

Monday 4<sup>th</sup> June 2012

Julie Dennett  
Committee Secretary  
Senate Standing Committees on Legal and Constitutional Affairs  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
Australia

Dear Ms Dennett

**Inquiry into the Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012**

The Asylum Seeker Resource Centre (ASRC) thanks the Legal and Constitutional Affairs Legislation Committee for the ability to make a submission to the parliamentary **Inquiry into the Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012**

The ASRC welcomes the April 30th announcement of a National Child's Commissioner, however has grave concerns that the position lacks the powers and resources needed to properly protect some of the most vulnerable children in our country and may not include responsibility for asylum seeker children.

Please find following the ASRC's submission to the Inquiry.

If you have any questions please do not hesitate to contact me on \_\_\_\_\_ or by email

Thank you for the opportunity to participate in this important inquiry.

Jana Favero  
Community Engagement

## Background

The Asylum Seeker Resource Centre (ASRC) protects and upholds the human rights, wellbeing and dignity of asylum seekers. We are the largest provider of aid, advocacy and health services for asylum seekers in Australia. Most importantly, at times of despair and hopelessness, we offer comfort, friendship, hope and respite.

We are an independent, registered non-governmental agency and we do not receive any direct program funding from the Australian Government. We rely on community donations and philanthropy for 95 per cent of our funding. We employ just 32 full time staff and rely on over 750 dedicated volunteers. We deliver services to over 1,200 asylum seekers at any one time.

## The proposed legislation

The ASRC supports the proposed **Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012**.

The ASRC notes that the Bill refers to **children in Australia**, however would like to see the rights of asylum seeker children explicitly referred to. This includes children seeking asylum who have been placed in closed or community detention, as well as children residing in the community who are seeking asylum.

We also note that the subsection 46MB(4) gives the Commissioner a discretion, when performing any of his or her functions, to focus on particular groups of children who are at risk or vulnerable.

We strongly recommend that the following vulnerable group of children be added to this list:

- **Children who are seeking asylum.**
- **Children detained as suspected 'people smugglers'.**

The ASRC is deeply concerned that the Minister for Immigration is the legal guardian of all unaccompanied minors seeking asylum.<sup>1</sup> The Minister can delegate those powers to DIAC officers.<sup>2</sup> This situation creates a clear conflict of interest. The Minister or a DIAC officer cannot ensure their primary consideration is the best interests of an unaccompanied minor when their roles are simultaneously guardian, the detaining authority and the visa decision-maker.

The following sections outline the reasons why children seeking asylum should be included in the Commissioner's focus as particularly vulnerable, and why their absence from this list, as it stands, is a serious omission.

## Children in detention

Since the Government announced that the 'majority' of underage minors and children would be released into community detention the number released has been a half plus a few – thereby barely meeting the 'majority' commitment. The Government's latest figures from 30 April 2012 show that 463 children are still in a detention facility<sup>3</sup>.

In Community Detention all school age children have access, however there are cases of children in detention facilities who do not have access to school. Children under age of 13 in detention facilities have access to schooling, but not all detention environments.

- Primary and secondary school age children in locked detentions centres in Darwin were denied access to school from April 2010 until October 2010.
- Primary school children on Christmas Island were denied school.
- Teenagers are routinely excluded from school across most detention facilities.
- Teenagers in most detention centres do not have access to the school education program.

In their concluding observations from 2005, the UN Committee on the *Convention on the Rights of the Child* (CRC) cited the mandatory detention of all children pending assessment of their claims for refugee status as a matter of primary concern. To date this matter has not been satisfactorily remedied.

<sup>1</sup> See *Immigration (Guardianship of Children) Act 1946* (Cth), s 6

<sup>2</sup> See *Immigration (Guardianship of Children) Act 1946* (Cth), s 5

<sup>3</sup> [http://www.immi.gov.au/managing-australias-borders/detention/\\_pdf/immigration-detention-statistics-20120331.pdf](http://www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-20120331.pdf)

Signatories to the CRC are obliged to hold children in detention solely as a measure of **last resort and only for the shortest appropriate period of time.**<sup>4</sup> Australia's current immigration detention policy fails to satisfy this requirement. All children entering Australia as unauthorised arrivals are mandatorily detained in non-reviewable administrative detention for an unspecified time upon arrival.

