

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

MIGRATION AMENDMENT (COMPLEMENTARY PROTECTION) BILL 2009

SUBMISSION

BY PROFESSOR MARY CROCK AND DANIEL GHEZELBASH

The University of Sydney, Faculty of Law

1 THE LEGISLATION IS NEEDED

Australia has signed and ratified the vast majority of international human rights treaties and conventions that are relevant to refugees and other forced migrants. As such it has assumed a variety of obligations under international law not to send back or refoule persons in Australia who would face serious infringement of their human rights upon return. As a matter of domestic law, however, Australia has chosen to date to focus on obligations assumed under the UN Convention relating to the Status of Refugees (The Refugee Convention) and its attendant Protocol. The non-refoulement obligations under those instruments are subject to a variety of constraints which severely limit the requirement to offer protection to international migrants who find themselves in Australia in situations of acute need. Successive governments have asserted that the protection of these non-refugees has been adequately addressed by the Minister for Immigration having a generic discretion to intervene where an applicant for protection is rejected by the immigration authorities.

The Committee will be aware that there have been a series of Senate inquiries over the years into the validity of this claim. Two strike us in particular as being of particular significance in this regard: the June 2000 Report, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Processes*; and Select Committee on Ministerial Discretion in Migration Matters. We would draw your attention also to Professor Crock's report on unaccompanied and separated refugee children, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in Australia* (2006); and to the work of the Edmund Rice Centre on the fate of persons determined not to meet the Convention definition of refugee: *Deported to Danger*: see www.erc.org.au/research/pdf/1096416029.pdf.

The most important work done by an Australian on this topic in recent years, however, is the doctoral study by (now) Associate Professor Jane McAdam. Her work is published in *Complementary Protection in International Refugee Law* (Oxford University Press, 2006).

The submission prepared for the 2000 inquiry by the Law Council of Australia sets out the nature of the international obligations and the need for the introduction of a protection scheme to complement that operating for persons recognised as refugees under the Refugee Convention. It is appended at Attachment 1.

In all of the works mentioned above and in many others, recommendations have been made in the strongest terms that the “non-review, non-compellable” discretion vested in the Immigration Minister is not a sufficient safeguard for non-citizens in Australia who hold real and grave fears for their safety and wellbeing if forced to return to their country of origin. The impetus for the Sanctuary Under Review inquiry in 2000 was the return to China by the Australian immigration authorities of a Chinese woman who was subjected to forced abortion of her at-term baby. The woman had been refused refugee status in Australia on the basis that opposition to China’s One Child Policy could not be used to support a claim to refugee status under the Refugee Convention. In spite of the unanimous agreement in the committee that Australian law and policy should change so as to ensure that things like this should never be allowed to happen again, not one of the Committee’s 43 recommendations were acted upon by the then coalition government.

In the decade that has passed since the Senate took evidence for the Sanctuary Under Review report, Australia has become more and more isolated in the community of Western refugee receiving countries in its failure to make provision for complementary protection for persons living in fear of return to their countries of origin. Sadly, evidence has emerged of repeated instances where Australia has failed to comply with its non-refoulement obligations under general human rights law.

2 SUGGESTED AMENDMENTS TO THE COMPLEMENTARY PROTECTION BILL

Although the proposed Bill is to be welcomed in most respects, we join with other members of the refugee advocacy community in submitting that the legislation could be improved in several key respects. In our view a central objective for Parliament should be to ensure that the new complementary protection determination process dovetails as closely as possible with existing refugee status determination processes and with existing international jurisprudence in the area. While it is inevitable that the new regime will result in court actions upon which an Australian jurisprudence will develop, every effort should be made to simplify the law so as to minimise litigation. In particular, it is important to ensure that applicants for refugee status and for complementary protection status face the same standard of proving their claim; that the new laws be stripped of embellishments that invite argumentation; and that they be consistent with both relevant provisions in applicable human rights treaties and (as far as possible) with similar laws enacted by comparator countries.

1. Simplify the standard of proof in proposed paragraph 32(2)(aa)

We submit that the standard of proof in the s 32(aa) is too onerous and inconsistent with international law and accepted practice. For an applicant to be awarded a protection visa on complementary protection grounds, proposed s 36(2)(aa) requires that the minister be satisfied of four matters:

(1) There are substantial grounds for believing the applicant will be harmed if removed from Australia;

- (2) The harm is a necessary and foreseeable consequence of the non-citizens removal;
- (3) There is a real risk that the non-citizen will be harmed because of a matter mentioned in s36(2A); and
- (4) the harm is irreparable in nature.

As Associate Professor McAdam explains in her submission, these four matters are discussed in international jurisprudence on complementary protection, but are used to explain the central real chance test of predicted harm, rather than as cumulative tests. We agree with Associate Professor McAdam that the use of these four thresholds in a cumulative manner will lead to:

- (a) substantial confusion for decision makers;
- (b) inconsistency in decision-making;
- (c) the imposition of a more onerous standard than is required in any other jurisdiction or under international human rights law; and
- (d) An increased risk that will expose people to refolement.

It is our view that the legislation should make it clear that the standard of proof for complementary protection status is the same as that for refugee status - that there be a real chance (in this instance, real risk). In relation to the key question – risk of what - the legislation should rely simply on a single definition of ‘serious harm’, as set out in s 36(2A) of the Migration Act 1958 (Cth) (see further discussion of ‘irreparable harm’, below).

