

14 December 2010

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

Dear Ms Dennett

**Inquiry into the Commonwealth Commissioner for Children and Young People
Bill 2010**

Please find following the **Hotham Mission Asylum Seeker Project's** submission to the Standing Committee on Legal and Constitutional Affairs Inquiry into the Commonwealth Commissioner for Children and Young People

If you have any questions please do not hesitate to contact me on 03 93268343, or by email director.asp@hothammission.org.au

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

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Introduction

Hotham Mission Asylum Seeker Project (ASP) is based in Melbourne and works with asylum seekers who are lawfully awaiting an outcome on their refugee or humanitarian protection claim, but who face destitution without community support. The ASP provides: professional casework support; housing; a basic living allowance; help with utilities and emergencies; a volunteer program of one-to-one support ; men's and women's support groups; state and national policy advocacy; and research towards a better reception framework for the future.

The ASP supports the private Senator's bill seeks to establish an independent statutory office of Commonwealth Commissioner for Children and Young People, to advocate at a national level for the needs, rights and views of people below the age of eighteen. The ASP is particularly pleased that the bill includes in S9 Functions and powers of Commissioner (inter alia)

*(d) promoting and protecting the rights of children and young people in immigration detention, or children whose parents or guardians are in immigration detention; and
(e) in appropriate cases, acting as the legal guardian of unaccompanied children and young people who arrive in Australia without the requisite visa or other authority for entry into Australia;*

In this submission the ASP will outline why it believes the groups of children referred to in these two sections will greatly benefit from the appointment of a Children's Commissioner with powers as drafted.

The ASP will also argue that there is another group of children that are not mentioned in the Bill, but who are particularly vulnerable and marginalised, and for whom a Children's Commissioner has the potential to greatly assist.

Children in Detention

Senator Hanson Young stated in the Bill's Second Reading (Senate Hansard 29 Sept 2010) and the ASP concurs, that the detention of children breaches many covenants to which Australia is currently a signatory. The United Nations Convention on the Rights of the Child (CROC), adopted by the United Nations General Assembly in 1989, and signed by Australia in August 1990, gives children a comprehensive set of rights. The paramount obligation under the Convention is that States act in children's "best interests". This is set out in Article 3(1) of CROC which provides:

- 1. In 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.*
- 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being*

The distress that detention causes to children, especially unaccompanied children is well documented in the 2004 HREOC Report *A Last Resort*¹. The report shows there is evidence from current and former detainee children and their parents, former ACM medical staff, department management reports, state child protection agencies, independent mental health experts, torture and trauma services and community groups involved with current and former detainees all confirming the detrimental impact that long term detention of children has on their mental health

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

The Victorian Foundation for the Survivors of Torture has reported children who were in detention for longer periods had significantly higher scores on the stress assessment schedule as the effect of length of

¹ A Last Resort? National Inquiry into Children in Immigration Detention (2004) Australian Human Rights Commission

stay appears to result predominantly from increased exposure to traumatic events within detention centres."²

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

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

Asylum seeker children living lawfully in the community

Asylum seeker children in detention are only part of the picture of asylum children in this country. In addition to asylum seeker children held in detention, there is an even larger group of asylum seeker children living lawfully in the community with their parents while they wait for a decision on their case. The issues facing these children, whilst different to the issues facing children in detention, are nonetheless critical. In 2009, 60% of the ASP's clients in 2009 were families with children.

Asylum seeker children living lawfully in the community fall into the following categories:

Children in families who are waiting a decision at the first two stages of the refugee determination process

Families with children who are awaiting a decision at the first two stages of the refugee determination process are eligible for the ASAS by virtue of having children less than 18 years of age. The ASAS is a Commonwealth funded program administered by the Red Cross to provide assistance to eligible asylum seekers living lawfully in the community. This is a clear acknowledgment of the inherent vulnerabilities of children.

It is important to note, however that ASAS payments are currently 89% of a Centrelink Special Benefit payment which keeps asylum seekers below the poverty line. Also, families receiving ASAS payments are ineligible for any government concessions, including the Pharmaceutical Benefits Scheme. Finally, the ASAS scheme does not include housing support, so many asylum seeker families with children face homelessness as they face significant barriers to accessing government funded housing and the private rental market.

Children in asylum seeker families who are appealing the Minister's decision on humanitarian grounds

To complete the picture, it is necessary to also consider children in families who are humanitarian appellants. A humanitarian appellant is a person who has not been found to be a refugee and who has appealed to the Minister for Immigration for humanitarian intervention to remain in Australia on humanitarian grounds. The number of people holding a Bridging Visa awaiting the outcome of a request for the Minister to intervene in December 2009 was around 1700.³

Critically, ASAS support is withdrawn from those families who are not successful following the RRT stage of the refugee determination process, leaving them with no income or supports for the later stages of the determination process. Families with children are left to rely on charity to support their children's most basic needs of food, shelter and healthcare.

