

Submission by the Office of the United Nations High Commissioner for Refugees
Inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010
Senate Legal and Constitutional Affairs Committee
16 December 2010

I. INTRODUCTION

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee (“the Committee”) in its *Inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010*.

II. UNHCR’S STANDING TO COMMENT

2. Australia has assumed responsibility to extend protection to asylum-seekers and refugees through accession to the *1951 Convention and the 1967 Protocol relating to the Status of Refugees* (“the 1951 Refugee Convention”).¹
3. UNHCR provides comment pursuant to its mandate in the Preamble and Article 35 of the 1951 Refugee Convention as well as the *1950 Statute of the Office of the United Nations High Commissioner for Refugees* (“the Statute”). UNHCR additionally has been given a specific and global mandate to contribute to the prevention and reduction of statelessness by the United Nations General Assembly in 1974 and 1976 as well as through subsequent resolutions.²
4. UNHCR’s supervisory role is complemented by Conclusions of its Executive Committee (ExCom) on International Protection which are developed through a consensual process.³ Although not formally binding, ExCom Conclusions on International Protection constitute expressions of opinion which are broadly representative of the views of the international community. The specialist knowledge of ExCom and the fact that its Conclusions are taken by consensus add further weight. Australia takes an active role in the work of ExCom. The Conclusion on Children at Risk adopted by ExCom in October 2007 provides operational guidance for States, UNHCR and other relevant agencies and partners on the protection of children affected by displacement and statelessness at heightened risk.⁴ In this Conclusion, ExCom inter alia recognized the following as fundamental principles of child protection: children should be among the first to receive protection and assistance; States should promote the establishment of child protection systems, in accordance with international obligations; due

¹ The term ‘1951 Refugee Convention’ is used to refer to the *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, [1954] ATS 5, (entered into force for Australia 22 April 1954) as applied in accordance with the *Protocol Relating to the Status of Refugees*, opened for signature on 31 January 1967, [1973] ATS 37, (entered into force for Australia 13 December 1973).

² UN General Assembly, Resolutions 3274 (XXIX) of 10 December 1974 and 31/36 of 30 November 1976.

³ ExCom Members are elected by ECOSOC on the basis of their (a) demonstrated interest in and devotion to the solution of refugee problems; (b) widest possible geographical representation; and, (c) membership of the United Nations or its specialized agencies.

⁴ UNHCR Executive Committee Conclusion on Children at Risk No. 107 (LVIII) – 2007.

weight should be given to the views of the child; and, the best interests of the child should be a primary consideration in all actions concerning children (para. (b)).

5. UNHCR also develops guidelines drawing on the 1951 Refugee Convention, ExCom Conclusions, and general human rights treaties like the *1989 Convention on the Rights of the Child* (CRC), which sets comprehensive standards for the treatment of children, and the *1966 International Covenant on Civil and Political Rights* (1966 ICCPR). UNHCR has issued a number of guidelines which seek to uphold the rights of all children of concern, including on: *Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*;⁵ *Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*;⁶ *Refugee Children: Protection and Care*⁷; and, *Child Asylum Claims*.⁸

III. SCOPE OF THE SUBMISSION

6. UNHCR's submission addresses issues in the Commonwealth Commissioner for Children and Young People Bill 2010 insofar as they affect asylum-seekers, refugees and stateless persons, and focuses specifically on their consistency with relevant international law and standards.

IV. GUARDIANSHIP OF UNACCOMPANIED MINORS

7. Under present legislation, unaccompanied minors in Australia are covered by the *Immigration (Guardianship of Children) Act 1946* ('the Act') which ensures that minors who arrive in Australia unaccompanied have a legal guardian. The Act applies to unaccompanied minors seeking asylum in Australia. Unaccompanied minors who fall under the Act are wards of the Minister for Immigration, who becomes their legal guardian, but who delegates this function to officers of the Department of Immigration and Citizenship (DIAC) and to officers in relevant child welfare authorities in each state and territory.
8. An anomaly arises in relation to the Minister's guardianship of children who are asylum-seekers. The Minister also has other duties under the *Migration Act 1958*, such as to detain certain asylum-seekers, including children, and to make decisions in regard to applications for refugee status and visas to remain in Australia. There may be a conflict of interest between the Minister's statutory roles as guardian and as decision maker under the *Migration Act 1958*.⁹
9. While UNHCR acknowledges that the welfare of unaccompanied asylum-seeker children is monitored by independent and qualified carers (*Life Without Barriers* and the Australian Red Cross), they are unable to represent the unaccompanied minors in any legal sense.