Accordingly, we submit that the section should be amended to read as follows:

Paragraph 32(2)(aa)

‘a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) to whom the Minister is satisfied that as a consequence of the non-citizen being removed from Australia to a receiving country there is a real risk that the non-citizen will be subject to serious harm, as defined in sub-section 2A’

This amended standard of proof reflects the standard outlined in the current s 32(2)(a) of the Migration Act. As such, it would provide greater certainty and avoid the need for the creation of a new body of jurisprudence that would necessarily arise around interpreting a new threshold.

2. Delete the requirement that the death penalty ‘will be carried out’ in proposed paragraph 36(2A)(b)

We submit that this amendment will give greater certainty to Australia’s non-refoulement obligations under the Second Optional Protocol to the International Covenant on Civil and Political Rights. The requirement that the death penalty ‘will be carried out’ invites argumentation and speculation in a way that will work against persons in need of protection. Whether a government will carry through with a threat to execution is often difficult to ascertain with certainty, given the possibility of last minute appeals, pardons or changes of law. Further, this requirement excludes persons who may be placed on death row for an unknown period. In *Soering v United Kingdom*, the European Court

of Justice ruled that being incarcerated for an undetermined period of time while awaiting execution itself amounted to cruel and degrading treatment. This amendment would ensure that does not refouler persons that would be subjected to such treatment.

3. Replace 'irreparably harmed' with 'subject to substantial harm' in proposed paragraph 36(2B)

This amendment is required to maintain consistency with the proposed amendment to the standard of proof in proposed paragraph 36(2)(aa). The phrase 'irreparably harmed' is an ill-defined and uncertain test that could be interpreted so as to impose a more onerous test on claimants than that contained in either the Convention Against Torture or in the international Covenant on Civil and Political Rights. The test 'substantial harm', which already exists in other sections of the Migration Act, should be used instead.

It is our submission that the Committee should accept the recommendations made in this regard by the Victorian Foundation for Survivors of Torture (Foundation House).

ATTACHMENT 1

MINISTERIAL DISCRETION AS A SAFTEY NET

3 The adequacy of the Minister's non-reviewable, non-compellable discretion to grant a visa as a safeguard against a breach of Australia's obligations under the UN Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment.

3.1 INTRODUCTION

The "non-compellable, non-reviewable" discretion which allows the Minister to overrule adverse decisions of the RRT is an inadequate safeguard for refugee claimants against refolement, both legally and morally. A ministerial discretion to overrule is not inherently bad. On the contrary, in light of the rigidity of migration legislation since codification, discretion is necessary to deal with exceptional cases not covered by the regulations. What is objectionable about the s 417 discretion is that it is non-reviewable and that the structure of migration legislation makes it the only safety net for people who do not meet the narrow technical refugee definition outlined in the 1951 UN Convention relating to the Status of Refugees. There are many "quasi" refugees who face significant danger to their personal security, human rights or human dignity if they are "refoled" or returned to the country from whence they have fled. The present system overestimates the ability of primary decision-makers and the RRT to pick out refugees and the Minister's ability to act as a safety net. The system glosses over the complexity of interpreting and applying international law obligations, and the political influences that impinge on these decision-makers. The discretion is also inappropriate because it assumes that applicants have the knowledge and resources to apply to the Minister and uses a public interest criterion when the focus should be on the danger that an individual faces. It is legally objectionable because it is based on a false premise of government largesse when such claimants may be protected against refolement under other international conventions which Australia has acceded to.

This part of the submission begins by exploring the extent of Australia's international non-refoulement obligations. Section 417 and the assumptions underlying it are then examined in light of these obligations.

3.2 AUSTRALIA'S INTERNATIONAL NON-REFOULEMENT OBLIGATIONS

Australia recognises the obligation not to refole refugees under Art 33 of the Refugee Convention. Australia is also a party to the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the 1966 International Covenant on Civil and Political Rights. These also contain non-refoulement obligations.

Obligations Under The CAT

Article 3 of the CAT provides that no State Party shall refole a person where there are "substantial grounds" for believing that they will be in danger of being subjected to "torture". "Torture" is defined as severe pain or suffering intentionally inflicted on a person or a third person for the purposes of obtaining information or a confession, punishment, intimidation, coercion or for any discriminatory reason at the instigation of, with the consent of or the acquiescence of government officials. It does not include pain and suffering arising from lawful sanctions.

The CAT is wider than the Refugee Convention in the sense that there is no need to prove a nexus with the five civil or political grounds that the latter requires. Conversely, it is narrower than the Refugee Convention as it requires a higher degree of state complicity. State acquiescence of torture is interpreted as a situation where public officials are clearly unwilling to protect a particular victim from torture; this compares with the Refugee Convention's requirement of mere unwillingness. It is also narrower because it relies on an objective standard and requires "substantial grounds" as compared to the more generous "real chance" and the subjective/objective tests.