² Submission to the National Inquiry into Children in Immigration Detention from Victorian Foundation for Survivors of Torture (VFST) http://www.hreoc.gov.au/human_rights/children_detention/submissions/vfst.html

³ Parliament of Australia, Question taken on notice, Additional Budget Estimates Hearing, 9 February 2010, Immigration and Citizenship Portfolio, (134) Program 3.1: Border Management. http://aph.gov.au/senate/committee/legcon_ctte/estimates/add_0910/diac/134_qon.pdf In the 2008–09 financial year 2816 requests for ministerial intervention were received under section 417 of the Migration Act: Department of Immigration and Citizenship, Annual Report 2008–09. <http://www.immi.gov.au/about/reports/annual/2008-09/html/>

The ASP has recently conducted research into the rights of children of humanitarian appellants living in the community with their family⁴. Research participants were clients of the Hotham Mission Asylum Seeker Project who held a Bridging Visa E at the ministerial stage of their application for protection and humanitarian processing. Families were invited to participate voluntarily in an interview, which took place with one or both parents present, or with adolescents over the age of 18. These adolescents had arrived in Australia as children and were able to comment on their past experiences.

The right to social security

None of the families studied received any kind of social security from the government. The dependent income for some was the Basic Living Allowance provided by Hotham Mission Asylum Seeker Project. This is \$33 per person per week; a modest sum, but extremely important for families who would otherwise have no income at all.

“You can’t imagine. \$33 divided by 7. It’s \$4.90 per day.”

Parents reported extreme difficulty finding employment, whether due to a lack of suitable vacancies, illness or long-term physical and psychological health problems or visa constraints. Employers are not willing to take on employees who cannot commit beyond two or three months due to the visa renewal system. In only two cases had a parent succeeded in finding work, and only one of those had ongoing, stable employment.

Despite having the right to work, these parents are not entitled to any unemployment or illness benefit. If they were unable to secure employment, their family had no income. Neither are the children entitled to any type of social security regardless of the employment status of their parents. They are not entitled to Youth Allowance while studying like their peers.

Many parents felt their limited income impinged on the human rights of their children. All said that some form of financial support would be extremely useful in enabling them to provide a decent standard of living for their children. It would also enhance their dignity and autonomy by enabling parents to pay for things without being completely reliant on charity.

Every child has a right to social security. In fulfilling this right, Australia must “tak[e] into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child” (CRC Art. 26). The Committee on the Rights of the Child (2005b) notes that social security and material assistance programmes enable children to enjoy their other human rights, including “a standard of living adequate for the child’s physical, mental, spiritual, moral and social development” (Art. 27).

A report on the implementation of the CRC by the National Children’s and Youth Law Centre and Defence for Children International (2005) is critical of Australia limiting social security to permanent residents and citizens only. In so doing, Australia is failing to fully implement the prohibition on discrimination (CRC Art. 2), a guiding principle of the CRC and central tenet of human rights.

The right to the highest attainable standard of health

“It doesn’t matter who you are, I mean whether you are black, white, a citizen or a permanent resident, or an asylum seeker, you can get sick ... We should be able to see a doctor, it is our right . . . We all get sick and we should all get treatment. All of us are human beings.”

Health care was a major concern of the families interviewed. All had experienced difficulty accessing

⁴ Hotham Mission Asylum Seeker Project The Rights of the Child: The experience of children living in the Australian community awaiting a decision from the Minister for Immigration June 2010, <http://asp.hothammission.org.au>

doctors and other health professionals, and all reported instances of seeking medical attention for their children without success. One family, unable to take their fevered toddler to the doctor, had to settle for paracetamol. Most families were thankful their children had not experienced serious illness during their time in Australia, as they were extremely concerned about their ability to access treatment.

Approximately half of the families interviewed had access to Medicare at the time of the interview, while most had experienced periods with and without Medicare during their time in Australia. In either case, humanitarian appellants are not eligible for Health Care Cards or the Pharmaceutical Benefits Scheme.

Without Medicare, health care is expensive, and especially unaffordable to those without an income. When children become ill, families either go without, try to find a sympathetic doctor who is prepared to waive their fee, or approach a charity such as the Asylum Seeker Resource Centre (ASRC). Doctors, dentists and other healthcare professionals volunteer their services at the ASRC, and will refer as necessary. The ASRC also assists with medication and treatments. These services are available free of charge to asylum seekers and humanitarian appellants without Medicare. It is often the sole way such children access medical care.

“It’s wonderful. Otherwise we wouldn’t be able to survive here in Australia. It’s really hard.”

