

# Chapter 7

## Refugee Status Determination for Children in Immigration Detention

### Contents

---

<b>7.</b>	<b>Refugee Status Determination for Children in Immigration Detention</b>	<b>235</b>
7.1	What are children's rights regarding refugee status determination?	236
7.2	How does the refugee status determination system work in mainland detention facilities?	238
7.2.1	The entry interview, screening and separation detention	239
7.2.2	Primary assessment	243
7.2.3	Merits review	244
7.2.4	Judicial review	245
7.2.5	Ministerial discretion to grant a visa	246
7.2.6	Findings regarding the refugee status determination process	247
7.3	Is there priority processing for children in detention?	248
7.3.1	How fast is the primary processing for children in detention?	248
7.3.2	How fast is the merits review at the RRT?	250
7.3.3	How fast is judicial review?	251
7.3.4	What is the impact of security checks on processing time?	251
7.3.5	Findings regarding priority processing for children in detention	253
7.4	Is there appropriate legal assistance for children in detention?	253
7.4.1	When is legal assistance available?	253
7.4.2	What are some of the problems with the IAAAS service?	254
	(a) Does it matter that migration agents are not provided at all stages of processing?	254
	(b) Do migration agents have sufficient time to give proper advice to children in detention?	255
	(c) Do migration agents gain sufficient access to children in detention?	256
	(d) Can migration agents get proper instructions from children?	258
	(e) Is there any quality control regarding the advice given by migration agents?	258
7.4.3	Findings regarding legal assistance for the refugee status process	260

7.5	Is there a child-friendly environment and assessment process for children in detention?	261
7.5.1	How should interviews be conducted?	261
7.5.2	What training and guidance is given to Department officers?	262
7.5.3	Are interviews being conducted in a child-friendly manner in detention?	263
7.5.4	Findings regarding child-friendly procedures for refugee processing of children in detention	264
7.6	Are special substantive considerations applied to children's asylum claims?	265
7.6.1	What should officers take into account when assessing a child's claim?	265
7.6.2	Findings regarding special considerations applied to children's asylum claims	267
7.7	What special measures are taken to assess claims by unaccompanied children in detention?	267
7.7.1	Why should unaccompanied children receive different treatment?	268
7.7.2	Does the Minister as guardian fulfil the special needs of unaccompanied children?	268
7.7.3	Does the appointment of a migration agent fulfil the special needs of unaccompanied children?	269
7.7.4	Does anyone else assist unaccompanied children?	271
7.7.5	Findings regarding special measures for unaccompanied children	272
7.8	What is the refugee status determination process for 'offshore entry persons'?	272
7.8.1	How is the refugee status determination process different for children arriving in 'excised offshore places'?	272
7.8.2	What is the impact of the 'Pacific Solution' on non-refoulement?	274
7.8.3	Findings regarding processing and protection of 'excised offshore persons'	274
7.9	Summary of findings on refugee status determination for children in detention	275
	Endnotes	277

## 7. Refugee Status Determination for Children in Immigration Detention

---

The United Nations High Commissioner for Refugees (UNHCR) estimates that around half of the 50 million displaced persons in the world are children. Around 10 million of these children are under the care of UNHCR. Approximately 100,000 separated children roam Western Europe.<sup>1</sup> During 1999 alone, more than 20,000 separated children applied for asylum in Western Europe, North America or Australia.<sup>2</sup> Of those 20,000 unaccompanied children, 46 travelled to Australia to seek asylum. In the same year a further 202 children sought asylum in Australia with their families.<sup>3</sup>

Thus, while some of the children who arrive in Australia without a visa are unaccompanied and must pursue their refugee status alone, others arrive with their family and often rely on the claims made by their parents, although they are also entitled to make separate claims. Either way, according to international law, the refugee status determination process must take account of children's special needs.

Almost all children in Australia's immigration detention centres are asylum seekers who are detained because they have arrived in Australia without a valid visa. If recognised to be refugees, they will be issued with a temporary protection visa and released from detention. If they are not recognised as refugees they must stay in detention until they are removed from Australia.

