When refugee claimants are kept in the dark: obstacles to see(k)ing asylum in Australia

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Australia was one of the earliest signatories to the United Nations Convention Relating to the Status of Refugees. This article highlights the concerns that have been expressed at a number of levels about obstacles that are placed in the way of persons coming to Australia who wish to claim refugee status under the Refugee Convention. It discusses the provisions of a number of international conventions, including the Convention on the Rights of the Child and the Refugee Convention, and their interaction with the provisions of the *Migration Act 1958* (Cth). The article argues that the lack of assistance and guidance provided to persons seeking refugee status under the terms of the Refugee Convention is of particular concern where those persons are within detention centres and therefore isolated from the Australian community and particularly isolated from the support of members of their own ethnic community and from legal advisers. It further discusses these issues in the context of children who seek refugee status in Australia, both where they are accompanied by parents or guardians, and where they arrive alone.

Introduction

This article argues that the Australian federal government has an obligation under international law to provide relevant information to all persons who are attempting to enter Australia or its territorial waters seeking asylum. This advice should, at the least, outline the processes necessary for them to claim refugee status in Australia, as all adult refugee claimants are unlikely to have had any experience with the legal system relating to a claim for refugee status, whether in their own country or in Australia. Such an obligation is of particular relevance and importance to child refugee claimants due to their youth and lack of adult experience of legal systems and processes. It is of even greater critical importance to unaccompanied minors who have no parent or guardian to protect their legal interests.

The definition of 'refugee' in the Refugee Convention

Australia was one of the original states involved in the drafting and implementation of the United Nations Convention Relating to the Status of Refugees of 28 July 1951

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and is also a signatory of the United Nations Protocol Relating to the Status of Refugees of 16 December 1967 (together referred to as the Refugee Convention). Australia has ratified the Refugee Convention.

Article 1A(2) of the Refugee Convention defines a refugee as:

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

Article 1A(2) does not define a 'refugee' as a person who has been formally recognised as coming within the definition. It provides that the term applies to any person who 'owing to a well-founded fear of being persecuted … is outside the country of his nationality…'. For the purposes of the Refugee Convention, a person is therefore a refugee regardless of whether he or she has been formally recognised as such under the official process of any particular country. As the United Nations High Commissioner for Refugee's *Handbook on Procedures and Criteria for Determining Refugee Status* states:

> A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee. [UNHCR 1992, 28.]

It is also apparent from the wording of other Articles of the Refugee Convention that these provisions apply to persons who have not been formally recognised as refugees. Article 31 provides that contracting states shall not impose penalties on refugees who have arrived illegally in the country. Clearly at this stage, these persons will not have had a chance to seek a formal declaration of refugee status. Article 33 prohibits the expulsion and return of refugees to the territory where their life or freedom was threatened. Again, they may not have had access to the local processes necessary for the declaration of refugee status, but this does not mean that they are not refugees. This principal has been confirmed by the United Nations Executive Committee (Conclusion No 79 (XLVII) 1996, para (j)).[1]

As one leading commentator has stated:

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1 For a more detailed discussion, see Lauterpacht and Bethlehem 2003, 115–18.

> The determination of refugee status is generally considered to be declaratory and not constitutive. The legal effect of a decision as to refugee status is merely formal recognition that the criteria for refugee status is satisfied. The decision does not itself confer that status. [Hyndman 1986, 151.]

Unlike the concept of 'refugee', the terms 'asylum' and 'asylum seeker' are not defined in the Refugee Convention. The 1951 convention does not actually refer to asylum in the main body of its text, although there is mention in the Preamble and in the final Act. It does not make any mention of 'asylum seekers'.

'Asylum seekers' is a phrase often used to refer to emigrants who because of economic and social necessity wish to immigrate to Western nations, but who cannot because of restricted migrant places. Nevertheless, they may also include persons who are seeking asylum from countries with repressive regimes such as Afghanistan, Iran and Iraq. In some cases they are members of religious and ethnic minorities who have migrated to certain countries and who have not been able to assimilate into the second country for such reasons as differing religious beliefs, cultural attitudes and racial discrimination. Examples of this are the Chinese from Vietnam and the Kurds from Turkey, Iraq and Iran (Hughes 2002, 104).

'Asylum seekers' is also used to refer to persons who have not been recognised as refugees but who are, as the term suggests, seeking asylum. They may or may not be refugees within the definition in the Refugee Convention. A 2001 Research Paper of the Australian Parliament has stated that an asylum seeker is:

> A person who enters or remains in a country either legally, as a visitor or tourist or student, or illegally, with no or with fraudulent documentation, and then claims refugee status under the terms of the 1951 United Nations Convention Relating to the Status of Refugees. [Commonwealth 2000–01.]

A reading of Art 1A(2) of the Refugee Convention indicates that refugees under international law are really a subgroup of persons who, for a variety of reasons, are displaced from their country of origin.

However, it is also true that 'the distinction between asylum seeker and refugee is far from sharp and open to cynical manipulation' (Ozolins 2002, 25).

