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RCOA represents over 50 non-government organisations working with and for refugees in Australia and around the world.

## **1. Introduction.**

The Refugee Council of Australia is Australia's peak refugee agency, engaging principally in research, policy development and advocacy. Collectively, its members represent all sectors of refugee work in Australia and around the world.

The Refugee Council welcomes the opportunity to reflect on Australia's adherence to its obligations under the Convention on the Rights of the Child. In so doing it expresses concern that the majority of the issues raised in this report were either omitted from or made light of in the Australian Government report on its compliance with the Convention (December 1995). This submission is presented as a supplement to the NGO response to the Australian Government report.

It is noted that by taking a full and often instrumental role in the lengthy process and debate leading up to the proclamation of the United Nations Convention on the Rights of the Child in 1989 and subsequently ratifying it on 17th December 1990, Australia pledged strong support for all aspects of a very important human rights document. The act of ratification indicated that Australia endorses that children universally have rights and that every child within the boundaries of Australian territory deserves to be treated with their best interests as a priority and with total equity.

Embodied within the Convention are a set of principles which can be summarised as follows:

- There must be no discrimination regarding race, colour, sex, language, religion, political opinion, birth status, property or age.
- All children must be given the best opportunity facilitated by law and other means, to develop physically, mentally, morally, spiritually and socially in conditions of freedom and dignity.
- All children must be afforded a decent standard of living in a decent physical and social environment involving adequate shelter, good nutrition and healthcare, and social security.
- Any child who is disabled should have special provisions made for him/her to facilitate good health and development.
- All children must be afforded a positive environment in which they may develop a normal personality in order to become well adjusted and productive adults.

- All children must be given free education, leisure and play in keeping with the child's cultural background.
- All children must be given protection in times of emergencies.
- Protection must be provided for all children from all forms of exploitation, neglect and cruelty.
- All children must be protected from practices that can encourage racial, religious or any other form of discrimination.

It is the contention of the Refugee Council that Australia is failing to meet these high ideals, at least with regard to the obligations of the state to children who are refugees and asylum seekers. The following submission will outline the reasons for this belief.

## **2. Australia's Obligations to Refugees and Asylum Seekers.**

Article 14 of the Universal Declaration of Human Rights states:

"Everyone has the right to seek and enjoy in other countries asylum from persecution."

As a signatory to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, Australia is further obliged to offer protection to those who are determined to fit the definition of a refugee contained in Article 1 of that Convention:

a refugee is "any person who owing to a well founded fear being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his (her) nationality and is unable, or owing to such fear, is unwilling to avail himself (or herself) of the protection of that country".

Australia's principal obligations to asylum seekers are derived from the 1951 Convention. This is not, however, the sum total of the state's obligations. Other international treaties apply as well. These include the International Covenant on Civil and Political Rights, The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Torture Convention and, of relevance in this instance, the Convention on the Rights of the Child.

## **3. Meeting these Obligations.**

In order to assess the applications of asylum seekers, Australia has instituted a two stage refugee status determination system. A primary assessment is conducted by officers of the Department of Immigration and Multi cultural Affairs. Those who fail at this primary stage can lodge an appeal with an independent review body, the Refugee Review Tribunal. During the determination system applicants are referred to as "asylum seekers". Once status is conferred, they can legitimately be referred to as a "refugee", though it is of prime importance to note that a person does not become a refugee with the bestowal of status but has been one since he/she fled the country in which they were being persecuted. It is anticipated that in the current financial year, some 10,500 people will seek refugee status in Australia. The majority will enter or will have entered with a valid visa (usually a tourist or student visa). They are permitted to remain in the community while their applications are being considered. A small percentage (possibly <5%) will arrive without adequate documentation. It is probable that they will be detained for the duration of the determination process. Entitlements and conditions for both groups will be discussed below.

The Department of Immigration does not issue information about the age of applicants. Anecdotal evidence from the asylum seekers legal representatives and from welfare agencies indicates that while the majority of asylum seekers are solo adults, a number arrive with dependent children. It is these children, and those who arrive without a parent or care giver, who are the focus of this submission.

