



**The National Ethnic and Multicultural
Broadcasters' Council (NEMBC)**

NEMBC Submission to the

Standing Committee on Legal and Constitutional Affairs

**“Public Inquiry Submission regarding Australia’s Agreement
with Malaysia in relation to asylum seekers.”**

2011

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The National Ethnic and Multicultural Broadcasters' Council (NEMBC) welcomes the opportunity to respond to the Legal and Constitutional Affairs Committee's request for a submission regarding Australia's agreement with Malaysia in relation to asylum seekers.

NEMBC's specific interest in submitting this response relates to our organisation's work with multicultural communities through a range of programs aimed at maintaining diversity in community broadcasting. NEMBC is well placed to respond to such an inquiry given the family connections communities we work with may have with asylum seekers affected under this agreement. As a peak body, NEMBC is motivated to provide a statement on behalf of our representatives which reflects the shared concern expressed by our members as to the human rights and legal protections potentially at risk under the agreement.

About our Organisation

NEMBC is a national peak body that advocates for multiculturalism and supports multilingual community broadcasting around Australia.

The role of the NEMBC is:

- To advocate for and support ethnic and multicultural community broadcasting
- To be a voice for multiculturalism in Australia
- To maintain and connect people with their ancestry, language and culture
- To counter racism in Australian society
- To contribute to media diversity in Australia
- To operate with integrity and in a manner that is ethical, professional, responsive and self-reliant

NEMBC would like to firstly acknowledge the challenges the Australian Government is facing in developing a sustainable and principled approach to providing protection to asylum seekers arriving on our shores and to commend the government for the increase in Refugee and Humanitarian Intake per annum to 14, 750. However, NEMBC is conscious of the need to ensure the non-government sector's critical voice is heard when developing regional responses to asylum seeker migration. NEMBC supports the view that bi-partisan support for a durable solution to asylum seeker movement in the region is required in order to reduce the politicisation of the issue and positively influence public opinion.

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

Australia's international obligations to asylum seekers is explicitly articulated in the 1951 Convention relating to the status of refugees (the Refugee Convention), ratified by the Menzies Government in 1954.¹ Although a narrow reading of our obligations can be applied resulting in an interpretation of restricted obligations to those fleeing persecution, the UNHCR and the civil society organisations internationally recognise a consistent meaning held within this convention.

As Counsel for the plaintiff in the current High Court case suggests, Section 31 of the Refugee Convention expresses a legal obligation of ratified nations towards asylum seekers to:

*"not impose penalties, 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 to the authorities and show good cause for their illegal entry or presence. "*²

¹ 1951 Convention Relating to the Status of Refugees , available at <http://www.unhcr.org/3b66c2aa10.html>

² Ibid, Section 31.

The High Court in 2002 chose to reiterate asylum seekers lawful entitlement: “*under conventional international law since the early 1950s (which has been enacted into Australian law) to claim refugee status as persons who are ‘unlawfully’ in the country in which the asylum application is made.*”³”

It appears that the *Migration Act (1958)*⁴ attempts to limit the applicability of our international obligations under the Refugee Convention implying in sections that protection under international law does not always result in protection under state law.⁵ Yet NEMBC sees the responsibilities of Australia towards asylum seekers as internationally recognised.

The transferal of asylum seekers to Malaysia has the potential of penalising those fleeing persecution, contrary to Section 31, and deflecting our nation’s international responsibilities onto a third party state. Malaysia is not a signatory to the Refugee Convention and as such is not bound to provide legal status to persons seeking asylum or to provide any protection to such individuals. As Counsel for the plaintiff in the current High Court case states, while Malaysia does cooperate with the UNHCR by allowing asylum seekers to remain in the country whilst UNHCR processes applicants, there has been a history of forced deportation pre 2009.⁶ Although close to 100,000 applicants are registered the UNHCR remains concerned about a large number who are not, indicating the perilous environment for many asylum seekers in Malaysia.⁷

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

Again, under our international obligations to the Refugee Convention, Australia has an obligation to ensure the protection of those fleeing persecution from any breach of their human rights. The right to non-discriminatory and non-penalising treatment of those seeking refugee status is expressed in the convention.⁸ Australia’s transferal of arrivals to Malaysia bypasses our provision of these rights and placing the burden on Malaysia to either afford asylum seekers such basic rights or not. Malaysia has limited obligations to provide arrivals, or transferees, with any basic human rights protections given its non-signatory status to the Convention.