For the purposes of this article, when 'refugees' are discussed this will be a reference to those persons who are declared under international law to be persons who have a well-founded fear of persecution because of one of the reasons set out in Art 1A(2) of the Refugee Convention.

The term 'refugee claimant' will be used to discuss those persons seeking refugee status under the Refugee Convention.

International law relating to refugees

It is important to remember when discussing international law that international human rights instruments were not and are not designed to make one group of society the dominant group. As some commentators have stated: 'equality is essential to the realisation of human rights. This means equality for all' (Dolgopol and Castell-McGregor 2001, 43).

International law differs from municipal law in that there is no superior sovereign to enforce it, although in some instances there are courts and tribunals established to deal with breaches of certain conventions.[2] The provisions of conventions are not usually self-implementing or self-executing. So, for the provisions of, for example, the Refugee Convention to be legally enforceable in the signatory state, they must not only be signed and ratified by the contracting state but their provisions must be enacted into that state's domestic laws (Germov and Motta 2003, 25).

The Universal Declaration of Human Rights (UDHR) provides in Art 14 for a 'right to seek asylum from persecution'. Although the UDHR is not binding on states, it is a fundamental legal principle and the right to seek asylum is implicit in the Refugee Convention.

The Refugee Convention sets out a charter of the rights that signatory countries agree to confer on refugees (Hyndman 1986, 151). These rights may or may not be legally enforceable in the country in which they seek asylum. They are not legally enforceable in the way that we consider Australian federal or state laws to be enforceable unless they have been enacted into Australian municipal law.

The Refugee Convention defines a refugee and sets out a series of obligations on the part of the member state designed to protect refugees. Examples of the important protection afforded by the Refugee Convention are found in Arts 31, 32 and 33. Article 31 states that contracting states should not penalise a person for entering into a state illegally, provided he or she shows good cause for the illegal entry, and Art 32 provides that a refugee can only be expelled on grounds of national security or public order and, more importantly, that any expulsion which takes place must occur in

2 For example, the International Court of Justice established by the United Nations Charter, which sits in judgment on disputes between states that have accepted its jurisdiction.

accordance with *the due process of law* and within a reasonable timeframe. Article 33 provides protection of a refugee against expulsion by the receiving state, if that will result in the refugee's return to a country where he or she fears persecution for a convention reason (the *non-refoulement* principle). It is irrelevant whether this refugee entered the receiving country's territory unlawfully or lawfully.

It is also important to bear in mind when considering the legal rights of refugees under the Refugee Convention that, although the convention sets out a standard by which a refugee is to be defined, it does not set out any procedure for the contracting state to follow either in declaring whether or not a person is a refugee or in how to implement the convention (Germov and Motta 2003, 25). The result of this, together with the fact that states have the sovereign prerogative of balancing their own national interests in allowing entry to their territory as they determine and permitting those already within to remain, means that it is up to the state to conclude how it determines refugee status under the convention (Johnson 1980, 46–47).[3]

In view of the fact that the Refugee Convention does not specifically set out a process for the determination of refugee status and the probability that the signatory states would not establish identical procedures, certain minimum requirements have been recommended by the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR). The major requirements are:

- The official to whom the applicant for refugee status addresses himself or herself should have clear instructions for dealing with cases which might come within the relevant international instruments. They should also be required to act in accordance with the principle of non-refoulement and refer these cases to a higher authority.
- The applicant should receive the necessary procedural guidance.
- There should be a clearly identified authority who has responsibility for examining and making decisions on refugee status.
- Applicants should be provided with the necessary facilities, including interpreter services, for submitting their case and the opportunity to contact a UNHCR representative.
- If the applicant is recognised as a refugee, he or she should be informed and issued with relevant documentation (UNHCR 1992, 192).

These requirements are not legally binding. However, they provide useful guidance as to the minimum standard that should be adopted and have been drafted by the

3 See also UNHCR 1992, 189.

UNHCR, which is charged under Art 35 of the Refugee Convention with the responsibility of supervising the convention's implementation.

Under the *Migration Act 1958* (Cth), anyone who is not an Australian citizen[4] and who is in Australia without valid documentation must be detained in a migration centre (*Migration Act*, s 189). The result is that many refugee claimants are detained in immigration detention centres that are often located in isolated areas of Australia.[5] Any guidance of the UNHCR in relation to the rights of refugee claimants in detention is therefore also relevant. The UNHCR has published guidelines relating to the detention of asylum seekers, providing that refugee claimants should be entitled to details of the reasons for their detention and their rights while in detention; the right to legal counsel; automatic and periodic reviews of the detention; the right to challenge the deprivation of liberty; and access to local UNHCR offices, refugee bodies and advocates (UNHCR 1999, Guideline 5).

International law relating to children

Under the United Nations Convention on the Rights of the Child (the Children's Convention), which was adopted by the United Nations General Assembly in 1989 and ratified by Australia in 1991, issues relating to the protection and care of children have been recognised by international law. The overriding principle, as set out in Art 3 of the convention, is that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. In particular, Art 37 provides that:

> States parties shall ensure that:
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> …
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> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
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> …
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> (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to prompt decision on any such action.