Detainees routinely suffer from anxiety, depression, symptoms of trauma and behavioural withdrawal. Children's normal developmental pathways are severely disrupted by detention. They themselves suffer from anxiety and are also adversely impacted by the anxiety and depression manifested by those around them. The motels, lodges and other facilities currently being used to house children are not designed for young people. Professor Louise Newman, child psychiatrist and head of the Australian Government's health advisory panel on immigration detention (DeHAG) argues that detention in such places compounds the effect of previous trauma and exacerbates the grief and loss that these children have already suffered.

In several instances, the exacerbation of pre-existing stresses by prolonged detention has led to self-harm. Teenagers in detention have reported to our staff cutting and slashing themselves 'to release the pressure' in their heads. They are also intermittently fasting. IHMS, the private contractor responsible for medical care, are not recording weights at regular intervals as evidence of the children's weight loss.

The distress that detention causes to children, especially unaccompanied children is well documented in the 2004 HREOC Report *A Last Resort*. The report shows there is evidence from current and former detainee children and their parents, former ACM medical staff, department management reports, state child protection agencies, independent mental health experts, torture and trauma services and community groups involved with current and former detainees all confirming the detrimental impact that long term detention of children has on their mental health

The report also shows that unaccompanied children are particularly vulnerable to the actions of other adults in the detention compounds. They see the other adults committing acts of self harm in order to try and end their detention and the children mimic their actions.

The Victorian Foundation for the Survivors of Torture has reported children who were in detention for longer periods had significantly higher scores on the stress assessment schedule as the effect of length of stay appears to result predominantly from increased exposure to traumatic events within detention centres.

The HREOC Report confirmed that children in detention are likely to suffer from developmental problems, depression and post-traumatic stress disorder and suicidal thoughts and acts of self harm. Again unaccompanied children are particularly vulnerable because they don't have the same familial support as accompanied children. This was recognised by one Doctor, who worked at Woomera, and stated to the 2004 HREOC inquiry:

*I can only say that the longer they spent, the worse the effects that I saw. And that was in some way dependant on the age and the support, whether they were an unaccompanied minor or whether they simply still had the support of their parents or even one parent*

The Australian Human Rights Commission (AHRC) and the Commonwealth Ombudsman's Office only have recommendatory powers. They are unable to force the government to accept their recommendations and the AHRC has made several recommendations in regards children in detention which have not been implemented.

The AHRC has repeatedly recommended that if children are to be detained, they should be placed in community detention with their families or with a suitable carer if they are unaccompanied.<sup>5</sup> While children are no longer being held in places designated as Immigration Detention Centres, they are still subject to constant supervision and experience a severely restricted freedom of movement. Children continue to be held in places under guard and constant supervision - behind locked gates and doors - in buildings and camps that are detention centres in all but name. The government calls these locked environments, 'Alternative Places of Detention' or APODS.

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<sup>4</sup> CRC, note 11, art 37(b)

<sup>5</sup> 2008 - *Immigration Detention Report*, Australian Human Rights Commission, p. 82

There are situations where the Ombudsman's office has made recommendations for the release of children from detention and they have not been accepted by DIAC.

The ASRC is also deeply concerned about the treatment of children detained on suspicion of people smuggling charges. During the age determination process for suspected people smuggling minors, documentation is not sought from Indonesia to show the age of the child. The controversial 'wrist x-ray' method is used to determine the age. There is wide concern and proof in the Australian legal community that minor alleged smugglers are being placed in adult detention facilities and adult prisons while awaiting the age determination process. There is no guarantee that minors are accommodated in children appropriate facilities.

#### Example

- The case of Ali Jasmin, a child crew member who was no more than 14 years old when convicted in an Australian court.<sup>6</sup>
- In February 2012 a minor arrived with his older brother (who was over 18) and they were both placed in an adult detention facility.

#### Children seeking asylum who are living lawfully in the community

In 2010/11, there were 1,566 children seeking asylum, who had arrived by plane and who were living in the community<sup>7</sup>.