Obligations Under the ICCPR

The UN Human Rights Committee contends that parties to the ICCPR should interpret their Refugee Convention obligations in a manner consistent with ICCPR obligations. Articles 6 and 7 of the ICCPR possibly have implicit non-refoulement obligations. Article 6(1) states that everyone has an inherent right to life which should not be taken from them arbitrarily whilst Article 7 states that no one shall be subjected to "torture or cruel, inhuman or degrading treatment or punishment". Refoulement of people who risk being killed, tortured or being subjected to cruel, inhuman or degrading treatment would breach Articles 6 and 7 respectively.

Like the CAT, Articles 6 and 7 of the ICCPR are wider than the Refugee Convention because they do not require a nexus with the five civil and political grounds. The ICCPR is wider than both the Refugee Convention and the CAT in that it does not require

persecution or intentional acts. It could thus apply to people caught up in situations of generalised violence and war but who cannot show that they have been targeted. Finally, Article 7's phrasing of "cruel, inhuman or degrading treatment or punishment" is wider than CAT's definition of torture. On the other hand, Articles 6 and 7 are narrower than the Refugee Convention because they are based on an objective standard.

Consequences of Breaches of these Obligations

Breaches of these refoulement obligations also lead to breaches in Articles 26 and 31 of the 1969 Vienna Convention on the Law of Treaties. Article 26 provides that parties must perform treaty obligations in good faith and Article 31 provides that treaties must be interpreted in good faith in accordance with the ordinary meaning and object and purpose. However, the problem facing refugee claimants in enforcing these non-refoulement rights is that international law does not vest rights in domestic law; it must be incorporated into domestic law before this occurs. Neither the ICCPR nor the CAT have been incorporated. The ICCPR is included in Schedule 2 of the Human Rights and Equal Opportunity Commission Act 1988 (Cth), but this is not incorporation. Some provisions of the CAT have been included in the Crimes (Torture) Act 1988 (Cth) and Art 3 has been given legal effect in s 22(3) of the Extradition Act 1988 (Cth) but this only relates to extraditions. Thus breaches of these non-refoulement obligations are not illegal under domestic law. Despite this, the approach taken by this essay is that these obligations should be honoured because it is morally absurd to distinguish between these refoulement obligations and Article 33 of the Refugee Convention when they all concern violations of fundamental human rights. Failure to respect these obligations would also make Australia look hypocritical and "platinuous".

3.3 SECTION 417 IN LIGHT OF THESE OBLIGATIONS

In light of these international obligations, s 417 provides a flimsy safety net for people who are not covered by the refugee definition but still face significant harm if refouled and for refugees who fail to be recognised even after RRT review. This is because s 417 is based on questionable assumptions about the competence of the Minister and the RRT and, the ability of a refugee to apply for this discretion.

The Minister Lacks Time and Expertise

Section 417 assumes that the Minister has the time and expertise to exercise this discretion properly. In reality the Minister is unlikely to have adequate time because of the large numbers of people involved. The Refugee Convention's refugee definition is extremely narrow; being based on outdated Cold War ideology and Eurocentric values. It does not acknowledge that most of the harms that cause flight nowadays do not involve discrimination on civil or political bases, but rather generalised violence, mass persecution and civil disorder. This suggests that the majority of people who seek protection visas will fail even though they face torture or death if refouled and are covered by the CAT and ICCPR. These people would then have to apply for the Minister's discretion. In 1997-98, 8101 protection visa applications were made. Out of this, primary decision-makers and the RRT granted 1524 protection visas. Thousands of

applications are made to the Minister asking him to exercise his discretion.

The speed at which refugee applications are processed also prevents proper exercise of this discretion. Evidence given to the Senate Legal and Constitutional Legislation Committee on Migration Amendment Bill (No.2) 1995 (Cth), revealed that 26 Sino-Vietnamese applicants were processed in 48 hours.

The assumption of ministerial expertise is dubious given the complexity of interpreting and applying international obligations. Within the Refugee Convention there is uncertainty about the breadth of the "particular social group" ground. The High Court in *Applicants A and B v Minister for Immigration and Ethnic Affairs* held that a "particular social group" could not be defined by a shared persecutory experience; rather members of a social group must have associative qualities which define who they are and not what they do. This is an impossible distinction because a person's social identity is defined by what they do as well as what they are. The difficulty of applying this is/does distinction is reflected in McHugh J's contradictory statement that the applicants would have been refugees if they had done something to publicly express their refusal to accept the one child policy. There is also vagueness in the CAT and ICCPR, relating to the extent of pain and suffering required for torture and what can be classified as cruel, inhuman or degrading treatment or punishment, respectively. The quality of the advice given to the Minister is debatable as most of the Department's work is focused on the Refugee Convention and not the CAT or ICCPR.

ATTACHMENT 2

Executive Summary Seeking Asylum Alone Report (2006)
(Full report available at:)

While children (defined in Australia as any person aged less than 18 years) have always constituted a sizeable proportion of the world's refugees and displaced persons, recent years have seen a remarkable number of children travelling alone. These children are referred to as unaccompanied or separated children, depending on whether they travel with or without non-relative adults of some description. Some children move within groups of obvious refugees or asylum seekers as "smuggled" people. Others travel with unrelated adults in exploitative arrangements as "trafficked" persons: a form of modern day slavery where children become victims of sexual and physical abuse.