4 The term used is 'non-citizen', which is a reference to people who are not Australian citizens: *Migration Act*, s 4.

5 For example, Woomera (closed 2003) and Port Hedland and Curtin (closed 2002) are in isolated desert areas.

In Australia, the *Migration Act 1958* (Cth) sets out the powers and obligations imposed on the federal government in respect of persons who enter Australia without valid documentation or who remain without such documentation. Since 1994, the Australian federal government has required the detention of anyone who is not an Australian citizen[6] who is unlawfully in Australia (*Migration Act*, s 189). This detention requirement continues until the person is determined to have a lawful reason to remain in Australia (and is granted a visa) or is removed from Australia (*Migration Act*, s 196). These provisions apply to every entrant into Australia, regardless of age. Therefore, all refugee children without valid visas must be detained until they are either granted a visa or deported (*Migration Act*, s 196). There is no distinction in the legislation between the treatment of children with their families and those without.

For the purposes of this discussion, the important words of Art 37(d) of the Children's Convention are, therefore, that children who are deprived of their liberty, as many refugee claimants in Australia are under the *Migration Act* (s 189), have the 'right to prompt access to legal and other appropriate assistance'.

Article 22 of the Children's Convention states that children who are seeking refugee status shall receive appropriate protection and humanitarian assistance to ensure that they fully enjoy their rights under this convention and any other international conventions. This article applies to all children, whether or not they are accompanied by a parent or carer.

The UNHCR minimum procedures relating to the detention of asylum seekers also apply to children. This means that child refugee claimants should be entitled to details of the reasons for their detention and their rights while in detention, access to legal counsel and so on (UNHCR 1999, Guideline 6).

Apart from the international conventions and guidelines referred to above, the UNHCR has also issued guidelines on unaccompanied children seeking asylum. Under the heading 'Refugee status determination for unaccompanied children', these guidelines provide that an unaccompanied child refugee claimant:

> [8.3] … should be represented by an adult who is familiar with the child's background and who would protect his/her interests. Access should also be given to a qualified legal representative …
> [8.4] The interviews should be conducted by specially qualified and trained representatives of the refugee determination authority who will take into account the

6 The term used is 'non-citizen'; see above, note 4.

> special situation of unaccompanied children, in order to carry out the refugee status assessment.
> [8.5] … All appeals should be processed fairly and as expeditiously as possible. [UNHCR 1997, 8.3–8.5.]

A legal guardian or adviser should also be appointed for unaccompanied children (UNHCR 1999, Guideline 6).

The Australian Migration Act 1958

Although Art 14 of the UDHR provides for a 'right to seek asylum from persecution', this right has not been enacted into Australian domestic law and a refugee claimant in Australia cannot therefore enforce this obligation through the Australian legal system.[7]

For the same reasons, the rights under the Refugee Convention and Children's Convention are not legally enforceable by a refugee claimant in Australia.

The current situation in Australia is that refugee claimants without visas are subject to mandatory detention in immigration detention centres. Under s 189 of the *Migration Act*, an officer must detain a person in the 'migration zone' if the officer knows or suspects that that person is what is termed under the legislation an 'unlawful non-citizen' — in other words, they are not an Australian citizen and don't have proper documentation (*Migration Act*, s 5). This provision also applies to persons who are outside the migration zone[8] and seeking to enter it, and who would, once they entered the migration zone, become an unlawful non-citizen (*Migration Act*, s 189(2)). Section 190 similarly provides for detention if the person fails to provide, or tries to avoid providing, proper documentation. A person whose visa has been cancelled or who does not produce evidence of being a lawful non-citizen can also be detained (*Migration Act*, s 192). The only mechanism for release from mandatory detention is if the person either shows evidence of being an Australian citizen; produces evidence of being a lawful non-citizen; or is granted a visa (*Migration Act*, s 191).

Section 256 of the *Migration Act* provides that immigration officials shall provide visa application forms to persons in detention if requested. But the catch is that this only

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7 For a more detailed discussion of the legal enforceability of international covenants and declarations, see Martin 1999, 155–80.

8 This migration zone covers the states and territories and their ports, but does not cover Australia's territorial seas (that is, the waters outside an Australian port), *Migration Act*, s 5.

applies if requested — there is no onus on the official to provide this advice if a refugee claimant doesn't ask for it. In fact, s 193(2) of the *Migration Act* specifically provides that there is no obligation on the part of the government to provide relevant information and legal guidance regarding visa applications and so on.

