Human Rights Watch

Submission to the Australia Senate Legal and Constitutional Committees

With Reference to the Australia-Malaysia Transfer and Resettlement Arrangement

August 30, 2011

On August 17, 2011, the Australian Senate referred the following matter of the Australia-Malaysia Transfer and Resettlement Arrangement to the Legal and Constitutional Affairs Committees for inquiry and report.

Human Rights Watch submits this assessment of the Australia-Malaysia Transfer and Resettlement Arrangement (hereafter, the Arrangement) with particular reference to the consistency of the agreement to transfer asylum seekers to Malaysia with Australia's obligations under international refugee law and with respect to the implications of the Arrangement for unaccompanied children, in particular, whether there are any guarantees with respect to their treatment.

The essential consideration in refugee/asylum seeker responsibility-sharing arrangements between states should be the harmonization of refugee status qualification standards, asylum procedures, and reception conditions by all parties to such arrangements. We believe the Arrangement fails to meet minimal standards for such a burden-sharing agreement.

With due regard to some improvements that Malaysia has made in the treatment of asylum seekers in recent years, including a reduction of forced repatriation at the Malaysia-Thai border, the gap in asylum standards and procedures and reception conditions between Australia and Malaysia remains enormous: Malaysia has not ratified the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (the Refugee Convention) and has no refugee law or procedure. On this basis alone, this Arrangement should have been rejected outright.

The Arrangement makes two references at the outset that demonstrate this fundamental failing. First, the preamble states that the arrangement recognizes "the sovereignty of states in determining their own immigration policy and laws relating to immigrants." It is noteworthy that the reference is to "immigrants," even though this Arrangement is specifically about asylum seekers and refugees. While it is certainly true that immigration policy is highly deferential to state sovereignty, the treatment of refugees and asylum seekers is a noteworthy human rights exception to the sovereign right to determine who has the right to stay or not be returned. This is not only recognized by the states that have bound themselves to the principle of nonrefoulement by becoming parties to the Refugee

Convention, but by the broader community of nations, which recognizes nonrefoulement as a principle of customary international law. The statement of principle should have recognized state responsibility for the protection of refugees as well as state sovereignty in immigration policy.

Second, the Arrangement accepts Malaysia's unwillingness to abide by international refugee law, which ought to have been the foundation of such an agreement. This is evident in clause 1.3, which states: "This Arrangement is subject to the respective Participant's relevant international law obligations in accordance with the applicable international law instruments or treaties to which the Participant is a Party." Malaysia's failure to ratify the Refugee Convention and to accept the obligations that Australia and 146 other states worldwide have taken on show the hollowness of the Arrangement. It is disconcerting when only one of the two parties to an agreement has accepted the obligations established by the most relevant treaty and otherwise failed to apply customary standards.

We also are greatly troubled by the informality of the Arrangement, as evidenced not only by the decision of the parties (called "participants," not "parties") not to call it an "agreement," but also because the Arrangement allows the participants to "vary or extend" the Arrangement (clause 19) and because the terms and conditions of the Arrangement—and by extension, the variances or extensions to it—"will remain confidential" between the participants (clause 15). Further, the Arrangement is "not legally binding" on the two parties. This means that Australia and Malaysia can basically change the Arrangement at any time without making such changes public. The fact that the text of the Arrangement only represents "a record" of the participants' "intentions and political commitments" (clause 16) highlights the unwillingness of the parties to be formally bound by its provisions.

These concerns are deepened because the Arrangement so clearly contravenes basic principles of refugee protection and burden sharing, most notably as expressed in the two United Nations High Commissioner for Refugees (UNHCR) Executive Committee (ExCom) Conclusions most relevant to this arrangement: ExCom Conclusions No. 23 on rescue of asylum seekers in distress at sea and No. 97 on protection safeguards in interception measures. ExCom Conclusion No. 23 affirms the international maritime law principle that persons rescued at sea, including asylum seekers, should normally be disembarked at the next port of call. ExCom Conclusion No. 97 affirms the principle that states within whose territorial waters interception takes place have the primary responsibility for addressing protection needs of any intercepted person.

The Arrangement utterly fails to address the particular needs of unaccompanied children. The Arrangement says only that special procedures "will be developed" to deal with unaccompanied children and other vulnerable cases. It says nothing about "best interests" determinations or other basic principles of protection under international law for unaccompanied children. The fact that implementing procedures will come later is no excuse for failing to articulate basic principles in the text of the Arrangement itself.

Our concerns about the failure to account for the needs of children are underscored by clause 3.3 on education, which states that school-age children will be permitted access to "private education," and then adds that if "such arrangements are not available or affordable" the children should have access to "informal education." Neither private education nor informal education meet the standards for the right to free and compulsory primary education in article 28 of the Convention on the Rights of the Child, to which both Australia and Malaysia are parties.

While we welcome Australia's willingness to admit 4,000 more refugees for permanent resettlement, we urge the Australian government to delink this potentially great humanitarian benefit from a deal that would deflect asylum seekers to another country, thereby demonstrating burden shirking rather than burden sharing.

And we also welcome Malaysia's willingness to recognize a group of asylum seekers as being lawfully present in Malaysia with work authorization while their claims are pending and while awaiting third-country resettlement. However, it is unacceptable to create a special exception for 800 people because they are being swapped when some 90,000 other refugees and asylum seekers living in Malaysia—with similar claims and vulnerability—remain as "illegal migrants" under Malaysian law, subject to arrest, detention, and deportation.

In conclusion, we ask that the Australian Senate recognize the fundamental flaws in the Arrangement and call on the Australian government to set this Arrangement aside before it becomes operational and any of the 800 slated for transfer from Australia to Malaysia are transferred.