The manner in which children's claims for asylum are processed is important for a number of reasons. First, the length of time a child spends in detention is directly related to the length of time it takes to process an application for a protection visa.<sup>4</sup> Second, if the refugee status determination process lacks integrity or fails to take into account the special needs of a child, this may result in a child being returned to a country where they face a real risk of persecution, as well as their continued detention while awaiting deportation, potentially for extremely long periods of time. Third, the manner in which the visa process is conducted can add to the distress felt by children in detention.

The Inquiry has therefore examined the refugee status determination process on mainland Australia in order to assess whether it takes account of the special rights

## A last resort?

and needs of children in detention. In particular, this chapter addresses the following questions:

- 7.1 What are children's rights regarding refugee status determination?
- 7.2 How does the refugee status determination system work in mainland detention facilities?
- 7.3 Is there priority processing for children in detention?
- 7.4 Is there appropriate legal assistance for children in detention?
- 7.5 Is there a child-friendly environment and assessment process for children in detention?
- 7.6 Are special substantive considerations applied to children's asylum claims?
- 7.7 What special measures are taken to assess claims by unaccompanied children in detention?
- 7.8 What is the refugee status determination process for 'offshore entry persons'?

There is a summary of the Inquiry's findings at the end of the chapter.

### **7.1 What are children's rights regarding refugee status determination?**

Article 22(1) of the *Convention on the Rights of the Child* (CRC) requires Australia to take appropriate measures to ensure that asylum-seeking children enjoy their rights under the CRC and the Refugee Convention:<sup>5</sup>

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

The protection of refugee children from being returned to the country in which they face persecution (non-refoulement) under the Refugee Convention is one of the fundamental rights of children which Australia has agreed to respect.<sup>6</sup> It will also be a breach of the rights of children if they are returned to a country in which there is a real risk of having their rights under the CRC breached.<sup>7</sup> Australia is therefore required to ensure that there is an effective process to ensure that these rights of children are protected.

Article 22 must be applied in the light of the non-discrimination principle contained in article 2 of the CRC. In the context of refugee status determination, the principle of non-discrimination means that children in detention are entitled to enjoy the same quality of refugee processing as children applying for asylum in the community. However, the impact of the deprivation of liberty may mean that children in detention require additional assistance to enjoy the same quality of process.

The 'best interests' principle in article 3(1) requires decision makers to make a child's best interests a primary consideration in their determinations. Further, article 20(1) of the CRC requires that additional assistance be given to unaccompanied children throughout the refugee status determination process to help them overcome the disadvantages of being separated from their parents.

Finally, article 37(b) of the CRC requires that detention be for the shortest appropriate period of time. Since the length of detention for children seeking asylum is invariably linked to the time it takes to process a child's claim, processing must be prompt for children in detention.<sup>8</sup>

While the Refugee Convention does not specify how refugee status is to be determined, the Department of Immigration and Indigenous and Multicultural Affairs (the Department or DIMIA) has acknowledged that it is 'difficult to see how a State can in good faith give effect to [the principle of non-refoulement] without providing asylum seekers access to a fair and effective status determination procedure'.<sup>9</sup> The right to procedural fairness is further reinforced by article 14 of the *International Covenant on Civil and Political Rights* (ICCPR) which may be applicable to the refugee status determination process for children.<sup>10</sup>

As the primary body responsible for the protection of refugees, UNHCR has issued several guidelines that are intended to assist States regarding the minimum standards for executing a fair refugee status determination procedure. They reflect the provisions of the CRC, Refugee Convention and ICCPR.

In its submission to the Inquiry, the Department states that it conforms to those instruments, including the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR Procedures Handbook) and the UNHCR *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (UNHCR UAM Guidelines).<sup>11</sup>

While the UNHCR UAM Guidelines were specifically created to take into account the special vulnerabilities of unaccompanied minors, they are for the most part, of general application and therefore relevant to all children. The UNHCR publication entitled *Refugee Children: Guidelines on Protection and Care* (UNHCR Guidelines on Refugee Children) also provides guidance on the protection that should be given to refugee children and the process of determining whether children are refugees.