Paragraph 20(6)(b) of the *Human Rights and Equal Opportunity Act 1986* (Cth) (the HREOC Act) provides that a person who is detained in custody is entitled to have delivered to them any sealed envelope sent to them by the Human Rights and Equal Opportunity Commission (HREOC). The rationale for this provision is that in this way HREOC can advise detainees of their legal rights and the assistance that can be provided to them. This is particularly important in the case of refugee claimants who may not understand the legal and administrative processes that they need to work through in order to have their claim for refugee status recognised and who will in most cases have limited English-language skills. The provision is also important as the very fact of detention isolates a detainee from the community and makes it that much harder for him or her to gain access to legal and procedural guidance.

In the Federal Court decision of *Human Rights and Equal Opportunity Commission v Secretary of Department of Immigration and Multicultural Affairs* (1996) 67 FCR 83, the court found that para 20(6)(b) of the HREOC Act operated to give a detainee in immigration detention the right to have delivered to him or her a sealed envelope from the HREOC without the necessity of a prior request by the detainee to his or her custodian. This meant that HREOC could initiate communication with a person in immigration detention — an essential provision, in view of the fact that most detainees would not even know of HREOC's existence, let alone its address, or have the English-language skills to communicate with its representatives.

As a response to this decision, the Commonwealth Government amended the *Migration Act* to provide under s 193(3) that HREOC is unable to assist a refugee claimant unless specifically requested by them. This provision places a barrier in front of refugee claimants who cannot be assisted by HREOC without actually making a specific request, an impossible situation in view of their probable lack of knowledge of HREOC's existence.

All of these legislative provisions involve dire consequences for the refugee claimant or asylum seeker. Immigration detention centres have been established in Sydney (Villawood), Melbourne (Maribyrnong) and Perth; near Port Augusta in South Australia (Baxter); and at the more remote sites of Woomera (closed in 2003), Port Hedland and Curtin (closed in 2002). These last three are desert camps in isolated areas. Even the detention centres that are near to cities are in locations that are difficult to access; they are on the fringe of the urban areas and may be difficult to

reach by public transport. This exacerbates the isolation of the detainees and through this isolation places further difficulties in the way of their accessing legal and procedural guidance.

The fact of mandatory detention and the conditions for detainees in Australian detention centres or offshore detention facilities have been the subject of a large volume of criticism from a range of sources, including the UNHCR (2000), the United Nations Commission on Human Rights (2002), the Australian Human Rights and Equal Opportunity Commission (2004) and many academics and health practitioners.[9] It is generally accepted that being placed in an Australian immigration detention facility is not a desirable outcome for any refugee claimant and does not facilitate access to guidance in applying for recognition of refugee status. The centres are in isolated locations and administrative difficulties are placed in the way of anyone who wishes to visit and offer assistance.[10] There are additional practical problems of providing adequate legal assistance to applicants in detention centres as, apart from the isolated locations, communication with detainees is often restricted. Where lawyers cannot visit a client personally, they must communicate by phone or facsimile. At all of the centres, detainees frequently experience problems obtaining access to telephones and facsimile machines. This is compounded by the need for the ready availability of competent interpreters to assist the communications. Many detainees are forced to rely on other detainees who have limited English-language skills to communicate with lawyers on their behalf. The importance of detainees being able to communicate with their legal representatives in a confidential and unconstrained manner is not being recognised by staff at the isolated centres (National Legal Aid).

This begs the question of how a claimant, who would not have English as his or her first language, who may be uneducated and illiterate (at least compared to the average Australian) and who may well be suffering from trauma caused by the persecution from which he or she is fleeing and the additional trauma of the journey to Australia, is expected to navigate the maze of migration legislation without some form of guidance or advice about this system. It is strongly argued that by not following the UNHCR guidelines for determining refugee status and the standards for asylum seekers in detention, Australia is breaching its international obligations implicit in the Refugee Convention and UDHR. Furthermore, by failing to provide children in immigration detention with prompt access to legal guidance, Australia is in breach of Art 37 of the Children's Convention.

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9 See, for example, Silove, Steel and Mollica 2001; Loff 2002; and Silove 2002.

10 For examples, see Burnside and the KIDS 2002, [1.6.2]; National Legal Aid.

Refugees in Australia: their experience

In their study of 34 refugees living in Australia who had been granted temporary protection visas (TPVs) by the Australian Government, Michael Leach and Fethi Mansouri spoke to these refugees about their experiences in applying for refugee status in Australia. As one refugee now in Australia under a temporary protection visa stated:

> I used to feel there weren't any guidelines for accepting or rejecting an application. Some people got accepted in two weeks, and others two years even thought they had the same experiences and the same suffering. No one knew whether their story would be accepted or rejected. We would sometimes ask about the reason behind the delays; no one would give us an answer. We felt so scared because of the secrecy. We never knew what was happening with our applications, even two hours before they gave us the visa. This is why I became extremely worried and nervous. [Leach and Mansouri 2004, 71.]

One refugee advised that he had spent seven months in the Woomera detention centre without receiving any information on the progress of his application, even though this was requested many times (Leach and Mansouri 2004, 72). He told the researchers that he and many asylum seekers that he knew had no idea what was happening for months and even years at a time (Leach and Mansouri 2004, 72). Other refugees in this same study complained that there were unjustifiable and inexplicable delays in the processing of visa applications and that they had met people who 'were in the camp for nine months without being interrogated once' (Leach and Mansouri 2004, 72).