This report charts the physical, legal and administrative experiences of unaccompanied and separated children seeking refugee protection in . It examines the treatment of children who have arrived on Australian soil, as well as those intercepted and deflected to either or (more recently) . has ratified all the major international human rights instruments, which are relevant to children travelling alone. The results of this research suggest that there is a marked divergence between these standards and the reality of children encountering 's border control, refugee processes and general immigration enforcement mechanisms. Australian decision makers have also been slow to recognise the need to adopt a child-focused approach. In particular, more attention needs to be paid

to forms of persecution that are peculiar to childhood, so as to acknowledge that children may in some cases qualify as refugees for different reasons than adults.

The Scale and Nature of Movement

has a long history of admitting unaccompanied children as part of its planned migration programs. In recent years, has been part of a global trend in which between 2% and 5% of asylum seekers present as child migrants travelling without the protection of a parent or adult guardian. Between 1999 and 2003, 4,089 children entered without valid visas, of whom approximately 290 were unaccompanied and separated children aged between 8 and 17 years. Such children have continued to arrive and to claim asylum in . In this project, special study was made of 85 cases of unaccompanied and separated children.

Insufficient attention has been paid to the phenomenon of children travelling alone: the available statistical data is poor, contradictory and incomplete. Official figures are at odds with estimates offered by non-government agencies. The failure to identify any child trafficking victims since 1994 is a matter of particular concern.

DIMA should collect accurate statistics on unaccompanied and separated child migrants entering either with or without visas. These should be updated periodically and shared amongst relevant agencies and authorities concerned with the care and welfare of children and immigration control. The statistics should be available publicly.

How and why children travel alone

A clear majority of the children whose cases were examined in this study appeared to have left their country of origin in response to serious and immediate threats to their life and livelihood. The evidence collected suggests that most of the 85 participants studied: had little or no control over the decision to leave their homes and countries; and had no access to authorities or facilities that would have enabled them to migrate through regular means.

Greater attention needs to be paid to the causes of child migration within government. Consideration should be given to the establishment of a special task force within DIMA to study all aspects of the phenomenon and assist in the formulation of appropriate reception and settlement policies.

The Identification of Unaccompanied and Separated Child Migrants

Little information was provided about either the training of government officials or the adoption of specific practices for the identification of unaccompanied and separated child migrants. Evidence from the young people interviewed and from secondary sources suggests identification is reliant on either the visual identification of children travelling without an obvious guardian or on the self-identification of such children.

The Federal government should institute specific identification procedures for

unaccompanied and separated children to find out: first, whether or not the child is unaccompanied; second, whether the child is an asylum seeker or not; and, third, whether the child is a victim of trafficking. These identification processes should accord with those recommended by UNHCR.

An operation task force to seek out child victims of trafficking should be instituted, targeting ports of entry into and child migrants living in the community.

Age Determinations

The recognition that a person is a child is critical to ensuring appropriate treatment. The research revealed that excessive reliance has been placed on either the testimony of children as to their age, and/or physical assessment mechanisms such as bone scans. Age assessments were found to be arbitrary, physically intrusive and unreliable. Concerns arose also about the way in which determinations were used.

Age assessment should be based on the totality of available evidence, taking account of: claims made by the child; physical and psychological maturity; documentation held (such as passport or identity cards); evaluation by healthcare professionals; information from family members; and any x-ray or other examinations. Where the outcome of age determination affects decisions about detention, independent experts should make the final determination.

The accurate assessment of age should be viewed as a child welfare issue, rather than an immigration enforcement issue. The assessment should be used to determine the type of care to be given to the child, rather than the credibility of his or her claim to refugee protection.

Access to Territory

In recent years has deliberately denied some unaccompanied and separated children access to its territory for the purposes of seeking asylum. These children have been sent to and to have their refugee claims determined. In the case of those sent to , the asylum process offered was markedly inferior to that on mainland . The continuing policy of sending asylum seekers who arrive by boat to for refugee processing is a matter of grave concern. As well as increasing the costs of the system, there is considerable potential for abusive processes to develop in this remote location.

The federal government should follow the guidelines set by UNHCRG, 4. Unaccompanied and separated children should never be interdicted and deflected from mainland , either by being returned to their country of origin or sent to an offshore processing centre. Their claims should always be considered under the normal refugee determination procedure.

The Reception of Unaccompanied and Separated Children: Guardianship and “Screening in”

Under Australian law, the Minister for Immigration is the official guardian of all immigrant children who are in without the protection of a parent or other responsible adult. The law places the Minister in a position of impossible conflict of interest because immigration control dominates over child protection issues at every point. Children engaged with immigration authorities often do not have an effective guardian for the purposes of either immediate care and control or assistance in negotiating administrative processes.

Unaccompanied and separated children face particular hurdles in trying to access asylum processes in . All those who arrive without a valid visa are subjected to a “screening-in” process which involves “questioning” and then “separation” detention. In order to access ’s asylum procedures, a child who enters without a valid visa must demonstrate without legal assistance of any kind that he or she is a person in respect of whom owes “protection obligations”.

Children should be appointed an advisor and guardian at the screening-in stage, because the interview is critical in establishing whether a full asylum claim can be made. Any screening process should be simply a mechanism for eliciting basic information about a child. It should be designed to be child-sensitive rather than demanding and punitive.