#### **4. Treatment of Child Asylum Seekers.**

As previously stated, asylum seekers can be divided into two broad groups: the majority who are permitted to remain in the community (with a Bridging Visa) while their claims are being considered, and the minority who are detained. There are significant differences in the experiences of each of these groups.

##### **4.1. Those in the Community:**

The rights and entitlements of these asylum seekers has varied considerably during the 1990s:

- at the beginning of the decade an asylum seeker had limited access to a work permit and no medical benefits. Cases of extreme hardship were common and community groups used these to advocate for changes to the entitlements;
- in 1992 limited welfare assistance was provided through a number of community based agencies;
- in 1993 the Migration Reform Act came into force. This introduced the Bridging Visas that gave asylum seekers legal status while their applications were being considered. It also made the granting of permission to work more systematic.
- also in 1993 the provision of welfare assistance was brought under the control of the Australian Red Cross who were contracted by the Department of Immigration to operate the Asylum Seekers Assistance Scheme (ASAS). ASAS provided limited financial support to asylum seekers who were unable to find employment. While there was a six month waiting period for eligibility to ASAS, exemptions were possible in cases of hardship;
- in 1994 the Red Cross began administering the ASAS Limited Health Care scheme that gave asylum seekers limited access to medical treatment;
- in 1996 it was determined that asylum seekers with permission to work were eligible to receive Medicare benefits;
- from October 1996 ASAS was withdrawn from asylum seekers who lodged an appeal to the Refugee Review Tribunal (RRT). Exemptions for applicants in the first 6 months after arrival became increasingly hard to get;
- changes to determination procedures (in particular rejections without interview at the primary stage) introduced during 1996 have meant that most applicants receive a primary decision within 6 months and thus never become eligible for ASAS;
- in March 1997 the Minister for Immigration announced that permission to work will only be granted to asylum seekers who lodge an application within 14 days of entering Australia. This is considered an unrealistically short period as genuine asylum seekers

typically arrive in a traumatised state and it takes them time to work out who to trust and what to do. Possession of a work permit is a prerequisite for receipt of medical benefits.

What does this mean for the parents of child asylum seekers and for the children themselves?

At the present time the majority of asylum seekers are ineligible for any financial support, either because they have been in the country for less than 6 months or because their case is before the RRT. Lucky ones are able to find employment and thus are able to support their children; but if an asylum seeker is a torture/trauma victim or a sole parent with young children, his/her ability to work is severely curtailed. Such people are forced to live on handouts from welfare agencies and support from within their own community. Both are in increasingly short supply. It is hard enough for a single adult to subsist without any form of income but when there are children involved, the plight of the asylum seekers becomes more critical. It is the Council's understanding that the Australian Red Cross will be submitting case studies documenting the impact of the current policy on asylum seekers and their children.

Another current anomaly relates to access to medical care. As previously stated, asylum seekers with permission to work are deemed eligible for Medicare. This eligibility covers the applicant only and not their dependants. As children are not allowed to work, they can not get a work permit and therefore are not eligible for Medicare. The system is such that children of unemployed asylum seekers who are in receipt of no financial assistance are being charged full fees by doctors and hospitals. The result is that children are effectively being denied access to medical care. In assessing the significance of this, it is necessary to consider that many of these children have come from countries in conflict (which impacts on their physical and psychological status) and are living in poverty in Australia (thus likely to be suffering from malnutrition and other diseases associated with the family's financial status).

Once the regulations announced by the Minister for Immigration in March this year are introduced, the plight of asylum seekers will become more severe. It is an unrealistic expectation that genuine asylum seekers will be able to apply within the 14 day limit imposed. Thus we will see a situation where the vast majority of asylum seekers do not have work permits (or Medicare) and are also unable to access ASAS. They ... and their children ... will be impecunious. Meeting all basic needs for their children will become a major struggle. Flowing on from this will be the psychological impact on the child, living with a parent or parents who could well have been traumatised by their past experiences and are confronted by the reality that they are unable to provide adequate care for their children in Australia.