However, the ASRC cannot meet the demand on its services so there is often a wait of multiple days for an appointment, which is not ideal when a child is ill. It can also be difficult for parents to take sick children to appointments when a long journey by public transport is involved.

Families on Medicare are able to see doctors and some health professionals, but often cannot afford medications prescribed. One father felt he was better off without Medicare, because at least he could then get treatment and medication from the ASRC. Lacking an income, he cannot afford to purchase medicines, limiting the usefulness of visiting the doctor.

Some further cases:

A woman with Medicare received healthcare during her pregnancy, but her son, once born, was not eligible for Medicare. Her partner tried for 12 months to enrol their son in Medicare, but the problem soon became irrelevant when the entire family was removed from Medicare. Not long after this, their one year-old son fell and knocked his head and was vomiting, and his parents were worried that he may have concussion or some other problem. It was late at night so they went to the emergency department of their local hospital and were sent to the GP across the road. The GP’s fee was \$58. This family survives on a living allowance [from Hotham Mission Asylum Seeker Project] of \$33 per person per week. Fortunately, the boy did not require any treatment, because after paying for the doctor, they would not have been able to afford any medication.

A primary school-aged boy developed coughing and wheezing symptoms but his parents could not afford to take him to see a doctor. His mother had been diagnosed an asthmatic when previously on Medicare. The boy was able to use her medication which seemed to help. When the medication runs out, the family will not be able to obtain a new prescription unless Medicare is reinstated.

An adolescent girl had a severe toothache but could not afford to see a dentist. She tried going to a community health centre, but was told they couldn’t see her without a Health Care Card.

The *Convention on the Rights of the Child* is unequivocal: Australia must ensure that no child is denied access to “facilities for the treatment of illness and rehabilitation of health” (CRC Art. 24 (1)). ‘Access’ is understood broadly by the Committee on the Rights of the Child: “Health facilities, goods and services

should be known and easily accessible (economically, physically and socially) to all.”⁵

Medicare was made available to some humanitarian appellants in July 2009, but not all, while all are excluded from the Pharmaceutical Benefits Scheme. Humanitarian appellant families unable to afford health care and pharmaceuticals are unlikely to enjoy the “highest attainable standard of health” as is their right.

Humanitarian appellant children’s access to health care is important not only for their own sake, but also in the interests of public health. Recent research conducted in New South Wales found a high level of asymptomatic diseases, such as tuberculosis and malaria, among refugee children arriving in Australia.⁶ Undetected and untreated – and very often unvaccinated – they pose a serious health risk to the community.

The right to an adequate standard of living

The CRC obliges Australia to “take appropriate measures to assist parents and others responsible for [children] to implement this right [to an adequate standard of living] and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing” (Art. 27(3)). The Committee on the Rights of the Child interprets this to mean “all possible means should be employed . . . to assure to young children a basic standard of living consistent with rights, including “implementing children’s right to benefit from social security,”⁷ as discussed above.

The present research exposed serious shortfalls in appellant children’s standard of living.

The right to food

Malnutrition [has] long-term impacts on children’s physical health and development . . . inhibiting learning and social participation and reducing prospects for realizing their potential.

– UN Committee on the Rights of the Child⁸

All families reported that their main source of food and household items was charities. The Hotham Mission Asylum Seeker Project and the ASRC both provide food, clothing and other material assistance that humanitarian appellant children would otherwise not be able to afford. Many families said they would simply be unable to eat were it not for this assistance.

These NGOs typically provide non-perishable food only, such as oil and sugar, tinned and dried food. Most families interviewed had difficulty obtaining fresh food such as fruit and vegetables, meat and dairy. Most were concerned about the lack of fresh food in their children’s diets and the nutritional consequences. One mother said her children would love to be able to drink fresh milk and juice but she was only occasionally able to obtain them.

“You can’t really buy things you like when you have no income. You survive on what you can get.”

A father was concerned about the nutrition and development of his two year-old son, who had never had ready access to fresh food. Fortunately, the child’s mother was able to continue to breastfeed him. The father went to a charity once a week, at a considerable distance, to obtain nappies and food items. The family was completely reliant on this food source, so he could not afford to miss a week due to illness or any other reason. Even with this assistance, it was sometimes difficult to feed the entire family; the parents often went without meals to ensure that their son had enough to eat.

“We have to feed our child. Doesn’t matter if we don’t have breakfast, lunch or dinner.

⁵ Committee on the Rights of the Child (2003a) para. 41(d).

⁶ Raman, S., Wood, N., Webber, M., Taylor, K., Isaacs, D. (2009) Matching the health needs of refugee children with services: how big is the gap? *Australian and New Zealand Journal of Public Health*, 33(5) 466-70

⁷ Committee on the Rights of the Child (2005b), para. 26.

