

Submission to the National Inquiry into Children in Immigration Detention from

from the United Nations High Commissioner for Refugees

In accordance with its supervisory responsibilities and Article 35 of the 1951 Convention relating to the Status of Refugees, the Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide a submission to the Human Rights and Equal Opportunity Commission (HREOC) on its national inquiry into Children in Immigration Detention.

UNHCR wishes to inform the HREOC that it has consistently conveyed to the Australian Government its concerns regarding detention issues affecting asylum-seekers, while recognising the Government's legitimate concern to combat people smuggling.

UNHCR, through this submission, re-iterates its position on the matter, which is as follows:

I. Detention in General:

1. UNHCR views the detention of asylum-seekers as inherently undesirable. The 1999 Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers ("UNHCR Detention Guidelines") set out under which exceptional circumstances the detention of asylum-seekers may be resorted to. The guidelines also spell out specific recommendations on the conditions of detention. They are not binding, but represent UNHCR's reference point, drawing upon the 1951 Convention relating to the Status of Refugees, relevant conclusions of the Executive Committee [\[1\]](#), and human rights law and standards such as, *inter alia*, the Convention on the Rights of the Child (CRC), the International Covenant on Civil and Political Rights (ICCPR), and the 1990 U.N. Rules for the Protection of Juveniles deprived of their Liberty.

2. The position of asylum-seekers differs fundamentally from that of ordinary immigrants in that they may not be in a position to comply with the legal formalities for entry. This element, as well as the fact that asylum-seekers have often had traumatic experiences, should be taken into account. In UNHCR's view, detention of asylum-seekers may be exceptionally resorted to, if prescribed by national law, for the following reasons, which are set out in Excom Conclusion No.44:

- a) to verify identity;
- b) to determine the elements on which the claim to refugee status or asylum is based;
- c) to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents, or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or
- d) to protect national security or public order.

3. Australia's detention policy applies to all unauthorised arrivals and does not single out asylum-seekers as such. However, the vast majority of illegal arrivals are asylum-seekers. In UNHCR's view, Australia's policy of mandatory detention of all asylum-seekers arriving illegally is not

consistent with applicable international standards, including Executive Committee Conclusions. [\[2\]](#)

4. In UNHCR's view, Australia's policy of mandatory detention does not fall within the exceptions provided for in Excom Conclusion No.44. Under Australia's policy, detained asylum-seekers are only released after they are issued a visa. The policy does not take into account whether:

- a) the asylum-seeker's identity is already established;
- b) the asylum-seeker possessed valid documents, or if without documents, had no intention to mislead, or has cooperated with the authorities;
- c) the elements on which the claim for refugee status is based have already been determined; and
- d) there is no evidence that the asylum-seeker has criminal antecedents and/or affiliations which are likely to pose a risk to national security or public order.

5. It is UNHCR's view that the 'determination of the elements on which the asylum-seeker's claim for refugee status is based', as spelt out in Excom Conclusion No.44, does not mean the duration of the entire refugee status determination procedure, or an unlimited period of time. In UNHCR's view, this means that detention is exclusively for the purposes of a preliminary interview to identify the basis of the asylum claim. This would only involve obtaining essential facts from the asylum-seeker as to why asylum is being sought and would not extend to a determination of the merits or otherwise of the claim. In Australia, a protection visa is issued only once an asylum-seeker is recognised as a refugee after undergoing the entire status determination process. The Minister for Immigration and Multicultural and Indigenous Affairs can issue a bridging visa and release the detained asylum-seeker before status is finally determined. However, this power is exercised as an exception and is discretionary, non-reviewable and non-compellable.

6. In UNHCR's view, Australia's policy of mandatory detention also does not contain adequate procedural safeguards. Minimum procedural guarantees to which detained asylum-seekers are generally entitled in line with international standards, are, in UNHCR's view, the following:

- a) to receive prompt and full communication of any order of detention, together with the reasons for the order, and the rights in connection with the order, in a language and terms they understand;
- b) to be informed of the right to legal counsel and, where possible, to receive free legal aid;
- c) to have the decision of the detention subject to an automatic review before a judicial or administrative body independent of the detaining authorities, to be followed by regular periodic review of the necessity for the continuance of detention, to which the asylum-seeker or his representative would have the right to attend; and
- d) either personally or through a representative, to challenge the necessity of the deprivation of liberty at the review hearing, and to rebut any findings made.

7. In the understanding of the Office, the mandatory detention regime in Australia does not provide an avenue for asylum-seekers to seek a judicial or administrative review of the decision of their detention; or a follow-up mechanism which provides for regular periodic review of the necessity for the continuance of their detention; or to challenge the necessity of the deprivation of their liberty. The Minister for Immigration and Multicultural and Indigenous Affairs may release

asylum-seekers from detention by issuing a bridging visa. However, the Office understands that this power is discretionary, non-reviewable and non-compellable.

II. Detention of Persons under the Age of 18 Years:

8. In UNHCR's view, as a rule, minors who are asylum-seekers should not be detained. [3] In addition to the relevant provisions of the CRC, [4] Article 37(b) of the CRC imposes an obligation on States to detain a child only as a measure of last resort and for the shortest appropriate period of time. Alternatives should therefore always be considered. Where possible, unaccompanied minors should be released into the care of family members who already have residence within the asylum country. Otherwise, alternative care arrangements should be made by the competent child-care authorities for separated minors to receive adequate accommodation and appropriate supervision. Residential homes for children or foster care may provide the necessary facilities to ensure that their proper development, both physical and mental, is catered for while longer-term solutions are being considered. All appropriate alternatives to detention should also be considered in the case of children accompanying their parents.