It is argued that both the current system and that which will come into effect when the new regulations are introduced breach Australia's obligations under the Convention on the Rights of the Child to the children of asylum seekers, in particular:

Article 2: which stipulates that States shall respect and ensure Convention rights are afforded to each child within their jurisdiction without discrimination of any kind.

Article 3: which specifies that in all actions undertaken by administrative bodies or legislative authorities, the best interests of the child shall be the primary consideration;

Article 6: which obliges the State to ensure the child's survival and development;

Article 22: which requires the State to take appropriate measures to ensure that a child who is seeking refugee status shall receive appropriate protection and humanitarian assistance in the terms of this Convention and other relevant treaties;

Article 24: which sets out the right to the highest level of health and medical services;

Article 26: which sets out the right of children to benefit from social security;

Article 27: which stipulates the rights of children to benefit from a standard of living adequate for the child's physical, mental, spiritual, moral and social development and goes on to set out the role for the State in assisting parents to implement this right, including by providing material assistance and support programs, particularly with regard to nutrition, clothing and housing;

Article 39: which sets out the State's obligation to ensure that child victims of armed conflict and torture (this includes refugees) receive appropriate treatment for their recovery.

The text of each Convention Article is paraphrased in this report.

#### **4.2. Those in Detention:**

As previously stated, asylum seekers who arrive without adequate documentation (this usually means a passport and/or visa) are detained for the duration of the determination process. For asylum seekers who arrived in the early 1990s, it was not uncommon for the period of detention to run to several years (the longest being 5 years). Measures have been introduced to speed up the determination of cases where the applicant is in detention, however, it is still possible for extensive delays to occur. As at 31 October 1996, 43% of those held in the Port Hedland Detention Centre had been detained for more than one year and 21% for more than two years. Figures from the Department of Immigration and Multicultural Affairs..

While detaining asylum seekers is not a breach of international law as such, UNHCR's Guidelines on detention set out that detention should be used only in exceptional cases and then only to establish the identity and intent of the asylum seekers (except in those cases where it can be argued that there is a threat to public safety or national security). The same guidelines go on to say that minors who are asylum seekers should not be detained.

Prior to 1994 there was no provision to release asylum seekers from detention, even in cases where detention was demonstrably detrimental to the individual. Following a Parliamentary Inquiry, the legislation was altered to allow for the release of certain specified groups, including torture/trauma victims and children. In the case of the latter, provision for release does not extend, however, to the parents or caregivers of the child.

The Council is concerned that, except in the case of an unaccompanied minor, the existing provision for release presents the parents with a Hobson's choice. Either they consent to the child being sent into foster care (recognising that the asylum seeker is in a country about which they know nothing), or they elect to keep the family unit intact and in so doing, expose the child to the detrimental environment in the detention centre.

It is the Council's understanding that the Australian Red Cross is preparing for the Committee a submission that documents their concerns about the treatment of children in immigration detention centres and provides case studies. The Council commends this report to the Committee. While we do not have the same level of regular involvement in a number of the centres as the Red Cross, the Council has been monitoring the evolving situation for a number of years and Council staff and Board Members have visited the centres. Our principal concerns are:

- the failure to provide for a parent or care giver to be released with the child from detention;

- the fact that despite the new procedures, detention in many cases is prolonged, for example there have been recent cases in Sydney of children being detained for periods in excess of six months. Some of the children who arrived in Australia in the late 1980s and early 1990s were detained for up to four years;
  - the fact that the environment in detention centres is detrimental to the psychological well being of the child. The facilities enclosed by high barbed wire fences and patrolled by uniformed guards. There are regular roll calls and room checks. Those detained, including the parents, are in a state of high anxiety about their future;
  - it can further be argued that there is also an ever present threat to the physical safety of the children in the detention centres. Over the years there have been a number of incidents such as roof-top protests and hunger strikes in which children have been involved. There is the added concern of accommodating children with highly stressed adults and the potential for physical violence and/or sexual abuse. It is argued that the DIMA's response that "it is the parents responsibility to protect the children" is a dereliction of the Department's own responsibility and fails to recognise that the best way for parents to protect the child would be to remove them from the source of danger, something that can only be accomplished by separating the child from the parents;
- 
- over the years the opportunities for children to be taken outside the centres for education or recreation have varied and it currently varies between centres. There have been extensive periods in all centres where children have not been offered any recreational activities and were not taken outside the centre;
- 
- in Villawood Detention Centre in Sydney children have been without formal education since October 1996 (when the then teacher resigned). DIMA has argued that it has been difficult to find a suitable replacement however 6 months has elapsed since the resignation and there has been no compensation for the lack of formal education by the introduction of any recreational or other activities for the children;
- 
- it has been reported to the Council that the mother of an infant in Villawood has been unable to obtain infant formula or food suitable for weaning the child and in the twelve months since the child's birth, the mother has had no respite from having to care for the child 24 hours per day.