In 2005, *Time* magazine in Australia reported that many cases made by asylum seekers who are in Australian detention facilities are so hampered by delays, challenged decisions and inadequate legal advice that people who are eventually deemed refugees wait in detention, often with additional damage to their mental health, for years (Clausen 2005, 34).

An example of where adequate guidelines provided in the early stages of processing could have saved not only the heartache and suffering of the refugee, but also significant resources of the Australian federal government, is outlined in a *Time* magazine article about a refugee from Iran referred to as Farhad (Clausen 2005, 35). Farhad arrived in Australian waters with 120 other people and was so concerned by the treatment that he and his fellow refugee claimants received from Australian officials that he was fearful he would face similar persecution to that which he had faced in Iran. Because of this, he didn't reveal that he had engaged in pro-democracy activities in his homeland for fear that he would be sent back and the information would be reported to the Iranian government. His initial application for refugee

status was therefore rejected, and only then did he realise that he needed to provide information that would place him within the terms of Art 1A(2) of the Refugee Convention. His attempts at doing this before the Refugee Review Tribunal were treated with scepticism and he had difficulty getting into evidence a letter he had received from an Iranian cleric supporting his claim that he had been a dissident in Iran. Four and a half years later, Farhad's refugee status has been recognised and he has been released into Australia on a TPV — but at what cost both emotionally and financially to himself and the Australian community? 'The problem is that a lot of asylum seekers are unrepresented or ill advised in those early stages, and by the time they come to lawyers — when they go to the Federal Court, for example — the opportunity to prove certain facts is over' (McNally, reported in Clausen 2005, 35).

Other legal advocates argue that the lack of guidelines, particularly to assess the applicant's credibility, increases the incidence of inconsistent and arbitrary decisions.[11]

These problems are compounded by the barriers set up by the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) and the contracting entity that manages the detention facilities against allowing legal advisers to visit detainees. As many lawyers have noted, legal advisers can visit unrepresented prisoners within the Australian prison system to offer their assistance. However, they are not allowed to enter immigration detention facilities unless a written request is made by a detainee.[12] This is an incredible Catch 22 when the majority of detainees would not know the name of an Australian lawyer qualified to assist them, let alone have the English writing skills to be able to make contact.

As Justice Marcus Einfeld stated in a speech delivered at the launch of Amnesty International Australia's Refugee Campaign in 2000:

> Unlike the laws that apply to the worst of criminals, the *Migration Act* enacts that asylum seekers have no right to legal advice or even to be informed about their right to apply for refugee status. The practical effect of this legislation is that even if detainees express grave fears about returning to their homeland, their failure to express in actual English words, of which many have little or no knowledge, a desire to seek refugee status has in some documented instances meant that decisions have been made to deport without giving the people concerned the opportunity to apply for Australian protection. This practice is contrary to Australian and international law. [Einfeld 2000, 310.]

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11 For example, David Mann, coordinator of Melbourne's Refugee and Immigration Legal Centre, reported in Clausen 2005, 35.

12 For example, Burnside and the KIDS, [1.4.5]; Barrister Claire O'Connor, reported in Clausen 2005, 37.

Many commentators, researchers and even the refugees themselves acknowledge that a processing period is necessary, as this enables the authorities to, for example, ensure that the refugee claimants do not carry any communicable diseases or other health risks (Ozolins 2002, 32) and to check into their backgrounds adequately and ensure that they are not criminals, or because there may be a reasonable belief that they would abscond.[13] It does, however, appear that the Australian Government is using the delays in processing refugee applications as a further deterrent to refugee claimants, rather than the public statement that it is for the protection of Australia (Leach and Mansouri 2004).

Further barriers in Australia to legal assistance for refugee claimants

Determination of refugee status is not easy, nor is it a mechanical and routine process. The UNHCR has stated that it calls for specialised knowledge, training and experience (UNHCR 1992, 222). There is also the human element, which arguably is even more important in that the official making the determination needs to be able to understand the applicant's individual situation and the factors involved in this.

A further matter that places obstacles, although unintended and probably unavoidable, in the path of the refugee claimant is the complexity of the issues raised in the Refugee Convention. For example, Arts 31, 32 and 33 discussed earlier all relate to difficult legal and administrative issues. They encompass the concepts of refugees entering, either legally or illegally, a member state; being expelled from member states; and being provided with the state's protection. These issues bring with them complex legal considerations. What does it mean to enter into a country illegally? Who are the appropriate authorities to which the potential refugee must report? How does the refugee claimant find out? These are but a few of the questions that an applicant for refugee status would need to be able to ask and have answered, in addition to the crucial question of whether or not they fall within the definition of refugee under the Refugee Convention. In order for a person to seek refuge in Australia under the convention, or to be able to deal with a possible expulsion from Australia, they would need legal advice on many areas, including the country's migration laws; its system of government, in order to ascertain the appropriate authorities to deal with; and what due process they must face if they are expelled.