As virtually every major inquiry has recommended since 2000, immigration policies and practices should be changed so as to require immigration officials to explain to unauthorized arrivals (including children) their rights to seek protection as refugees. This information should be provided to children in the presence of their guardian or advisor in a manner appropriate to a child’s age and stage of development.

Detention

Until July 2005, it was normal practice in to make no distinction between adults and children found in without a valid visa. All were placed immediately in immigration detention. For the young people studied, this practice was extremely damaging. Although abandoned the policy of mandatory detention of children in July 2005, State practice in this country still falls short of the benchmarks set by UNHCR, the Human Rights Committee and the Committee on the Rights of the Child. There remains no absolute prohibition on detaining immigrant children.

Unaccompanied and separated children should never be detained. Where a child’s age is being disputed, they should be given the benefit of the doubt and should not be placed in immigration detention.

The Treatment of Trafficked Children

While most of the smuggled children have been allowed to lodge refugee claims, the same is not true of the one child identified as the victim of trafficking in ’s recent past. Initiatives have been taken to combat trafficking in persons in . However, trafficking visas are primarily focused on the prosecution of traffickers. Unaccompanied and

separated children should have a right to protection in that is independent of their ability to assist in the investigation or prosecution of a trafficker. Treatment should be determined by what is in the best interests of the child, considering also the wishes of the child.

The Provision of Legal Advice

The Migration Act contains no provision requiring government officials to inform unauthorised arrivals of their rights. Advisors and application forms are only provided if specific requests are made.

Unaccompanied and separated children should have an immediate and automatic right to a government-funded advisor.

's policy of funding advisors under the Immigration Advice and Application Assistance Scheme is laudable. However, the research showed that IAAAS advisors were regarded by many children as government officials, with some unaware that the advisors were there to assist them. This perception may be due in part to the passive role played by the advisor during interactions with immigration officials.

IAAAS advisors must be given the time and space to offer full and proper assistance. This is best achieved by ensuring that children have their immigration status resolved outside the environment of detention centres or remote processing locations such as where an intensive "task force" approach is used.

Formal Status Determination Processes

Many of the problems identified in the processing of refugee claims made by unaccompanied and separated children relate back to problems associated directly or indirectly with the detention environment.

The UNHCR Handbook (1997) sets out three key principles for deciding a child asylum seeker's legal status: expert advice on child development, a focus on objective country conditions, and a generous exercise of the benefit of the doubt in favour of children. All three principles should be adhered to more widely in Australia.

It is unclear whether appropriate training regimes are in place for either the DIMA officers charged with conducting interviews, or for interpreters. Evidence from the children's interviews suggests that such training, if provided, has been inadequate. The children's poor understanding of the process indicates that they were not kept informed in an age-appropriate manner.

DIMA interviews are supposed to be non-adversarial. However, most participants in the study found the interview process to be very confronting – even where their claims were accepted. The interview transcripts examined and observations made by service providers in this study suggest that some DIMA officials used interview techniques that were insensitive to the age, culture, experience and psychological state of the young interviewees. Few concessions appear to have been made for the possibility of the

children having been affected by past experiences of torture or trauma.

Particular concerns were raised about the use of language analysis to determine ethnic identity and origin of applicants.

DIMA officers and interpreters should be provided with specialist training in: the psychological, emotional and physical development and behaviour of children; and matters relating to cross-cultural understanding and the effects of torture and trauma.

Interpreters need to be carefully chosen to ensure their linguistic and social compatibility with the child applicant. They need to be screened for competence and impartiality, and the same interpreter should be allocated to a case for its entirety. Interpreters should never be accessed over the telephone but should attend in person during asylum hearings; nor should children meet their interpreter for the first time immediately before being called to give evidence or answer questions in hearings.

Challenging Adverse Decisions

Refugee Review Tribunal (RRT) guidelines address the treatment of children giving evidence, demonstrating that some thought has been given to the problems associated with children seeking asylum alone. Priority is given to applications made by children. However, the research suggested that in practice, RRT procedures often made no distinction between adult and child applicants. The shortcomings in the processes observed were due in part to the legislative framework within which the tribunal operates. For example, the closed nature of proceedings was identified as a factor that might explain the culture of defensiveness and introspection observed.

Children should have a right to be represented in tribunal hearings, and should only be interviewed by the RRT if they have an advisor present. The RRT's guidelines should be amended to address emergent jurisprudence on children as refugees.

RRT members should be provided with specialist training in: the psychological, emotional and physical development and behaviour of children; and matters relating to cross-cultural understanding and the effects of torture and trauma.

Judicial Review and Other Avenues of Appeal

Unaccompanied and separated children who are unsuccessful in an RRT appeal may seek judicial review of that ruling, but only on very narrow grounds. Few safeguards exist to deal with the particular needs of children. Australian courts have been unwilling to make use of international law to inform the interpretation of either procedures or law in relation to children.

Legislative time limits have played a role in denying child applicants access to judicial review because of the challenges they face in trying to understand what is happening to them. However, applicants have been assisted by High Court rulings on the constitutional right to have fundamental legal errors corrected.

The Federal judiciary should be provided with specialist training in matters related to the

legal and procedural entitlements of children in immigration proceedings.

Consideration should be given to the institution of special measures for the judicial review of decisions involving unaccompanied and separated children. For example, such children should not be subjected to the punitive measures contained in the Migration Litigation Reform Act 2005.