Australia as a signatory to the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, also agrees to uphold the freedoms of individuals ‘within its territory and subject to its jurisdiction’, of which it appears asylum seekers belong once they arrive on Australian shores.⁹ Affording arrivals basic human rights becomes a national responsibility which should not be eschewed through individuals’ transferral to a third state.

The reports of Amnesty International suggest the forced return of refugees to their home-land from Malaysia has been high prior to 2009.¹⁰ In addition to this deprivation of the right to access a process of determination of refugee status, the instances of canning and corporal punishment in Malaysia of refugees is well documented. The right to employment, health care, interpreters and education is also significantly restricted in Malaysia currently, as per the Coalition for Asylum Seekers, Refugees and Detainees’ (CARAD)

³ A Masri v Minister for Immigration and Multicultural and Indigenous Affairs 192 ALR 609, 623. As quoted in the Centre for Policy Development’s report, A New Approach. Breaking the Stalemate on Refugees and Asylum Seekers.

⁴ *The Migration Act (1958)*, available at: <http://www.comlaw.gov.au/Details/C2011C00595>

⁵ Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCATrans 224, Justice Kiefel, 1865.

⁶ Amnesty International (2010). Abused and Abandoned: Refugees Denied Rights in Malaysia, p. 14. Available at <http://www.amnesty.org/en/library/asset/ASA28/010/2010/en/2791c659-7e4d-4922-87e0-940faf54b92c/asa280102010en.pdf>

⁷ Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCATrans 224, 1570.

⁸ Article 33, 1951 Convention Relating to the Status of Refugees, available at <http://www.unhcr.org/3b66c2aa10.html>

⁹ Article 2, International Covenant on Civil and Political Rights, available at <http://www.unhcr.org/refworld/pdfid/3ae6b3aa0.pdf>

¹⁰ Above, 6.

recent assessment.¹¹ Amnesty International also reports that the right of those claiming refugee statuses not to be subject to arbitrary arrest or detention is being violated by Malaysian authorities.¹² For Australia to disregard such human rights breach under the agreement impacts our nation's high international standing as a democratic state which upholds social justice principals.

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

(i) oversight and monitoring.

As per Refugee Council of Australia's (RCOA) sentiment, NEMBC supports the view that if such an arrangement were to be imposed, it would be essential for Australia to implement a rigorous monitoring process and capacity building process for Malaysian and UNHCR officials overseeing the conditions of asylum seekers. As RCOA has voiced, many states in the Asian region do not have the capacity to implement an agreement such as this with full protection provided to asylum seekers. As such the burden lies with UNHCR to ensure asylum seekers are afforded access to a process of assessment of their claim for refugee status. With over 90,000 refugees in Malaysia this burden is significant and to add to it through the suggestion that the 800 asylum seekers proposed to be transferred from Australia will be afforded more rigorous standards than others, risks creating a two tiered system.¹³

NEMBC acknowledges that there is potential for Malaysia to significantly improve the refugee determination process and the conditions in which refugees are living through this agreement. As CARAD notes as the most positive potential outcome of this agreement, conditions for all refugees in Malaysia could improve through the ongoing monitoring and resource allocation to Malaysia from Australia. This ideal is only achievable through a dedicated financial and capacity building commitment from Australia.

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

NEMBC believes it is essential for the utmost caution to be taken with vulnerable asylum seeker cases, including at risk single women, female headed families, the sick and elderly and unaccompanied minors. It is strongly suggested that the ideal situation would be for these vulnerable individuals to remain in Australia for processing onshore thereby safeguarding the interest of those who are the least able to self-protect.

(iii) mechanisms for appeal of removal decisions.

Whereas currently those who have had their claim for refugee status rejected in Australia have access to appeal processes through the Refugee Review Tribunal, it is uncertain from the agreement how the appeal process will work and if applicants will have access to legal support to assist in appeals.

(iv) access to independent legal advice and advocacy.

