

Standing Committee on Legal and Constitutional Affairs

A submission from Early Childhood Australia to the Parliamentary inquiry into the agreement between Australia and Malaysia on the transfer of asylum seekers to Malaysia

Early Childhood Australia (ECA) is a national non-government advocacy organisation for young children. ECA has a direct interest in the treatment of refugees because of children who are refugees seeking asylum here, either together with their parent or parents, or as 'unaccompanied minors.'

ECA advocates strongly for the rights of children. In responding to the issue of transferring asylum seekers to Malaysia (or otherwise sending asylum seekers to an offshore location for 'processing' or detention) we focus on the rights of children who are seeking asylum and the primary obligation of governments to protect their well being and to make decisions and establish programs in their best interests.

Our submission speaks to the moral and practical significance for the children involved, and for all of us, in considering and protecting children's rights. We believe that at present the moral imperative for considering the rights of children in the situation is lost in the rhetoric of 'stopping boat people', 'stopping people smuggling' and 'stopping queue jumping'. We also believe that we should not, as a nation, declare a policy to be 'in the national interests' without having addressed the fundamental question of human rights.

We call on the Australian Government, indeed on all political parties, to ensure that children are not collateral damage in a policy response that is described as being aimed at stopping people smuggling and eliminating the dangerous sea voyages they sell. This can only be done by separating out the elements of the situation and dealing with each on its merits, de-linking action on the issue of people smuggling from the policy approach to the children of refugees.

In doing this Government would provide leadership to the community that is moral, intelligent and meets the obligation to act in the best interests of children.

Early Childhood Australia State and Territory Branches

The rights of children who are refugees

While the *UN Convention & Protocols Relating to the Status of Refugees*¹ describes the responsibilities of governments to refugees in general, the rights of children who are refugees are identified through the United Nations *Convention on the Rights of the Child*², supported by the *UN Policy on Refugee Children*³. Australia's status as a signatory to the UN conventions carries with it significant legal and moral obligations in this regard.

These conventions set out fundamental human rights. These rights seek to guarantee the protection of the things that are necessary for human beings to flourish. In signing the UN conventions relating to the rights of refugees and children Australia did more than simply acknowledge that these rights exist it also took on an obligation to protect and defend those rights.

ECA strongly supports the long held principle of the United Nations, enshrined in this convention and policy that governments making decisions about children must first and foremost act in a way that will provide for the well being of those children: *the best interest of children* will be paramount. We believe that this fundamental principle of the UN provides the benchmark against which any policy proposal regarding to the children of asylum seekers and unaccompanied child asylum seekers should be assessed.

Importance and challenges of acting to protect rights

ECA endorses the view of the Australian Human Rights Commission president who is reported as saying of the Malaysia agreement 'that Australia [has] to respect the Convention on the Rights of the Child and "we should not be amending our laws in ways that undermine [that] obligation."' ⁴

The acknowledgement of fundamental rights for human beings places some obligation on all of us to protect those rights. In defending the rights of others we are defending them for ourselves. Not to defend the rights of others is to undermine those entitlements for everyone. In the case of children this is particularly important – children are dependent, vulnerable and need special care and protection to realise their potential.⁵ A commitment to recognising and protecting the rights of Australian children as a fundamental principle requires a commitment to recognising and protecting the rights of all children in Australia, including children seeking asylum, as a fundamental principle.

In considering the question of the protection of people's rights, and children's rights in particular, ECA believes that Governments have a singular

¹ UNHRC *Convention & Protocols Relating to the Status of Refugees* ¹
<http://www.unhcr.org/3b66c2aa10.html>

² UNICEF (1990). *Convention on the rights of the child*. www.unicef.org/crc/crc.htm

³ UN High Commissioner for Refugees, *UNHCR Policy on Refugee Children*, 6 August 1993, EC/SCP/82, available at: <http://www.unhcr.org/refworld/docid/3f9e6a534.html> [accessed 13 September 2011]

⁴ 'Children remain challenge in Malaysia plan' by Kirsty Needham, Sydney Morning Herald 13 September 2011 P6

⁵ UNHRC Policy on Refugee Children Page 1

responsibility to ensure not only that the pre-eminence of children's rights informs its thinking, decision making and action, but that this is clearly articulated to the population.