It is argued that the current situation runs counter to Australia's obligations under the Convention on the Rights of the Child, in particular:

Article 37: which stipulates that the detention of a child should only be used as a measure of last resort and for the shortest appropriate period of time. Further, that every child deprived of his/her liberty shall be treated with humanity and respect for the inherent dignity of the human person and in a manner that takes account of the needs of a person of that age; and

Article 9: which grants children the right not to be separated from their parents against their will;

and also:

Article 2: which stipulates that States shall respect and ensure Convention rights are afforded to each child within their jurisdiction without discrimination of any kind;

Article 3: which specifies that in all actions undertaken by ... administrative bodies or legislative authorities, the best interests of the child shall be the primary consideration;

Article 6: which obliges the State to ensure the child's survival and development;

Article 16: which sets out the right to protection from interference with privacy, family, home and correspondence;

Article 22: which obliges the State to provide special measures of protection to refugee children and asylum seekers who are minors;

Article 24: which sets out the right to the highest level of health and medical services;

Article 28: which spells out the obligations of the State to provide education; and Article 31: which sets out the right of children to leisure, play and participation in cultural and artistic activities.

## **5. Unaccompanied Minors.**

While the vast majority of children who come to Australia as asylum seekers are with one or both parents, there are occasional instances of unaccompanied children. In some cases these children will be genuinely unaccompanied, in others they may have arrived in Australia to join a relative and in other cases the child may have come as part of a larger group which may or may not include blood relatives (and which may or may not continue to provide support). Whether or not they are subject to detention is determined by their immigration status (see above).

The guardianship of unaccompanied minors who are without effective support is an issue about which there appears to be some confusion. State government Departments of Community Services argue that such children are outside their mandate, not being permanent residents, but add that consideration on a case by case basis will be given to taking on guardianship if requested to by the Minister for Immigration. Irrespective of whether this formal relationship is established, there is no effective provision for any active support of the minor or monitoring of any care relationship that exists.

In the United Kingdom they have what is called a Panel of Advisers. This is a government funded project that provides for Advisers to be appointed to any unaccompanied minor who is seeking asylum. These advisers are expected to develop a relationship of trust with the minor and ensure that all of the child's legal and welfare needs are being met, in so doing acting as an advocate, adviser and friend. This seems an eminently sensible way to ensure that the obligations to the child are being met. Not having such a program in Australia we have seen recent instances of:

- a 13 year old unaccompanied asylum seeker being detained in the maximum security section of Villawood Detention Centre;
- a boy from Western Sahara, upon grant of refugee status, being released from detention into the care of a young man (early 20s) from the same country who had a serious substance abuse problem;

- two teenage girls (asylum seekers) from the Horn of Africa who were initially released from detention into the care of a member of their community with whom inadequate arrangements have been made. When this arrangement broke down, the girls spent brief periods with a number of people, including their lawyer, before a place could be found for them at a youth refuge where they remained for several months until they were granted refugee status. Recent information indicates that they are still residing in refuges.

It is the Council's understanding that the Red Cross submission will also deal with this matter.

With regard to unaccompanied children, the Council considers that Australia is failing to meet its obligations under the Convention on the Rights of the Child, in particular:

Article 20: which sets out the obligations of the State to provide special protection for children deprived of their family environment and to ensure appropriate alternative family care or institutional placement is made available to them, taking into account the child's cultural background.