13 This is a more important issue in other countries. For example, see the United Kingdom Home Office 2002, [4.76–4.77].

Determination of refugee status is a two-stage process. The facts relating to the claim must be ascertained and then the definition of refugee set out in the Refugee Convention needs to be applied to these facts (UNHCR 1992, 29).

Furthermore, in order for the principle of non-refoulement to be properly implemented, an examination of the facts of each case is required. Leading commentators argue that if this does not take place, then denial of protection would be inconsistent with the non-refoulement principle (Lauterpacht and Bethlehem 2003, 118). In view of the serious consequences if a decision is not properly arrived at, the UNHCR's Executive Committee has recommended that:

> … as in the case of all requests for the determination of refugee status or the grant of asylum, the applicants should be given a complete personal interview by a fully qualified official and, whenever possible, by an official of the authority competent to determine refugee status. [UNHCR Executive Committee, conclusion No 30 (XXXIV) 1983, at para (e)(i).]

Although it is a generally accepted legal principle that the burden of proof is on the person making a claim, it is also the situation with refugee claimants that they often arrive in a country with only the barest of documentation, or none at all, in order to protect themselves from apprehension while fleeing persecution, or because of the haste in which they fled or because the documentation was destroyed. The UNHCR therefore recommends that the duty of ascertaining and evaluating all the relevant facts should be shared between the applicant and the examiner (UNHCR 1992, 196). This means that the relevant government official should be providing guidance to the applicant as to the information required for the application.

This places practical burdens on the government of the receiving state. Such difficulties include resourcing for the training of staff and for recruiting staff who are competent to deal with complex issues, such as advising on what is needed to establish refugee status under the Refugee Convention and recognising the possibility of a breach of the non-refoulement principle.

Prior to 1998, DIMIA established an Application Assistance Scheme to fund selected government agencies to provide application assistance to asylum seekers who met a financial means test and who were judged to have a chance of success in their applications. Even at this stage, many asylum seekers complained of inadequate access to specialist legal assistance (Silove and Steel 1998, 6). Under the *Migration Act*, DIMIA officers are not required to provide visa assistance unless the refugee claimant asks for it and, unless the person specifically requests a lawyer, legal assistance is not provided. There is no requirement to inform children and their

parents of their right to a lawyer, or that this might be advisable. Once a person is in immigration detention and has been through the screening process, DIMIA assigns government-funded migration assistance through the Immigration Advice and Application Assistance Scheme (IAAAS). IAAAS providers are registered migration agents and, although some are lawyers, they need not be. IAAAS is funded directly by DIMIA and commenced in 1995 (National Legal Aid).

Prior to 1998, refugee claimants were eligible for assistance from the Legal Aid Commission; however, this funding has been withdrawn. Funding for Commonwealth law matters is provided to each of the legal aid commissions/offices under agreements for the provision of legal assistance between the Commonwealth and each state or territory. Those agreements provide strict guidelines for the kinds of matters for which legal aid may be granted. Since 1 July 1998, legal aid for migration applications at the primary (DIMIA) and review (Refugee Review Tribunal) stages is no longer available under these Commonwealth/state agreements. Prior to this date, the state legal aid commissions were also funded through the Attorney General's Department to provide advice and representation in migration and refugee applications. The Legal Aid Commission of NSW ran a weekly advice session at Villawood Immigration Detention Centre. This service has also ceased and there is no publicly funded advice service for people in immigration detention. The IAAAS therefore now represents the only publicly funded access to legal representation to people in detention (National Legal Aid).

It is particularly significant that there is no legal advice provided to refugee claimants during the screening process (as opposed to IAAAS assistance once they have been screened), as this is the initial stage where claimants, including unaccompanied children, are either placed in immigration detention or removed from Australia (National Legal Aid).[14] This is the time when it is crucial that their complete story is told (HREOC 2004, 7.4.2 and 7.9).

Furthermore, the isolated location of detention centres and the difficulties imposed on legal advisers by DIMIA in visiting asylum seekers create a further barrier to adequate legal representation (Catholic Welfare Australia 2003). This was the finding of a report of HREOC in 1998 and subsequently in 2004 (HREOC 1998, 215 and HREOC 2004, [7.9]).

14 HREOC confirms that detainees who have been 'screened out' by DIMIA in the initial process are not entitled to IAAAS; see HREOC 2001, [3.3].

Other barriers have been placed in the way of refugee claimants gaining advice in establishing their refugee status. For example, in 1999 (as discussed earlier) the government abolished the ability of HREOC to provide information to refugee claimants in detention about their legal rights. Through an amendment to s 193 of the *Migration Act*, HREOC is only able to assist refugee claimants if requested by them — a difficult situation when they may not even be aware of the existence of HREOC.[15] Detainees have also been moved between detention centres without notice being given to their legal representatives and community contacts (Crock and Saul 2002, 92).