The language of 'boat people', 'people smugglers' and their associated 'business plans', and 'queue jumping' implies that somewhere there is an order, accessibility to due process and resources, and life choices that for the vast majority of asylum seekers do not exist. This language masks rather than exposes the reality which is human need on an incomprehensible scale - refugees now numbering in the tens of millions and their lives more often than not characterised by terror, suffering and chaos. For many, their refugee status and experience becomes their life for many years.

In Australia we are well removed from the problem. Off shore processing promotes a dimension of 'out of sight out of mind' – an unacceptable base for developing policy, especially where human rights are involved. Distance from the problem coupled with the language used to describe it makes it easier for us to assume an asylum seeking process which is orderly and accessible and less likely that we will focus on more complex issues – the causes of war, terror and displacement; the actions that are necessary to prevent and/or address these wherever they happen; and what we can do to work with other countries to stop people smuggling while protecting the rights of asylum seekers both in refugee camps off shore and those who do arrive here.

ECA does recognise that the enormity of the numbers of people seeking asylum and the complexity of the issues makes this very difficult, but we believe that not to try to find a way to address this in fact makes us less human.

In this situation it is the responsibility of governments to lead from principle, to change the language and focus of the discussion, and to be clear about the primacy of human rights and the commitment to these. As a community we need a realistic understanding of the situation, we need broad, informed and incisive debate about the issues and we need a rights based, compassionate response. Our governments over many years have not, on the whole, served us well in providing this. The result is that consideration of the issue of the agreement between Australia and Malaysia on the transfer of asylum seekers is both coloured and clouded as a focus on human rights is lost. We call for a change in this situation.

Policy implications

We note that the UNHRC Policy on Refugee Children says that 'protection and assistance activities are intrinsically linked.'⁶ We believe that using the UN convention and policy to inform rights-based decisions about the treatment of asylum seeking children in Australia in conjunction with the evidence about what children's well being leads to the following conclusions. ECA strongly supports these positions:

⁶ Op cit p1

- Families with children and unaccompanied minors should be placed in the community while their claims are assessed. There is strong evidence that holding children in detention has very negative effects on their long term health particularly, their mental health.

This means that asylum seeking children who arrive in Australia should not be transferred to Malaysia but should remain in Australia with their families, as should children who are unaccompanied and seeking asylum.

- In the event that an application for refugee status is unsuccessful and families and unaccompanied minors cannot return to their home country, families and unaccompanied minors should continue to live in the community until such time as they can return home.
- While in Australia, refugee children (and their families if they are with them) should have access to the education and care services as well as to the health, family support and other services that are available to others in the community.⁷

In essence ECA's position is that:

- The UN conventions on the rights of children and the policy on refugee children should provide the benchmark for Australia's approach to refugees seeking asylum in Australia.
- The Australian government should respond to the question of children seeking asylum here in its own right, de-linking it from the need to stop people smuggling and giving priority to the rights of the children according to the UN Convention on the Rights of the Child.
- Following from this, refugee children in Australia are the responsibility of the Australian government and should not be sent to a third country but should have their applications for asylum processed here. There is clearly no evidence that the well being of these children will be better served in Malaysia or even that it will be well served there.
- Further, it is fundamental to the well being of children that they remain with their families, and so families accompanying children should also remain in Australia and have their applications processed here.
- Also following from this, all refugee children (and their families if they are with them) should be held in the community, not in detention centres. They should have access to the services and supports that are available to all children and families in Australian communities.
- The public comment by all political parties about 'boat people' seeking asylum in Australia should reposition these people as refugees seeking

⁷ ECA's full *Position on the Children of Asylum Seekers* is available at http://www.earlychildhoodaustralia.org.au/position_statements/eca_position_statement_children_of_asylum_seekers.html

asylum in Australia because they are the victims of war and persecution who have suffered unknown traumas and Australia is obligated to protect their human rights.

Again, ECA acknowledges the complexity of the issues but at the same time believes that each piece of the solution should be defensible against our obligations under the UN conventions dealing with the rights of refugees and of children.

Finally, while ECA is fundamentally opposed to sending the children of refugees seeking asylum in Australia to other countries, if this occurs then Australia must negotiate conditions which ensure the strictest regime for the protection and long term health of these children and their families. The starting point for these negotiations must be that these countries are signatories to the UN conventions on the rights of refugees and the rights of the child.

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