#### 6. Children as Refugee Applicants.

Provision in law exists for all members of a family group to have their claims for refugee status considered. What happens in reality is that the male head of household will lodge the claim and it will be his situation that is considered. In some instances, the claims of a dependent woman will be examined, but this is done typically only in cases where the woman volunteers that she has additional claims rather than the investigation taking place as a matter of course. Rarely will any consideration be given as to whether a minor who is part of a family group may have claims of his/her own, even though these claims may in fact be the strongest of any member of the family. Such cases could include those where a child, if returned to their country of origin, would be exposed to:

- underage conscription;
- female genital mutilation;
- trafficking or sexual exploitation;
- forced labour, bonded labour or slavery;
- being singled out (as kidnap victims or for "disappearance") to make a statement to the community, i.e. to keep the community compliant (as has happened in Guatemala and Sudan);
- being targeted because of the activities of their parents (as is the case in Sri Lanka);
- being targeted by combatants (e.g. the use of antipersonnel mines that are shaped like toys in Afghanistan).

In such cases a child could well fit the definition of a refugee and if so, the entire family would have refugee status conferred.

The Department of Immigration currently has no procedural guidelines for case officers in how to deal with child claimants. There has been some work on the development of guidelines but progress is very slow.

Also relevant to asylum claimants is the issue of access to legal advice. The lodgement of a refugee status claim requires a clear understanding of the definition and the presentation of all relevant information in a coherent and substantiated manner. As asylum seekers are in a strange country, often with little or no English, their ability to lodge the claim unassisted is limited. The consequences of lodging a poorly prepared application can mean death or imprisonment for a genuine refugee.

While it is common in many western countries to provide legal assistance to asylum seekers as a matter of course, this is not the case in Australia. There is a limited amount of money allocated by the Department of Immigration for advice to asylum seekers in the community who pass a means and merit test. Some assistance is also provided by the Legal Aid Commissions in various states. Most asylum seekers are unable, however, to access free advice and thus either lodge unsupported applications or have to pay commercial rates. Further, the limited community based advice that does exist is under severe threat in the current climate of fiscal constraint.

The policy with respect to asylum seekers in detention is that they will be provided with advice if they request it. They are not advised of their right to seek this advice or of its availability.

It is argued that current practice with respect to children and refugee status determination runs counter to Australia's obligations under the following articles of the Convention on the Rights of the Child:

Article 3: which stipulates that all decision concerning the child, whether undertaken by an administrative authority, court or legislative body should take into consideration the best interests of the child;

Article 12: which sets out the right of the child to express an opinion, and to have that opinion taken into account, in any matter affecting the child;

Article 37: which, inter alia, sets out the right of every child deprived of his or her liberty to have prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the detention before a court or other body.

## **7. Refugee Children.**

While all of the above has focused on children who are asylum seekers, there are also issues relevant to refugee children that are worthy of examination in the context of the Convention on the Rights of the Child~ Principal amongst these is the treatment of refugee children who have no adult support.

During the 1980s Australia brought in unaccompanied minors as part of the humanitarian resettlement program. Most were Indochinese, in particular Vietnamese and Khmer. Failure in many instances to provide adequate support services meant that too many of these young people ended up being estranged from both their own community and the mainstream

community, being literate in the language and culture of neither. The well identified deficiencies of this program have made people wary of reintroducing any systematic entry for unaccompanied refugee minors. While this may no longer be the issue that it once was, there is now concern about children who may have entered as part of a family group and later become separated from it (i.e. they become "detached minors").

Because of the nature of the refugee experience and the associated stains and traumas, it is not uncommon for family structures to break down after arrival and, as in all cases of family breakdown, this has a significant impact on the children.

Another phenomenon associated with the refugee experience is for children to arrive in a "family" that is not their nuclear family, often but not always consisting of blood relatives. It is the Councils experience that such family groups are more vulnerable to break down after arrival. In some cases the care givers consider that they have discharged their obligations to the child once they have entered Australia and the child is turned Out to fend for themselves. In other cases there is a serious rift between the child and the care givers (e.g. disputes about the amount or nature of the work in the home expected of the child, especially in cases where there is an expectation that the child will act as a servant to the family or in cases where the child is exposed to sexual abuse).