Together, these UNHCR guidelines state that children are entitled to, amongst others, the following safeguards during the refugee status determination process:

1. determination of status by 'a competent authority, fully qualified in asylum and refugee matters'<sup>12</sup> and formal review of a negative refugee status determination by a fair and independent tribunal<sup>13</sup>
2. priority processing for children and their families (especially where the consequence of a slow process is continuing detention)<sup>14</sup>
3. legal assistance from the moment of arrival throughout the entire refugee status determination process<sup>15</sup>

## A last resort?

4. child-friendly procedures<sup>16</sup>
5. liberal application of the benefit of the doubt in assessing credibility and facts<sup>17</sup>
6. the appointment of a guardian or adviser to assist unaccompanied children through the process.<sup>18</sup>

These six issues are discussed in turn throughout the remainder of this chapter.

The guidelines also state that it is desirable for all interviews with unaccompanied children be conducted by trained and qualified persons with knowledge of the psychological, emotional and physical development and behaviour of children. Where possible, such experts should have the same cultural background and mother tongue as the child.<sup>19</sup> As far as possible, interpreters should also be skilled and trained in refugee and children's issues.<sup>20</sup> It is also important that the decision-makers on unaccompanied children's asylum claims have an understanding of the history, culture and background of the child.<sup>21</sup>

Children 'old enough to understand what is meant by status determination' should be informed of the process, their current status, what decisions have been made and the possible consequences, to reduce anxiety and ensure that poor expectations do not lead to the child falsifying information.<sup>22</sup>

## 7.2 How does the refugee status determination system work in mainland detention facilities?

The integrity and fairness of the process of determining whether or not a child in detention is a refugee is of fundamental importance. This section examines whether Australia's refugee status determination process, as it applies to children in immigration detention, is conducted by the appropriate authorities and allows for appropriate review of a negative refugee status determination. The Inquiry has attempted to identify those aspects of the process that are particularly problematic for children in immigration detention and examine whether the process adequately caters for those difficulties.

Under international law, the detention of unauthorised arrival children and their families throughout the refugee application process imposes special duties on the Department. The primary responsibility is to expedite the process because, under Australia's detention laws, children are detained until the application has been finally determined. However, the exclusion of children and their families from the general community removes the power of choice and control from the asylum seekers and the Department is obliged to take account of this impediment. Although the Department has primary responsibility for the refugee application process, the Inquiry notes that the Department must operate within the confines of legislation which sets out the process of refugee status determination, including asylum seeker access to the appeals process and migration assistance. Australasian Correctional Management Pty Limited (ACM) does not have responsibility for the process of refugee status determination, although it is required to ensure that there are reasonable facilities for detainee contact with legal representatives.

In its submission to the Inquiry the Department describes the refugee status determination process to include the following stages:

1. Entry interview, screening and separation detention
2. Primary assessment of a protection visa application
3. Merits review
4. Judicial review
5. Ministerial intervention.

### **7.2.1 The entry interview, screening and separation detention**

When a child or adult arrives in Australia by boat, without a visa, they will have a biodata interview which records basic details. They will then be taken to an immigration detention centre. Once at the immigration detention facility, the Department commences an entry interview, sometimes referred to as the 'screening interview'. When a child is unaccompanied, that interview will be with the child alone. Children are not generally interviewed when they make an asylum claim with their parents.

Information provided at this entry interview is crucial in determining the Department's view of whether children and their families are seeking to engage Australia's protection obligations or not. If the child or family is 'screened-out' they will be expected to return to their country of origin and will usually stay in separation detention until they are removed or deported. If 'screened-in' they may proceed to the primary processing stage and are moved to the main detention compounds.