Ministerial Discretion

Other mechanisms available to persons who were unable to obtain protection involved the personal intervention of the Minister through the exercise of a non-compellable, non-reviewable discretion. IAAAS advisors expressed the view that the formal guidelines for the Minister's exercise of discretion are inadequate and that the process remains an arbitrary one, lacking in transparency. The diversity of outcomes produced by the Ministerial appeal process supported this view.

Mechanisms are needed to facilitate the grant of protection in failed refugee claims where applicants have protection rights under other human rights treaties.

The federal government should enact legislation to allow for the grant of complementary protection to persons who are not refugees but who have a genuine fear of returning to their country of origin for reasons that engage the non refoulement obligations of the Torture Convention or similar human rights instruments.

The federal government should enact legislation to create visas similar to the Special Immigrant Juvenile Status visas used in the . These would allow for the grant of permanent residence to children travelling alone who are found to be in a situation of particular vulnerability in .

Use of the Refugee Convention

The grant of asylum or permanent protection under the Refugee Convention represents the most protective State response for many unaccompanied and separated children who have reason to fear return to their country of origin. More attention needs to be paid to interpreting the Refugee Convention in a way that is sympathetic to vulnerable children. In particular:

The requirement of demonstrating subjective fear should not be enforced strictly in children's cases. The child's capacity to express fear may be affected by his or her developmental stage as well as particular experiences. Additionally, the child's access to the resources necessary to corroborate the objective claim may be very limited, reducing the child's ability to assemble evidence required to make a compelling case.

Difficulty in accessing the asylum system means that the grant of refugee protection to separated or unaccompanied child applicants often represents the exception rather than the rule, despite compelling evidence of persecution. In the case of children interdicted and sent to for processing, well over half (32 of 55) failed in their attempt to gain recognition as refugees and were returned to .

Consideration needs to be given to the particular way in which children can suffer persecution. Children can face the same harms as adult asylum seekers. Decision makers seem to be most willing to recognize as refugees children in this category.

In addition, however, children can suffer forms of persecution that are particular to childhood. Examples are children conscripted as child soldiers, sold into slavery or oppressive marriages, or children suffering persistent discrimination as “black” (unauthorized) children. The recognition of this type of persecution as a basis for asylum is more uneven.

Finally, there are forms of persecution that involve harms that are only persecutory in nature because of the children’s minority. These are harms that might cause distress in adults, but prove to be debilitating for children. More consideration needs to be given to interpreting the Refugee Convention through the eyes of the child and in accordance with the Convention on the Rights of the Child (CRC).

The failure to effectively articulate a doctrine of child-specific persecution to complement the generic concept of persecution is a reflection of a broader blindness to the needs and interests of children, particularly those who are unaccompanied and separated from their families. It is an instance of the widespread finding that children are practically invisible and inaudible in migration policy and in international law more generally.

Much greater consideration needs to be given to the categorization of vulnerable immigrant children as refugees. A more systematic consideration of child specific needs and vulnerabilities is urgently required.

should promulgate guidelines concerning children’s asylum applications to encourage the development of case law that develops and explores child-specific persecution.

Protection outcomes

In , no child who enters the country without a valid visa can ever receive permanent refugee status at first instance: temporary protection is granted for three years, after which the whole asylum application process must be repeated. The “seven day” rule and other changes relating to convictions for certain criminal offences have had the potential of leaving some refugees on perpetual temporary protection visas (TPVs). For unaccompanied and separated children, this process is debilitating because of the ban on family reunion and denial of access to government-funded education and training (as they are treated as overseas students and subject to high fees).

The TPV regime should be abolished – most particularly in its application to unaccompanied and separated child refugees.

Children found to be refugees should be given immediate assistance to find and sponsor family members. The right to family reunification should extend to children who reach their majority during or shortly after the refugee determination process.

A direct correlation was apparent between access to support networks and the well-being and success of children who seek asylum alone in .

Specialist intervention programs should be instituted to assist the development of all unaccompanied refugee children and young adults (to the age of 25).

RECOMMENDATIONS

1 DIMA should collect accurate statistics on unaccompanied and separated child migrants entering Australia either with or without visas. These should be updated periodically and shared amongst relevant agencies and authorities concerned with the care and welfare of children and immigration control. The statistics should be available publicly: UNHCRG, 5.19; CRC General Comment, VIII(b).

2 Greater attention needs to be paid to the causes of child migration within government. Consideration should be given to the establishment of a special task force within DIMA to study all aspects of the phenomenon and assist in the formulation of appropriate reception and settlement policies: CRC General Comment.

3.1 The Federal government should institute specific identification procedures for unaccompanied and separated children to find out: first, whether or not the child is unaccompanied; second, whether the child is an asylum seeker or not; and, third, whether the child is a victim of trafficking. These identification processes should accord with those recommended by UNHCR: See UNHCRG, 5 and Annex II; CRC General Comment, V (a).

3.2 Processes for the identification of child asylum seekers and victims of trafficking should be instituted. These should apply both to officials operating at ports of entry into and to immigration officers and law enforcement officials who might encounter unaccompanied and separated child migrants living in the community: CRC General Comment, 95-97.