⁵ UNHCR, *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999: <http://www.unhcr.org/refworld/docid/3c2b3f844.html>

⁶ UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997: <http://www.unhcr.org/refworld/docid/3ae6b3360.html>

⁷ UNHCR, *Refugee Children: Guidelines on Protection and Care*, 1994: <http://www.unhcr.org/refworld/docid/3ae6b3470.html>

⁸ UNHCR, *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/09/08 of 22 December 2009.

⁹ *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524 per North J at [34], [41] and [43]; *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 69 ALD 312 at [90]; *Jaffari v Minister for Immigration and Multicultural Affairs* [2001] FCA 985 (unreported, French J, 26 July 2001).

V. REFUGEE STATUS DETERMINATION PROCESSES

10. Under UNHCR's Procedural Standards for Refugee Status Determination under UNHCR's Mandate, "A guardian should be designated for all unaccompanied and separated children to assist the child in all stages of the process and to ensure the child is properly represented, that his/her views are expressed, and that any decisions taken are in his/her best interests."¹⁰
11. The Handbook on Procedures and Criteria for Determining Refugee Status equally states that "A child – and for that matter, an adolescent – not being legally independent should, if appropriate, have a guardian appointed whose task it would be to promote a decision that will be in the minor's best interests. In the absence of parents or of a legally appointed guardian, it is for the authorities to ensure that the interests of an applicant for refugee status who is a minor are fully safeguarded."¹¹
12. Article 3 of the 1989 Convention on the Rights of the Child establishes the general principle that the best interests of the child shall be the primary consideration in all actions affecting children.
13. In Australia, as noted above in paragraphs 7 to 9, the Minister for Immigration and Citizenship is the Guardian of unaccompanied children. Notwithstanding his ability to delegate that responsibility, UNHCR is concerned that the same authority which is detaining, determining refugee status and deporting is the same authority which is meant to be representing the child's best interests.
14. UNHCR believes the Government of Australia should review guardianship arrangements for unaccompanied minors to ensure their interests are fully considered and no actual or potential conflict of interest arises. One possibility would be to appoint an independent Commissioner along the lines proposed in the Commonwealth Commissioner for Children and Young People Bill 2010.

VI. RECEPTION OF UNACCOMPANIED REFUGEE CHILDREN

15. In recognition of the particular vulnerability of unaccompanied children, and in accordance with its Guidelines, UNHCR is of the view that authorities at ports of entry should take necessary measures to ensure that unaccompanied children seeking admission to the territory are identified as such promptly and on a priority basis.
16. A guardian or adviser should be appointed as soon as the unaccompanied child is identified. The guardian or adviser should have the necessary expertise in the field of child caring, so as to ensure that the interests of the child are safeguarded and that his/her needs are appropriately met.
17. It is desirable that all interviews with unaccompanied children be carried out by professionally qualified persons, specially trained in refugee and children's issues. Insofar as possible, interpreters should also be specially trained persons. Initial interviews of unaccompanied children to collect biodata and social history information should be done immediately after arrival and in an age-appropriate manner. At all stages of the asylum process, unaccompanied and separated children should have a suitably qualified legal representative to assist them to present their claim for asylum. Legal representatives should be available at no cost to the child.
18. In all cases, the views and wishes of the child should be elicited, and considered.

¹⁰ para. 3.4.5.

¹¹ Para. 214, the Handbook.

VII. DETENTION OF CHILDREN

19. The detention of asylum-seekers is in the view of UNHCR inherently undesirable. This is even more so in the case of vulnerable individuals, including children. In accordance with this general principle and UNHCR's *Guidelines on Refugee Children*,¹² minors who are asylum-seekers should not be detained.
20. UNHCR welcomes the Australian Government's commitment, in October 2010, to begin moving children and vulnerable families currently in immigration detention facilities into more appropriate community-based accommodation.
21. It would, in UNHCR's view, be desirable, along the lines proposed in the Commonwealth Commissioner for Children and Young People Bill 2010, for a person to be appointed with the specific task of promoting and protecting the rights of children and young people in immigration detention, or children whose parents or guardians are in immigration detention as well as to act as legal guardian of unaccompanied children who arrive in Australia without the necessary documentation, but who claim asylum or may be stateless.

VIII. CONCLUSION

22. UNHCR supports the principle that an independent legal guardian for unaccompanied minors be established to promote and protect the rights of children who have sought asylum in Australia, or who may be stateless.

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New Zealand, Papua New Guinea and the Pacific.
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¹² UNHCR, *Refugee Children: Guidelines on Protection and Care*, 1994:
<http://www.unhcr.org/refworld/docid/3ae6b3470.html>