Malaysia makes no distinction between undocumented economic migrants from neighbouring states and refugees, placing both in the category of illegal arrivals. The Malaysian Constitution makes specific reference between the legal rights afforded to citizens and the restriction of such rights for non-citizens. Malaysia's Internal Security Act allows for detention without trial also, indicating a real need for legal representation for asylum seekers.¹⁴

According to CARAD's report, there is very limited-to-no access to legal advice in Malaysia and many asylum seekers are left uninformed and in limbo in regards to their legal status and their claim for

¹¹ RCOA Visit to Malaysia July 11th – 15th 2011- Report by Judyth Watson, Board Member CARAD
http://www.carad.org.au/components/com_acajoom/upload/august2011.pdf

¹² Above 6, p 14.

¹³ RCOA Visit to Malaysia July 11th – 15th 2011- Report by Judyth Watson, Board Member CARAD
http://www.carad.org.au/components/com_acajoom/upload/august2011.pdf

¹⁴ Plaintiff M70/2011 v Minister for Immigrating and Citizenship [2011] HCATrans 224, 1605.

protection. A logical solution would be for the Australian Government to increase resources to local justice and legal NGO's to provide neutral advice to asylum seekers in regards to their claims and to financial additional support for UNHCR operations. Reports from local NGO's suggest the wait time for claims is extremely lengthy and that the lack of correspondence, due to restricted UNHCR resources, exacerbates an already tenuous situation for many asylum seekers.

(v) implications for unaccompanied minors, in particular, whether there are any guarantees with respect to their treatment.

In regards to unaccompanied minors, echoing the views of the refugee NGO sector, this vulnerable group cannot be transferred to Malaysia with absolute guarantees for their wellbeing. Although conscious of the Government's perception that special treatment of unaccompanied minors will create an influx, it is difficult to envisage particular protection of this sub- group of the 800 transferees in Malaysia without officially appointed guardians in-country.

(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 proposition by counsel for the plaintiff in the current High Court case is that under Section 6 of the *Immigration (Guardianship of Children) Act* the Minister for Immigration has a legal duty to act in the best interests of unaccompanied children arriving in Australia and to avoid any acts which may result in their harm.¹⁵ NEMBC supports the view that the transferral of unaccompanied children or minors to Malaysia exposes this particularly vulnerable group of asylum seekers to potential harm. The absence of immediate care provision in Australia is especially an issue given that upon transferral to Malaysia children will remain without guardians to oversee and protect their welfare. The Parliamentary intent of this particular provision was for the Commonwealth to automatically assume responsibility for unaccompanied asylum seeker minors, including the immediate integration into the safety of the Australian community.¹⁶

(d) the costs associated with the agreement;

Clause 9 of the Agreement outlining the cost of the arrangement indicates that Australia will be covering all expenses associated with transferrals.¹⁷ In addition to these costs, the Department of Immigration will burden the extra financial implications of managing the arrangement including staffing costs in Australia. Both the human and financial costs of this arrangement are higher than what would be incurred if additional arrangements were put in place in Australia to accommodate asylum seekers. The deterrence argument for the arrangement does not justify the cost or the detrimental effects the deal will have for those seeking protection.

(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;

Recent reports from CARAD, RCOA and Amnesty International indicate the current inadequacy of services and support provided in Malaysia. These conditions are unlikely to be altered for the 800 transferred from Australia given the government's commitment to not affording these individuals preferential treatment. In respect to work rights, currently Malaysia does not afford refugees with access to employment with many working 'illegally' under exploitative conditions for either food or minimal sums. The right to self-determination through employment is essential for refugee welfare in Malaysia and the denial of access to

¹⁵ Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCATrans 224, 2020.

¹⁶ Second reading speech *Immigration (Guardianship of Children) Act*.

¹⁷ Clause 9, "Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement"

work exposes many to the risk of abuse. The Minister for Home Affairs in Malaysia, although indicating his consideration of allowing work rights for asylum seekers, is yet to provide this opportunity.¹⁸ Amnesty International has reported on the arrest of individual holders of UNHCR protection cards in immigration sweeps of various workplaces, indicating just how little protection refugees are provided in Malaysia.

Access to education for refugees and asylum seekers is limited to what under-resourced NGO's can offer. According to RCOA, classes for children are informal and are often organised by refugee communities themselves. Government funding is not provided for such classes. Given the length of time many face in Malaysia, a lack of educational opportunities for children can have detrimental effects on their future prosperity. According to CARAD, only 47% of refugee children have access to volunteer learning centres.¹⁹

Reports of conditions in detention facilities appear unacceptable due to limited access to clean water, poor sanitation and the instance of infectious diseases.²⁰ CARAD reports that basic primary health care provision is accessible but that the costs of additional treatments are beyond affordability for refugees and asylum seekers. These conditions are especially unacceptable given the accommodation of vulnerable children within the same centres. Reports of rape and abuse are also of much concern for the special needs groups of single women.