Age assessment should be based on the totality of available evidence, taking account of: claims made by the child; physical and psychological maturity; documentation held (such as passport or identity cards); evaluation by healthcare professionals; information from family members; and any x-ray or other examinations. Where the outcome of age determination affects decisions about detention, independent experts should make the final determination: UNHCRG, 8; CRC General Comment V (a) A.

The accurate assessment of age should be viewed as a child welfare issue, rather than an immigration enforcement issue. The assessment should be used to determine the type of care to be given to the child, rather than the credibility of his or her claim to refugee protection.

No process for the determination of an asylum claim should be instituted until an assessment is made of the applicant's age and identity as a child.

5 The federal government should follow the guidelines set by UNHCRG, 4. Unaccompanied and separated children should never be interdicted and deflected from mainland, either by being returned to their country of origin or sent to an offshore processing centre. Their claims should always be considered under the normal refugee determination procedure.

6.1 should abandon its current methods of screening all unaccompanied and

separated children arriving by irregular means. Any screening process should be simply a mechanism for eliciting basic information about a child. It should be designed to be child-sensitive rather than demanding and punitive.

6.2 Identification of unaccompanied or separated children should immediately result in involvement of the welfare agencies of the State or Territory in question. Children travelling alone should be allocated an advisor and/or guardian so that they are informed about the process they are entering and are in a position to present their story. This person should have the necessary expertise to ensure that the interests of the child are safeguarded and that her or his immediate needs are met. Children should only be interviewed after being given access to professional or legal advice: UNHCRG, 5.7; CRC General Comment, V (b); and HREOC, rec 3.

6.3 Immigration policies and practices should be changed so as to require immigration officials to explain to unauthorized arrivals (including children) their rights to seek protection as refugees. This information should be provided to children in the presence of their guardian or advisor in a manner appropriate to a child's age and stage of development.

6.4 The Federal government should follow the recommendations made in UNHCRG 5.8-5.9 and CRC General Comment, VI. In particular:
No screening interview should take place if an unaccompanied child is not assisted by an appropriate adult and his or her own legal representative.

An adult should not be deemed to be an appropriate (or "responsible adult") until it has been ascertained that he or she has the necessary training and experience to fulfill this role.

The Screening Interview should not be used to probe the credibility of an unaccompanied child's substantive asylum application or to reach a conclusion as to his or her overall credibility or willingness to tell the truth. Any evidence of credibility obtained at this stage should not be taken into account when making the decision, or upon appeal to the RRT.

The Screening Interview should primarily be used to check an unaccompanied child's identity or to resolve any child protection concerns.

The Screening Interview should not be used to resolve any disputes about the separated child's age.

The interviewer should always ensure that the unaccompanied child has fully comprehended the precise purpose and limitation of the Screening Interview and the type and extent of information he or she is expected to provide.

The interviewer should always ensure that an unaccompanied child fully understands any interpreter being used in the Screening Interview and that he or she is also happy about the gender and nationality or ethnic or tribal origins of the interpreter. Interpreters should also be specially trained to interpret for unaccompanied children seeking asylum.

No unaccompanied child should ever be detained in an immigration detention centre. The detention provisions of the Migration Act 1958 should, at a minimum, be repealed insofar as they apply to unaccompanied and separated children: UNHCRG, 7.6-7.8; CRC General Comment, V(c); HREOC, rec 2.

Where a child's age is being disputed, they should be given the benefit of the doubt and should not be placed in immigration detention.

Beyond this, the Australian government should follow the recommendations made in UNHCRG, 7 and CRC General Comment, V(c):

Unaccompanied or separated children are children temporarily or permanently deprived of their family environment

[T]he particular vulnerabilities of such a child, not only having lost connection with his or her family environment, but further finding him or herself outside of his or her country of origin, as well as the child's age and gender, should be taken into account. In particular, due regard ought to be taken of the desirability of continuity in a child's upbringing and to the ethnic, religious, cultural and linguistic background as assessed in the identification, registration and documentation process. Such care and accommodation arrangements should comply with the following parameters:

Children should not, as a general rule, be deprived of liberty.

In order to ensure continuity of care and considering the best interests of the child, changes in residence for unaccompanied and separated children should be limited to instances where such change is in the best interests of the child.

In accordance with the principle of family unity, siblings should be kept together.

A child who has adult relatives arriving with him or her or already living in the country of asylum should be allowed to stay with them unless such action would be contrary to the best interests of the child. Given the particular vulnerabilities of the child, regular assessments should be conducted by social welfare personnel.

Irrespective of the care arrangements made for unaccompanied or separated children, regular supervision and assessment ought to be maintained by qualified persons in order to ensure the child's physical and psychosocial health, protection against domestic violence or exploitation, and access to educational and vocational skills and opportunities.

States and other organizations must take measures to ensure the effective protection of the rights of separated or unaccompanied children living in child-headed households.

In large scale emergencies, interim care must be provided for the shortest time appropriate for unaccompanied children. This interim care provides for their security and physical and emotional care in a setting that encourages their general development.

Children must be kept informed of the care arrangements being made for them, and their opinions must be taken into consideration.

Access to the trafficking visas should not be dependent on a child's co-operation with police investigations and prosecutions.

8.2 Greater consideration should be given to the protection needs of trafficked children. In particular, such children should be given access to asylum procedures where reunification with family and return to country of origin is not in their best interests.