The Department describes the screening interview as a fairly simple process:

It is one where, as I say, people are invited to simply tell their story. That can often be a time consuming interview, sometimes several hours, so it is not one where we are attempting to limit people's opportunity, quite the reverse – give them as much opportunity as possible to explain what their circumstances are.<sup>23</sup>

Under the *Migration Act 1958* (Cth) (Migration Act), Department officers are not required to provide visa assistance, such as providing a visa application form, unless the detainee specifically requests it.<sup>24</sup> Further, unless the detainee specifically requests a particular private lawyer, legal assistance is not provided. There is no requirement to inform children and their parents of their right to a lawyer if they want one. It is not until a detainee is 'screened-in' to the protection process that the Department assigns the detainee government-funded migration assistance through the Immigration Advice and Application Assistance Scheme (IAAAS).<sup>25</sup>

These provisions of the Migration Act are of particular concern when applied to unaccompanied children who may not be aware of the need to request asylum specifically.

Furthermore, it would be dangerous to underestimate the pressures faced by children in detention and their parents during this process. Often these interviews occur shortly after arrival and transfer to an immigration detention facility. The Refugee

## A last resort?

Advice and Casework Service (RACS) expressed concern that the stresses on children and their parents during these interviews mean that 'children may be not able to express their fears or situation completely'.<sup>26</sup> Child asylum seekers in detention confirm the reality of these concerns:

Most people come from small villages in Afghanistan – they are not ready for the interviews when they first arrive – they are almost dizzy, and still can't walk properly on the land because they had been on a small boat for anywhere between 10 and 30 days.

Then the people try so hard to prepare for the interviews – I think that they should be allowed a time at least to ready themselves, and should be given an information session about what the interviews mean and why they are done etc.<sup>27</sup>

The Department states that the interviews occur in a 'non-threatening setting'.<sup>28</sup> However, entry interviews for unauthorised arrivals generally take place in 'separation detention', an area that is fenced off from the rest of a detention centre. The ACM Policy on 'Separation Detention', developed in accordance with the Department's requirements, makes clear that the primary purpose of separation detention is to prevent communication with the outside world. Other than sending an initial letter to an overseas address to confirm safe arrival, detainees in separation detention are not permitted to make or receive outside calls, nor access incoming or outgoing mail or faxes.<sup>29</sup> Furthermore there is no access to live television, radio, newspapers or magazines.<sup>30</sup>

Three children describe separation detention as follows:

Before the interview we were kept away from other detainees who were interviewed before. We were not allowed to talk to other detainees. It was like a separate camp within the camp. We had to put on ID cards at all times, 24 hours a day. We had TV only once every three weeks, only movies, no news or other programs, no papers. Only in the last two weeks of our stay were we able to borrow newspapers.<sup>31</sup>

Closed camp was first and was very restrictive – even talking to people outside the camp was restricted – the case officer was the only person I was allowed to talk to.<sup>32</sup>

In the closed camp, we could play outside for between 15 and 20 min, then we had to go back inside.<sup>33</sup>

The Department's rationale for separation detention is to ensure the 'integrity of Australia's visa determination process' by providing the Department 'with the assurance that any claims by unlawful non-citizens to remain in Australia are put forward by detainees without the embellishment or coaching of others'.<sup>34</sup> This argument somewhat contradicts another assertion by the Department, namely that unauthorised arrival asylum seekers are coached by people smugglers. If people smugglers coached the asylum seekers in what to say, it would not matter whether or not they were separated from other detainees on arrival because they would already have the relevant information.