A further difficulty is the practice of separation detention. This practice places another barrier in front of the refugee claimant in accessing legal guidance. Under separation detention, new detainees are isolated from the main population of the detention centre for the purposes of 'screening out' those detainees who do not, in DIMIA's view, immediately fall within Australia's international protection obligations. As HREOC found in 2000, persons in separation detention are denied visits by friends or family and are prevented from using the telephone, obtaining news and receiving correspondence. Requests for legal assistance are not responded to in a timely manner, and the period of separation detention can be indeterminate and the reasons for it not adequately explained (Human Rights Commission 2000, [4.1]).[16] HREOC considers that one of the main reasons for separation detention has been to ensure that new arrivals do not learn from other detainees about their right to make an application for a protection visa and to request legal assistance (HREOC 2001, [3.2]).

Practical difficulties for child refugee claimants obtaining legal guidance

As child refugee claimants may be lawfully detained under s 189 of the *Migration Act*, the only judicial review of detention available is whether this mandatory detention actually applies to them. In other words, the only reviewable issue would be whether or not they are an 'unlawful non-citizen' within the meaning of that phrase in the *Migration Act*. As it is probable that a child fleeing from persecution in his or her home country has arrived in Australia without a visa, judicial review of the mandatory detention is unlikely to assist them. As HREOC has stated:

> … in Australia, judicial review of immigration detention is very limited as the detention of unauthorised arrivals is lawful under the *Migration Act 1958* (Cth). Asylum seekers are not

15 *Migration Legislation Amendment Act (No 1) 1999* (Cth), amending s 193 of the *Migration Act*.

16 Subsequently confirmed in HREOC 2001, [3.3].

> able to challenge their detention on the basis that there has been a violation of their human rights under any international instrument to which Australia is a party including the ICCPR or CRC. Without this possibility, there is little to pressure government to speed up processing times, to allow for either the release of a detainee or safe removal to a third country. [HREOC 2001, [3.2].]

Nor does a refugee claimant have access to legal aid or legal advice to challenge their conditions of detention, or treatment in detention, unless this is provided voluntarily. Because of the difficulties discussed earlier in gaining access to advice on how to make a claim for refugee status, child refugee claimants are effectively denied their rights under the Refugee Convention and the Children's Convention (Burnside and the KIDS 2002, Ch 1, Legal, 1.4.5).

Children not accompanied by family members may be given immigration advice in respect of protection visa applications by IAAAS providers, but no legal representative is appointed to represent their individual needs and interests in detention. In respect of their mental and physical well-being, as well as their treatment in detention, unaccompanied minors are reliant on ad hoc voluntary legal support offered by lawyers acting pro bono (Burnside and the KIDS 2002, Ch 1, Legal, 1.4.5).

In the decision of *B & B v Minister for Immigration and Multicultural and Indigenous Affairs*, 2003, the Full Court of the Family Court looked at the issue of children's participation in legal processes. The applicants were child refugee claimants who were being held in immigration detention centres in Australia. The court noted research in the area which concluded that ordinary Australian children and young people face significant barriers to exercising their legal rights and that these barriers are increased when this difficulty is exacerbated by the fact that the children have limited language skills and are held in isolated detention centres.

Although in this case the court's comments were focused more on the capacity of the children to engage in appropriate legal processes, the comments also highlight the practical difficulties that children in detention face in gaining access to legal assistance and the right to challenge their detention. They often have faced trauma and experienced separation from their parents, had sporadic schooling and have limited English, so their capacity to make decisions about a legal challenge to their detention is severely restricted. Coupled with this is the fact that there is no actual process for these children to access legal assistance from adults within the ethnic community.

Furthermore, there does not appear to be any consideration given by DIMIA in ensuring that IAAAS providers have expertise or experience in dealing with

children. Even children who arrive with their families may have separate claims for protection, and unaccompanied children will often have difficulty both in expressing their claims and in providing relevant information due to their youth and the trauma that they have experienced. It is considered by many experts in this area that representatives of child refugee claimants have expertise in interviewing children and the ability to make submissions on their behalf (National Legal Aid).

The *Immigration (Guardianship of Children) Act 1946* (Cth) (the IGOC Act) applies to children who arrive in Australia without family members and was originally enacted to deal with the many British children coming to Australia during World War II. Under this legislation, an unaccompanied child becomes the ward of the Minister, who should apply common law principles in undertaking this role, unless there are any statutory regulations.[17] Section 6 of the IGOC Act states that:

> The Minister shall be the guardian of … every non-citizen child who arrives in Australia … and shall have, as guardian, the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have, until the child reaches the age of 18 years or leaves Australia permanently, or until the provisions of this Act cease to apply to and in relation to the child, whichever first happens.

The Federal Court held in *X v Minister for Immigration and Multicultural Affairs*, 1999, at 595 that the duty of the guardian under the IGOC Act is to ensure that all children under the guardian's care enjoy the fundamental human rights in the Children's Convention, and in particular that the guardian must act at all times in the best interests of the child.