9.1 The Federal government should ensure that guardians and IAAAS advisors are assigned to represent and advise unaccompanied and separated children as soon as they are identified. Both guardians and IAAAS advisors should have specific training and experience in dealing with vulnerable children.

9.2 The procedures for interviewing children should be adjusted so as to ensure that IAAAS advisors have adequate time to gain the trust of unaccompanied or separated children.

9.3 IAAAS advisors should only interview unaccompanied or separated children in

the presence of a guardian.

10.1 The UNHCRG should be used as the basis for the training of all officials involved in assessing refugee claims lodged by unaccompanied and separated children. Training should cover topics such as international guidelines and practice, child development, interview considerations, and the legal analysis of claims. Existing training programs used in the include a documentary film related to refugee children, role-play, and instruction by officers who have conducted interviews with children themselves. Similar training programs should be instituted in .

10.2 Interpreters need to be carefully chosen to ensure their linguistic and social compatibility with the child applicant. They need to be screened for competence and impartiality, and the same interpreter should be allocated to a case for its entirety. Interpreters should never be accessed over the telephone but should attend in person during asylum hearings; nor should children meet their interpreter for the first time immediately before being called to give evidence or answer questions in hearings. See Generally, UNHCRG, 5.12-5.13; CRC General Comment, VI (c) and (d), VIII (b).

11.1 At a minimum, DIMA decision makers should be trained in and familiar with the specialist requirements for eliciting information from traumatized and frightened children: CRC General Comment VIII (b).

11.2 The federal government should follow the recommendations made in UNHCRG, 2, 11 and CRC General Comment VIII (b) and VI (c):

It is desirable that all interviews with unaccompanied children be carried out by professionally qualified and persons, specially trained in refugee and children's issues. Insofar as possible, interpreters should also be specially trained persons;

In all cases, the views and wishes of the child should be elicited, and considered;

Children seeking asylum, particularly if they are unaccompanied, are entitled to special care and protection;

Considering their vulnerability and special needs, it is essential that children's refugee status applications be given priority and that every effort be made to reach a decision promptly and fairly;

Interviews should be conducted by specially qualified and trained officials; and

In the examination of the factual elements of the claim of an unaccompanied child, particular regard should be given to circumstances such as the child's stage of development, his/her possibly limited knowledge of conditions in the country of origin, and their significance to the legal concept of refugee status, as well as his/her special vulnerability.

It is desirable that agencies dealing with unaccompanied children establish special recruitment practices and training schemes, so as to ensure that persons that will assume responsibilities for the care of the children understand their needs and possess the necessary skills to help them in the most effective way.

12.1 Special attention needs to be given to the way in which the RRT handles hearings involving unaccompanied and separated children. Training programs should include modules that provide members with knowledge of child development; child psychology and cross-cultural understandings specific to children coming before the tribunal. Members should not be allocated cases involving children until they have

undergone specific training to equip them for this task.

12.2 The federal government should follow the recommendations made in UNHCRG, 5.7 and CRC General Comment, VI (e). In particular:

An asylum-seeking child should be supported in any appeal process by a guardian who is familiar with the child's background and who would protect his/her interests;

Such children should be afforded assistance in relation to their appeal by an IAAAS advisor;

In the examination of the factual elements of the claim of an unaccompanied child, particular regard should be given to circumstances such as the child's stage of development, his/her possibly limited knowledge of conditions in the country of origin, and their significance to the legal concept of refugee status, as well as his/her special vulnerability.

13.1 Consideration should be given to the institution of special measures for the judicial review of decisions involving unaccompanied and separated children. For example, such children should not be subjected to the punitive measures contained in the Migration Litigation Reform Act 2005.

Programs should be created for training the federal judiciary in matters relating to both the processing of refugee claims by children and the emergent jurisprudence on children and refugee status.

14.1 That the federal government enact legislation to allow for the grant of complementary protection to persons who are not refugees but who have a genuine fear of returning to their country of origin for reasons that engage the non refoulement obligations of the Torture Convention or similar human rights instruments: CRC General Comment, VI (f).

That the federal government enact legislation to create visas similar to the Special Immigrant Juvenile Status visas used in the United States. These allow for the grant of permanent residence to children travelling alone who are found to be in a situation of particular vulnerability in their country of origin.

15.1 An understanding of child specific persecution is critical to the recognition of asylum claims made by children. The youth of an asylum seeker may be central to the harm experienced or feared. In these cases, decision makers should take a more expansive approach to notions of persecution to correct adult- centered and static conceptions of refugee status. The Refugee definition, and in particular the open-ended ground of "membership in a particular social group" could be applied much more widely and creatively to children's persecution cases than has been the case to date. The adoption of guidelines on children's asylum applications would be a positive step forward.

15.2 Much greater consideration needs to be given to the categorization of vulnerable immigrant children as refugees. A more systematic consideration of child specific needs and vulnerabilities is urgently required.

The regime for the granting of temporary protection to persons recognised as refugees after entry into should not apply to unaccompanied and separated children. Such children should be granted permanent residence as soon as refugee status is granted.

Children found to be refugees should be given immediate assistance to find and sponsor family members. The right to family reunification should extend to children who reach their majority during or shortly after the refugee determination process.