#### Key issues

- **According to the *Convention on the Rights of the Child (CRC)*, Australia is not taking the appropriate measures to ensure that asylum seeker children are afforded the right to an adequate standard of living, the right to health care and the right to access to social security.**
- **Young people seeking asylum are particularly vulnerable due to the intersection of the asylum seeker experience with adolescence and young adulthood.**
- **Unaccompanied asylum seeker minors are vulnerable due to their lack of a guardian, and are rendered more vulnerable due to the challenges present in accessing the Refugee Minor Program.**

#### ***Accompanied children***

The Early Childhood Australia (ECA) (2004) position statement regarding children of asylum seekers states the following:

'Basic health care, nutrition and education are recognised as necessary for the physical and intellectual development of children...For refugee children, healthy psychosocial development also requires coping effectively with the multiple trauma of loss, uprooting and often more damaging experiences. In short, tragic long-term consequences may result where children's developmental needs are not adequately met.'

Article 22(1) of the *Convention on the Rights of the Child (CRC)* (1989) requires Australia to take appropriate measures to ensure that refugee children can enjoy all of their rights, including the right to an adequate standard of living (article 27), health care (article 24), education (article 28) and access to social security (article 26). All of these rights impact upon a child's right to the maximum possible development, rehabilitation and social reintegration (articles 6(2) and 39). Children, regardless of their immigration status, require specialist support to ensure their health, welfare, safety and basic needs are met. A study commissioned by Hotham Mission ASP (2010) into the rights of asylum seeker children found that:

'Most parents lacked the income necessary to feed and house their children to the standards required by international law, while also restricting their children's access to healthcare and normal childhood leisure activities. At the same time the children's rights to education and to freedom of religion and culture were found to be in large measure fulfilled' (p. 2).

Of serious concern is the lack of a consistent approach to ensure that asylum seeker children in Australia, at all stages of the refugee determination process, have their basic human rights met.

<sup>6</sup> <http://www.theglobalmail.org/feature/an-age-of-uncertainty/190/>  
<sup>7</sup> Department of Immigration and Citizenship Asylum statistics – quarterly tables – March Quarter 2012 pg 5

Families with children who are awaiting a decision at the first two stages of the refugee determination process are eligible for the ASAS by virtue of having children less than 18 years of age. This is a clear acknowledgment of the inherent vulnerabilities of children and, despite the income being below that of an equivalent Centrelink income, aims to ensure the safety and wellbeing of children. ASAS support is withdrawn from those families who are not successful following the RRT stage of the refugee determination process, leaving them with no income or supports for the later stages of the determination process. Families with children are left to rely on charity to support their children's most basic needs of food, shelter and healthcare. Whilst some families are accepted on to the CAS Program, this is rare and not all families with children are eligible and acceptance onto the program. Acceptance only happens following extended periods of time and concerted advocacy efforts.

Under a Victorian State directive, asylum seeker children are eligible to attend primary and secondary school, regardless of the restrictions on their parents' visas. This demonstrates a clear commitment to a child's right to education; however lack of income hinders the welfare, safety and development of children. Families with no access to income cannot pay for school fees, uniforms, books, stationary and excursions. This causes distress and shame in parents and children alike and it impacts on children's development, their school work, their participation and socialisation, their psychological and emotional health and overall well being. A further impact on a child's overall wellbeing is appropriate access to healthcare and medication which is not assured for asylum seeker children and families who are left to rely on charity.

The ASRC is in support of ECA's (2004) recommendations to help achieve the goals to enable all asylum seeker children and their families to have their safety and wellbeing assured, which includes:

- Families should have access to the support they need to care for their children and participate in the community.
- All school-aged children should have access to the same education available to all other Australia children.
- All young children and families should have access to the same range of children's services and funding support available to all other Australian children.
- All children should have access to health programs and services.
- Language and support should be available in the child's home language.

Further to these recommendations, the ASRC also supports those recommendations put forward in the 2009 Study by Hotham Mission ASP (2010) into the *Rights of the Child: The Experience of living in the Australian Community awaiting a decision from the Minister for Immigration*.

