I urge you to ensure that these restrictions are lifted, and that people subject to third country transfer are provided with unfettered access to telephones and internet facilities.

In addition, the Commission has been informed by DIAC that people in this group have not been provided with contact details for independent oversight bodies such as the Commission or the Commonwealth Ombudsman. This is of particular concern to me as it limits their capacity to exercise an entitlement under Australian law. I urge you to rectify this as soon as possible so that all people subject to third country transfer are provided with contact details for independent oversight bodies and are able to communicate with these bodies freely and confidentially should they wish to do so.

Arrangement with Malaysia

I welcome the Australian Government's agreement to accept an additional 4000 refugees from Malaysia over the next four years, and I commend you for making this commitment.

However, I am concerned about the transfer to third countries of asylum seekers who arrive in Australia by boat. Arguably, this penalises asylum seekers because of their mode of arrival in Australia, in breach of article 31 of the *Convention Relating to the Status of Refugees* (Refugee Convention), as well as the right to equality and non-discrimination protected by article 26 of the ICCPR. The following paragraphs should be read subject to this over-arching concern.

You may be aware that I have publicly raised the Commission's concerns about the human rights implications of the arrangement with Malaysia. You are also no doubt aware that the Commission was granted leave to intervene in the current High Court of Australia case regarding the Malaysia arrangement on issues relating to your

obligations as legal guardian of unaccompanied minors subject to third country transfer.

I am worried by the potential impacts of the Malaysia arrangement on the human rights of those transferred. My primary concern is that the transfer of asylum seekers to a country that is not a signatory to the Refugee Convention increases the risk that they may be returned to a situation of persecution or danger in their country of origin. I recognise that the arrangement specifies that the Government of Malaysia will 'respect the principle of *non-refoulement*'. However, as the arrangement is non-binding and non-enforceable there remains a risk that the principle of *non-refoulement* will be breached.

In addition, I have concerns regarding pre-transfer assessment procedures. I am particularly troubled that transferring asylum seekers to Malaysia could potentially lead to breaches of Australia's *non-refoulement* obligations under the ICCPR, the CRC and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. I urge you to ensure that a thorough assessment of these obligations is conducted for each individual subject to third country transfer, and that transfer is not proceeded with in cases where Australia's obligations may be breached. I am also concerned about the adequacy of pre-transfer vulnerability assessments and I urge you to ensure that vulnerable individuals including survivors of torture and trauma, families with children and unaccompanied minors are not transferred to Malaysia.

In my view, it is important that there be a level of transparency surrounding the pre-transfer assessment procedures and pre-transfer vulnerability assessments. In that context, I reiterate my request for a copy of the pre-transfer assessment guidelines – a request that I made of your office via Mr Andrew Metcalfe on 4 August 2011.

As you will be aware, the Commission has particular concerns about the situation of unaccompanied minors and about the execution of your guardianship responsibilities with respect to these minors. The CRC requires that the best interests of the child be the basic concern of a child's parent or legal guardian. I urge you to ensure that a proper analysis of the best interests of each unaccompanied minor is undertaken and that their best interests are the basic concern in any decision made in relation to their individual situation.

The treatment in Malaysia of those who have been transferred is also of concern to me. Specifically, I am concerned about how a non-binding and non-enforceable agreement will operate in a country that has a very poor record for the treatment of asylum seekers. I am worried that, in some cases, the standard of services to be provided may be inadequate to meet international human rights standards. For example, children will be permitted to access private education arrangements only if they are available and if not, children will be provided access to informal educational arrangements. These arrangements may not fulfil children's right to education under the CRC.

Memorandum of Understanding with Papua New Guinea

I also have serious concerns about the recently announced Memorandum of Understanding (MOU) with Papua New Guinea.

While Papua New Guinea is a signatory to the Refugee Convention, I am concerned that the MOU contains no detail about how refugee claims will be assessed or by whom; whether asylum seekers will be provided with access to legal or migration assistance with their refugee claims; whether they will have access to independent merits review of decisions about their refugee status; what resettlement options will be made available to those recognised as refugees; and how long those resettlement options might take to implement.

In addition, I hold significant concerns about the conditions for those transferred to the 'assessment centre' on Manus Island. In particular, I am troubled by the potential for these people to be subjected to prolonged and indefinite detention in circumstances where independent or judicial oversight of their detention is not available, and in a location that may not be able to support the provision of appropriate services such as health and mental health care and torture and trauma counselling. These factors could result in significant impacts on the health, including on the mental health, of people transferred to Manus Island. As you are aware, the prolonged and indefinite detention of asylum seekers on Manus Island under the former government's 'Pacific Solution' had significant detrimental impacts on the mental health of some of those detained.

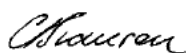
Given the above, I am particularly concerned about the circumstances of vulnerable individuals subject to transfer to Papua New Guinea, including survivors of torture and trauma, families with children and unaccompanied minors. I urge you to ensure that adequate pre-transfer vulnerability assessment procedures are put in place, and that vulnerable individuals are not transferred.

Finally, my comments above in relation to unaccompanied minors subject to transfer to Malaysia apply equally in the case of Papua New Guinea. I urge you to ensure that a proper analysis of the best interests of each unaccompanied minor is undertaken and that their best interests are the basic concern in any decision made in relation to their individual situation.

Given the serious nature of these concerns regarding third country transfer, the Commission remains of the view that all claims for asylum that are made in Australia should be processed in Australia, on the mainland, under the provisions of the *Migration Act 1958* (Cth).

Thank you for your consideration of the matters that I have raised in this letter. I look forward to your response, and would be happy to discuss any of these matters in person should you wish to do so.

Yours sincerely



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