⁸ *ibid.*, para. 27(a).

Doesn't matter. Sometimes we need to sacrifice our meals for him. We have to."

Relying completely on charities which, in turn, depend on unreliable resources and donations, these families cannot be said to enjoy food security. The right to food is essential to their right to health, to an adequate standard of living and to life, survival and development (Art. 6), one of the four guiding principles of the CRC. Australia must respect, protect and promote the right of children to a standard of living adequate for their development (Art. 27) and take appropriate measures to combat disease and malnutrition "through the provision of adequate nutritious foods" for all children within its jurisdiction (Art. 24(2)).

The right to housing

"Otherwise, I sleep in the car. A horrible life, you know?"

Sleeping in a car, on the streets or squatting, without a conventional form of shelter, is known as primary homelessness. There were two further ways in which the families interviewed generally found a place to stay. One was to stay with someone they knew – free of charge – and the other was housing 'donated' for use by clients of the Hotham Mission Asylum Seeker Project, again, free of charge, funded solely by community and philanthropic donations.⁹

Staying with friends or family may constitute secondary homelessness if the guests must sleep in the garage, say, or if their presence means the home is overcrowded, or if they are obliged to move frequently ('couch surfing'). Tertiary homelessness occurs where the family may have been staying at one address for 4 months or more, but it is still insecure, lacking a lease, a living room separate from their bedroom, or without bathroom or kitchen facilities of their own.

Currently there is no government-subsidised housing provided to asylum seekers or humanitarian appellants in Australia who live in the community on bridging visas.

Most families studied were happy with the quality of their housing provided by Hotham Mission ASP, saying that it was comfortable and appropriate for the children, but a number of families felt their housing was insecure. All those interviewed would be described as homeless, by the Australian Government's definition.

The right to recreation and leisure

Many parents could not afford for their children to pursue hobbies or participate in sports and leisure activities. Only one of the 8 families interviewed had children with ongoing sporting team membership. Hotham Mission ASP provides minimal financial support for recreation for children funded by philanthropic grants, this funding is insecure and limited to ensure equity across the family groupings. Thus some children may have the opportunity to enrol in recreational activities, but are unlikely to be able to continue them after an initial period.

All children have a right to recreation and leisure, both for their intrinsic value and for their benefits to health (CRC Art. 24) and development (Art. 6). The primary impediment to full enjoyment of this right by the humanitarian appellant children studied is household income below the poverty level.

The right to education

The Committee on the Rights of the Child (2005b, para. 28) understands the right to education as beginning from birth, as it is closely linked to children's right to maximum development (CRC Art. 6). In all families

⁹ Asylum Seeker Project offers its tenants leases and asks them to pay 25% of their income in rent, if they have an income; however, most do not have the income to pay. Utility charges are sometimes shared between the tenants and the NGO, and many parents were accumulating large debts with utility companies.

studied, the children were in full-time education appropriate to their needs (CRC Art. 28). Most of the children were enjoying school and enthusiastic about studying.

“Whatever happens to us, the kids have to study. They have to have a future, and make up for our lost time.”

The only problems associated with fulfilling these children’s right to education were attributed to violations of the right to an adequate standard of living (Art. 27) and/or the right to social security (Art. 26). Families with no access to income cannot pay for school fees, uniforms, books, stationary and excursions. This causes distress and shame in parents and children alike and it impacts on children’s development, their school work, their participation and socialisation, their psychological and emotional health and overall well being

Conclusion

A right is of little value unless there is some means of enforcing that right, and for every human right, there are rights-holders and duty-bearers. The State, in all its manifestations, has primary responsibility to respect, protect and fulfil human rights.

In Australia, the term ‘asylum seeker’ refers to a person who has applied for a protection visa and who may be at any stage in the determination or appeals process, however the issues facing children of asylum seekers may depend upon whether they are in detention, residing in the community while their family awaits a decision, or are part of a family who has not been found to be a refugee and who has appealed to the Minister for Immigration for humanitarian intervention to remain in Australia on humanitarian grounds. The issues facing children in these three groups differ, and these children would greatly benefit from an independent statutory office to advocate at a national level for their needs, rights and views.

There is currently no system for appraisal of government policies at Commonwealth, State, Territory or Local Government level to assess their compliance with CROC. None of the three State Commissioners for Children has a statutory responsibility to review and monitor government policies. In contrast, the New Zealand Commissioner for Children Bill, includes the full text of CROC in a Schedule and gives the Commissioner a statutory responsibility to monitor the observance of the principles of CROC by government departments.

The ASP therefore welcomes this Bill and considers it an important step in fulfilling our international human rights obligations to all children, including those seeking asylum.