### **Case study**

*A nine year old boy presented with asthma, obesity, soiling, bedwetting, night terrors and insisted on sleeping in his mother's bed.*

*His family was threatened by possible forced departure, and was deeply demoralized by being dependent on charity for their survival. While the boy had previously been a good student, he became reluctant to attend school or do homework, the night terrors increased and the bedwetting and soiling escalated.*

*During counselling sessions some progress was made on these issues - the boy's symptoms reduced and his treatment plan was closely monitored.*

*At this point the family received their notice to leave to country within 28 days. The child and his parents were unable to focus on any treatment as their stress levels escalated. The boy's previous gains were lost and the problems increased. The family was forced to leave the country.*

### **Unaccompanied minors**

Children and adolescents under the age of 18 arriving in Australia alone are among the most vulnerable asylum seekers as they are living in Australia without any formal guardian or support. The Refugee Minor Program (RMP) is a government funded program administered by the Department of Human Services (DHS) in Victoria. Minors who arrive in Australia with a permanent refugee visa or humanitarian visa without a guardian are automatically referred into RMP and provided with case management support until they turn 18 years old. Unaccompanied asylum seekers under the age of 18 arriving in Australia are not automatically referred into RMP. The referral pathway for unaccompanied asylum seeker minors is not so simple and access to this program and appropriate exit plans upon turning 18 years remains problematic for young people seeking asylum.

As a specialist program RMP is to be commended for the comprehensive work they undertake with children and young people. However, there are a number of challenges in ensuring that asylum seeker minors have access to RMP. The process of referral to the program is timely and in some cases unsuccessful. Currently, referrals to RMP have to be made to DIAC case management, with DIAC case management referring into RMP. Even when a young person's age is known to DIAC, it can still take months of negotiation, documentation proof and bone density testing before someone is referred into this program. Many young asylum seekers are excluded from this program for a significant period of time due to these delays. This leaves unaccompanied asylum seeker minors to navigate a multitude of complex systems including the schooling system, the refugee determination process and sourcing appropriate housing. In addition, they generally require support and guidance around living skills such as accessing finances and budgeting, developing community connectedness, acculturation, shopping, cooking etc. These young people also suffer from separation from their family and many have been traumatised from experiencing horrific situations.

The delayed referral process along with the expectation that the asylum seeker sector must justify referrals of asylum seekers to RMP fails to recognise the inherent vulnerabilities of these children and young people. Simply being an unaccompanied asylum seeker minor should be enough to be accepted into RMP. Despite the conflict of interest that arises with DIAC having dual guardianship and immigration decision making roles, it is still essential that asylum seeker minors have a guardian and effective welfare support. RMP is best placed, and their case managers most appropriately skilled, to address the needs of the children and young people from refugee backgrounds.

Once an asylum seeker minor is on the program the work undertaken is of a high quality and the children and young people are intensively and appropriately supported. Further challenges have arisen when RMP is closing work with the young asylum seeker. Whilst there is recognition that RMP cannot continue to work with minors past 18 years of age it is essential that appropriate exit planning is undertaken to ensure the ongoing safety and wellbeing of the young person.

The issues facing these children, whilst different to the issues facing children in detention, are nonetheless critical.

## **Conclusion**

The issues facing asylum seeker children are in breach of the CRC and these children would greatly benefit from an independent statutory office to advocate at a national level for their needs, rights and views. The expansion of the list of children referred to in subsection 46MB(4) should be expanded to include children seeking asylum, so that this vulnerable group of children's specific needs are acknowledged.

The ASRC is deeply concerned that the Minister for Immigration is the legal guardian of all unaccompanied minors seeking asylum.<sup>8</sup> The Minister can delegate those powers to DIAC officers.<sup>9</sup> This situation creates a clear conflict of interest. The Minister or a DIAC officer cannot ensure their primary consideration is the best interests of an unaccompanied minor when they are at the same time the guardian, the detaining authority and the visa decision-maker. Therefore it is imperative to the welfare of asylum seeker children that the Children's Commissioner is appropriately resourced and mandated to consider this vulnerable group.

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<sup>8</sup> See *Immigration (Guardianship of Children) Act 1946* (Cth), s 6

<sup>9</sup> See *Immigration (Guardianship of Children) Act 1946* (Cth), s 5