As permanent residents, detached minors have the same entitlements as all Australian residents. Thus, if a minor is separated from their parent or legal guardian, he/she comes under the jurisdiction of the Department of Community Services (or equivalent) in the state in which the child is resident and becomes a ward of the state. In larger states, especially in NSW, the ability of the state department to provide adequate protection to their wards has come under question. In the case of detached minors, we are dealing with an especially vulnerable group. Like all refugees they have been deeply traumatised, some may have been tortured. In addition to this, many have experienced the grief of separation from (or loss of) their parents and now experience the grief of loss of "the second family". So too language, educational and other barriers may be present. The ability of existing services to meet adequately these needs is questioned.

Concern is thus expressed about Australia's compliance with the following articles of the Convention on the Rights of the Child:

Article 20: which sets out the obligations of the State to provide special protection for children deprived of their family environment and to ensure that appropriate care is available to them, taking into account their ethnic, religious, cultural and linguistic background;

Article 22: which stipulates that special protection should be afforded to children who are refugees.- .

## **8. Conclusion.**

The Council reiterates its view that in relation to children who are asylum seekers and refugees, the Australian Government is currently falling short of meeting its obligations and, if those measures currently proposed by the Government are introduced, a more severe breach will occur.

In order to remedy this situation there needs to be a major conceptual shift at the highest

policy level, i.e. recognition that treaty obligations extend to all people within a country, irrespective of their status. It is not acceptable to deny children certain basic rights because they are not citizens or permanent residents, especially if this denial results in a child being put at risk.

Beyond this, legislative and administrative changes are required to ensure that child asylum seekers and refugees receive the protection that is their right. Such measures should include the following:

i. provision of means tested welfare assistance to families of asylum seekers with children, irrespective of where they are in the refugee status determination process;

ii. access to emergency medical care, either through the Red Cross or Medicare, for all children of asylum seekers;

iii. provision for release from detention for children and a parent or care giver, and that in such cases, there should be access to welfare benefits (as above);

iv. If it is considered necessary to detain one member of the family when the child and care giver are released (e.g. if there is a demonstrable flight risk), opportunities should be provided for the child to visit the detained parent regularly;

v. until such time as the child is released from detention, every effort must be taken to ensure the child's physical safety and that there are age appropriate educational and leisure activities provided for the child;

vi. if a woman with an infant is detained, provision should be made for support for the mother, including child rearing advice, respite care and age appropriate food for the baby;

vii. in the case of unaccompanied children who lodge a refugee status claim, a suitably trained adult should be appointed to take responsibility for ensuring that the child's legal and welfare needs are met (as in the United Kingdom with the Panel of Advisers);

viii. automatic release of unaccompanied children from detention into the care of a suitable adult (preferably a member of the child's ethnic group) who will receive subsidisation for this care;<sup>3</sup>

ix. allocation of a suitably trained case manager from the State Department of Community Services to a refugee child who becomes detached from his/her family. This person would have direct responsibility for ensuring that the physical and psychological needs of the child were met;

x. institutional recognition that it is essential to consider whether any member of a family group may have a claim for refugee status, not just the head of household;

xi. introduction of guidelines and training for decision makers on working with child claimants;

xii. enhancement of the Department of Immigration's information data base to ensure the inclusion of material pertaining to refugee status claims made by children.

Further, if the office of Children's Ombudsman is established as has been discussed, it is recommended that the statute of this organisation give it the power to investigate complaints from children irrespective of their immigration status.

While opinions about the cost of detention vary, a conservative estimate can be gleaned from the report of the Joint Standing Committee on Migration: Asylum Border Control and Detention. In 1992/93 the cost of detaining someone in Villawood Centre in Sydney was given at \$55.86 per day (p41). Obviously this figure would be higher in 1997. Thus to provide even generous assistance to a community carer would amount to a substantial saving when compared to the cost of keeping the child in detention over the period during which the claim was being examined.

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