A solution to these concerns again points to the need for an increase in resources to UNHCR to intervene in detention facilities housing vulnerable individuals as well as to support NGO's who are providing education support to arrivals. Obtaining work rights for asylum seekers requires pressure to be placed on the Minister for Home Affairs by the Australian government.

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

The issue of refoulement is central to the discussion of Australia's international obligations in regards to this proposed agreement with Malaysia. Article 33 of the Refugee Convention prohibits signatory nations from 'the expulsion of persons who have the right to be recognised as refugees to territories where their life or freedom would be threatened.'²¹ Amnesty International recorded that prior to 2009 there were significant numbers of forced repatriation for those who may have been determined refugees. In spite of the articulation in the agreement under Clause 10 that Malaysia will respect the principals of non-refoulement, there is no guarantee of adherence to this statement given their non-signatory status to the Refugee Convention. Additionally, the provisions included in the clause imply that Malaysia maintains autonomy over decisions to potentially refole in certain circumstances.

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

NEMBC supports the long held view of the refugee sector, including bodies such as RCOA as well as the Centre for Policy Development, that a regional Asia-Pacific response to refugee movements needs to be developed with the principals of shared responsibility and durable solutions at the forefront. The current arrangement with Malaysia indicates to the region that Australia seeks an immediate solution motivated largely by political interests. This agreement reinforces the view held by our regional neighbours such as Thailand, Indonesia and East Timor, that in spite of the significant burden they carry in hosting the majority

¹⁸ Plaintiff M70/2011 v Minister for Immigrating and Citizenship [2011] HCATrans 224, 1650.

¹⁹ Above 12.

²⁰ RCOA "Australia's Refugee and Humanitarian Program 2011-2012, Community views on current challenges and future directions" p 52.

²¹ Ibid, p 11.

of asylum seekers, Australia will provide little reprieve through negotiating self-interested policy arrangements.

Regional cooperation was an agreed approach at the Bali Process in 2010 where delegates supported a solution which ‘applied consistent standards for protection, resettlement and repatriation’. These discussions also acknowledged the need to address irregular movements of asylum seekers and to reduce people tracking concerns. Although the Malaysian agreement focuses on tackling human trafficking, it remains to be seen if the humanitarian goals aimed for via regional solutions will be achieved under the current agreement terms.

As per RCOA’s recommendations, NEMBC would encourage a regional approach to addressing flows of asylum seekers which prioritises efficient and fair access to refugee determination as well the human rights of individuals, including safeguards against violence, secure accommodation, employment access and legal support. Centre for Policy Development’s suggestion of Australia providing more training and mentoring for the region is welcomed as is the recommendation of investment into regional processing infrastructure.²²

Overall, NEMBC would encourage Australia’s further consideration of a multilateral agreement of protection for asylum seekers which simultaneously achieves the objectives of stemming the flow of arrivals and reducing the burden for developing nations whilst ensuring safe and equitable access to refugee determination within the region.

Key recommendations

Given the above consideration of Australia’s international obligation under the Refugee Convention and the Guardianship duties imposed on the Minister, NEMBC holds the view that a significant reconsideration of the Malaysian agreement is necessary.

NEMBC in conclusion would like to propose the below recommendations to the Committee for consideration.

1. That the Malaysian agreement be reconsidered in favour of a regional, multilateral solution to safeguard asylum seekers rights to protection.
2. That any agreement developed must have the full support of the UNHCR.
3. That the interests of particular vulnerable groups, such as children and at risk women, be considered above all with the ideal situation being no further transit for these groups but assessment on arrival.
4. That if, contrary to recommendation 1, the current agreement is to progress, the Australian government commit to increasing the conditions of all asylum seekers and refugees in Malaysia through resourcing UNHCR and in-country NGOs. This includes a recommendation to commit to improving the capacity of local educational, legal, health and employment related services.

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²² Centre for Policy Development’s report, A New Approach. Breaking the Stalemate on Refugees and Asylum Seekers. Available at www.cpd.org.au.