9. It is UNHCR's understanding that, in the absence of alternatives, detention should be as a measure of last resort, and for the shortest possible period of time. If children are detained at airports, immigration holding-centres or prisons, they should not, in the Office's view, be held under prison-like conditions. If all efforts to have them released or placed in other accommodation have been made and proved impossible, special arrangements should be made for living quarters which are suitable for children and their families.

10. The Office understands that a number of States do not detain children (or do so only exceptionally). For example, Canada, Sweden, Finland, Ireland, Norway, Denmark, and Belgium have adopted regulations, which take into account the age and the vulnerability of the child asylum-seeker. In Canada, although the Immigration Act permits the detention of minors based on exceptional grounds, a 1998 Operations Memorandum issued by the Department of Immigration also states that decisions to detain minors should be governed by Article 3 of the Convention on the Rights of the Child, and directs officials to make every effort to avoid detaining minors. Furthermore, the new Canadian Immigration and Refugee Protection Act specifies that detention of minors should occur only "as last resort". In Belgium, following a positive decision at the admissibility level, separated minors are admitted to the territory and usually accommodated in a specialised section of an open reception centre until a decision is taken on their asylum application or, in absence of a decision, until adulthood. If the children are accompanied by parents or a guardian, accommodation will be provided in an "open centre". In Sweden, where child asylum-seekers are only exceptionally detained, a foreign child under the age of 18 may not be kept in detention for longer than 72 hours, which can be extended in exceptional cases for a further 72 hours. In other countries where authorities believe that some form of control or supervision is required, substitutes for detention have been implemented. Among the various categories of alternative measures, the supervised release of children to local social services is an option that the U.K., for example, has implemented.

11. It is the Office's understanding that children who are illegally in Australia, whether separated or otherwise, are in general detained. There is no existing legislation that automatically allows for the release of minors to the care of family members who already have residency within Australia. There is no existing mechanism that automatically allows access to alternative care arrangements. The alternative detention arrangement in Woomera is currently on a trial basis, and for a limited number of persons. In UNHCR's view, the barbed wire fences surrounding the detention centres, strict security arrangements, and curtailment of freedom of movement are akin to prison-like conditions.

12. It is the Office's understanding that, according to international human rights standards, during detention, children should have the right to an education, which optimally takes place outside the detention premises in order to facilitate the continuance of their education upon release. In practice, by contrast, Australia provides educational services in detention and only allows a minimal number of children to study outside the detention premises.

13. In UNHCR's view, children should benefit from the same minimum procedural guarantees as adults (listed above). These procedural guarantees are not presently available to them.

14. Likewise, in UNHCR's view [\[5\]](#) a legal guardian or adviser should be appointed for minors. In Australia, it is the understanding of the Office that unattached minors (without parents or a close adult relative over 21 years of age in Australia who can provide care) normally become wards of the Minister, who delegates his powers under the Immigration (Guardianship of Children) Act to senior officials of state government welfare departments. In such cases, a conflict of interest may, however, arise if a minor challenges a decision made on their behalf by the Minister, such as when a decision is not for their best interest as required by Article 3 of the Convention on the Rights of the Child, or to challenge the necessity of deprivation of liberty.

III. Recommendations concerning children asylum-seekers in Australia from UNHCR's perspective:

15. Children who are seeking asylum should, in principle, not be detained, and they should never be held in prison-like conditions. This is particularly important in the case of separated children.

16. In accordance with international standards, alternatives to detention should be considered. These may be release on bail, reporting requirements, or open centres. Such options provide a degree of control over the whereabouts of asylum-seekers while allowing basic freedom of movement.

17. A child who has adult relatives living in Australia should normally be allowed to reside with them, pending determination of the asylum application. If this is not possible, alternative care arrangements should be made to ensure that the child receives adequate accommodation and appropriate supervision in an atmosphere of "care" rather than "detention."

18. Consideration should be given to provide an avenue for asylum-seekers to seek a judicial or administrative review of the decision of their detention, or a mechanism which provides for regular periodic reviews of the necessity for the continuance of their detention.

19. Educational services should be extended to all children to study outside the detention premises.

20. There is a need to address the issue of a possible conflict of interest in cases of unattached minors who are wards of the Minister for Immigration and Multicultural and Indigenous Affairs, who may challenge decisions made on their behalf by the Minister. UNHCR therefore recommends the appointment of a guardian or advisor, trained in child welfare matters, for separated minors seeking asylum. Given that most children are neither legally independent nor of sufficient maturity to fully represent their own interests in asylum proceedings, UNHCR considers it important that a qualified adult be tasked with the responsibility to ensure that the child's best interests are met. The guardian should have the necessary training and expertise in the field of child-caring so as to ensure that the interests of the child are safeguarded, and that the child's legal, social, medical and psychological needs are appropriately covered during the refugee status determination procedure and until a durable solution for the child has been identified and

implemented. UNHCR also considers meaningful access to legal counsel to be critical in safeguarding the rights of children asylum-seekers. [\[6\]](#)

1. The Executive Committee, of which Australia is a member, supervises the UNHCR programme.

2. See, for example, Executive Committee Conclusions Nos. 46 para f) (1987), 47 para e) (1987), 50 para l) (1989), 65 para c) and j) (1991), 71 para f) (1993), 85 para cc) and ee) (1998), and 89 (2000).

3. See also UNHCR's *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, Geneva, February 1997; and UNHCR's *Guidelines on Refugee Children* (hereafter UNHCR Guidelines on Refugee Children).

4. See Articles 2, 3, 9, 22 and 37 of the CRC.

5. See UNHCR's *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, Geneva, February 1997; and UNHCR's *Guidelines on Refugee Children*.

6. As stated in UNHCR's *Guidelines on Children Seeking Asylum*, "[u]pon arrival, a child should be provided with a legal representative."