It has been argued that this situation appears to create potential for a conflict of interest in respect of children who are detained in immigration detention (Creyke 2003, 49), as the Minister is effectively acting as both 'guardian and jailer' (Philipson 2002). This was recognised in the 2004 HREOC report *A Last Resort?: National Inquiry into Children in Immigration Detention*, which states that 'the legislation providing that the Minister be the guardian of children and the delegation of those powers to department managers created an insurmountable conflict of interest' (HREOC 2004).[18]

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17 *Migration Act*, s 6; See Department of Immigration and Multicultural and Indigenous Affairs 2004; Creyke 2003, 49.

18 This conflict was also recognised in the case of *Odhiambo v Minister for Immigration and Multicultural Affairs*.

UNICEF has recommended that Australia put in place a process to appoint an independent guardian for unaccompanied refugee children to protect these children's rights (UNICEF Australia and UNHCR 1997, [5.7]). The UNHCR and the International Save the Children Alliance in Europe also make this recommendation in the case of all separated child refugee claimants. The role of this person is to advise and protect unaccompanied children, and the guardian should have special training in areas such as childcare and cultural sensitivities in order to carry out the role effectively (International Save the Children Alliance in Europe and the UNHCR 2004, 16).

DIMIA, however, takes the position that the IGOC Act does not apply while the minor is held in immigration detention, and that the Minister does not accept responsibility for guardianship of minors in detention centres (National Children's and Youth Law Centre).

The 2004 HREOC report into children in immigration detention concluded that the staff members responsible for running the detention centres were also the people who ultimately became responsible for unaccompanied children in detention, despite no documentation supporting the delegation of guardianship from the Minister or his delegates to the staff.[19] The staff had developed a range of strategies over time to improve the care available for unaccompanied children, such as case management plans, progress reports and regular meetings to discuss their needs. Despite these systems being in place, HREOC concluded that they were not adequate to 'address the problems and serious distress faced by these children' (HREOC 2004, 56). Recommendation 3 of the major recommendations and findings of the report states that '[a]n independent guardian should be appointed for unaccompanied children and they should receive appropriate support' (HREOC 2004, 7).

It is important to note that of all the major countries where refugee claimants seek to settle either permanently or temporarily, Australia is the only one that has no articulated policy or publicly available procedures relating specifically to unaccompanied children claiming refugee status (Philipson 2002).

Conclusion

International human rights conventions and guidelines set out minimum standards for detainees in immigration detention regarding their right of access to legal assistance and

19 *Immigration (Guardianship of Children) Act 1946* (Cth), s 5, permits delegation to any officer of authority of the Commonwealth or any state or territory.

guidance. These guidelines recognise the difficulties that member states face when attempting to comply with international standards and, as such, the guidelines are often general principles that leave a lot of the administrative detail to the relevant countries to determine. Nevertheless, the timely and accurate provision of relevant information to a refugee claimant is not only a human right, but also an effective method of informing people of their situation and minimising their concerns. This is of particular importance when the people involved are in isolated immigration detention centres.

This article has highlighted the concerns that have been expressed at a number of levels about the absence of adequate legal guidance for persons coming to Australia who wish to claim refugee status under the Refugee Convention. It has shown how the very system of immigration detention — which isolates detainees from each other and from their legal advisers, the ethnic community and the wider Australian community — has placed significant barriers in the path of persons who wish to claim refugee status under the Refugee Convention. Interpreters are usually a necessity when dealing with complex legal issues; however, they are not easily available in detention centres and detainees do not have ready access to telephones and facsimile machines, which are essential in view of the isolation of the centres and the difficulty of lawyers gaining physical access.

Further obstacles have been placed in the path of refugee claimants through, for example, the amendments to the *Migration Act* preventing HREOC from initiating contact with detainees and also the prevention of immigration officials from offering advice without a request. Furthermore, the absence of any funding for legal aid, even for general advice sessions, has meant that even if a detainee can contact a lawyer, he or she will have to pay for the expense personally unless the advocate is prepared to work pro bono. This places a tremendous strain on the majority of detainees, who would have arrived in Australia with little or nothing.

Of additional importance is the problem of unaccompanied children in detention centres. These children are not provided with an independent adviser who can advise them through the long and often arduous process of claiming refugee status. Although IAAAS assistance is available, it is not available at the crucial screening stage for these children. Furthermore, migration agents may not be legally qualified and usually do not have any expertise in interviewing children and acting on their behalf. It is crucial where children have no parent or caregiver to advise them that they are provided with an independent person who can act in their best interests and make submissions on their behalf.

Strains and conflicts in government systems are actually caused by slow, clumsy, inept and non-transparent immigration processing. If host countries such as

Australia could improve their processing of asylum seekers and the transparency of the processes refugee claimants have to undergo, it is arguable that these problems could be alleviated.[20] Improvements in the provision of legal advice and guidance to refugee claimants in Australia would also bring Australia into line with the international human rights standards that it has agreed to and that the international community expects. ●

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20 For a general discussion, see Hughes 2002, 42–43.

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