This approach to determining whether children and their families who are unauthorised arrivals are entitled to access Australia's protection process is contrary to the spirit of the UNHCR guidelines. These guidelines highlight that it may be difficult for children to express their views and that, therefore, interviews should take place in a child-friendly environment.<sup>35</sup>

Furthermore, it marks a significant difference between the assessment of child asylum seekers in the community and children in detention. Children in the community can make an application for protection after the benefit of consulting a range of people, including lawyers, who may assist them in making the best possible claim for their circumstances. If the presence of such people does not affect the integrity of the process for child asylum seekers in the community, it is unclear why their advice would affect the integrity of the process for children in separation detention. In fact, as lawyers from RACS point out:

having access to lawyers at that [entry] point would add to the integrity of the process. You have asylum seekers knowing what their rights are and knowing that Australia can offer them protection from the persecution that they may be suffering in their country.<sup>36</sup>

The Department states that if the child is 'screened-out' of the process at the entry interview, it is still possible to be 'screened-in' later on if the child asks to apply for a protection visa.<sup>37</sup> It gave oral evidence to the effect that screening-in sometimes occurs after additional concerns are raised by the detainee:

there have been instances where those individuals have subsequently, through communications with staff in the Centre, elaborated on their earlier interviews and, in those circumstances, if they have raised something that expresses a concern, then they have been offered assistance of an IAAAS provider and subsequently made visa applications.<sup>38</sup>

Further, during its visits to the detention facilities, the Inquiry became aware of persons who had spent substantial time in separation detention because of initial difficulties in persuading the Department of their claims and were later permitted to make a protection application.

One family told the Inquiry that they had spent seven months in separation detention in Port Hedland prior to being screened-in. They alleged that they had tried to get the attention of Departmental staff in order to discuss their case further and obtain a lawyer, to no avail. Finally one of the daughters broke a window to get the Department's attention.<sup>39</sup> Shortly thereafter they lodged a visa application.

RACS describes the process as somewhat haphazard:

There certainly [are] instances of self screening-in and that's where a detainee manages to come back into the screening process after a while and that's been done by people throwing application forms over fences to lawyers when they go up to detention in other matters ...<sup>40</sup>

Thus the Inquiry has two concerns about the 'screening-in' process for children and their families. The first is the effective unavailability of legal assistance while in

## A last resort?

separation detention. The second is the lack of a requirement to ensure that children are aware of the process for applying for protection. These features create a concern that there are persons who are being deported despite being genuine refugees. This concern was expressed by the Senate Legal and Constitutional References Committee in its 2000 report entitled *A Sanctuary Under Review*.<sup>41</sup> The Senate cited an example of Sri Lankan asylum seekers who were initially rejected but who were found to be refugees after the intervention of lawyers.<sup>42</sup> The Inquiry has heard of similar stories involving children. The following example describes the case of two unaccompanied siblings who were initially screened-out, but were eventually granted refugee status after a year in detention:

---

### Unaccompanied children and the screening process

---

June 2001	Unaccompanied children aged 10 and 14 arrive in Australia. They are taken to Woomera. They are screened out in a large group of Afghan detainees.  [They] are orphans. Their mother died some time ago and their father was taken by the Taliban. They believe he is dead. They had been living with their grandparents who feared for the children's lives and their futures and decided to get the children to safety. <sup>43</sup>
September 2001	Department staff raise the possibility of reviewing the children's 'screening-out' in light of changes in Afghanistan. <sup>44</sup>
October 2001	The children are referred to an IAAAS migration agent for assistance in making a protection application.  When they arrived in Australia they had one interview with DIMIA. After this, each morning this girl would dress carefully, take her chair outside the donga and wait to be called for another interview like all the other people. But she and her brother were never called. They had been screened out. They hadn't said the magic words [of asylum] ... These two children waited every day for almost six months, then miraculously they were back in the system. <sup>45</sup>
November 2001	The IAAAS providers lodge a protection visa application for the children. The Department conducts a primary interview.
January 2002	The children are transferred to the Woomera Residential Housing Project for six days and then to foster care as an alternative place of detention.
June 2002	Primary decision-maker finds them to be refugees and they are granted temporary protection visas.

---

### 7.2.2 Primary assessment

Once children and their families in detention make a protection visa application, the Department commences primary assessment of their cases. Usually children will be included in the application of their parents, however unaccompanied children may make their own application and children within a family are also entitled to make separate applications.<sup>46</sup>

A protection visa application for persons in Australia starts the process of determining whether or not a person is a refugee to whom Australia owes 'protection obligations'.<sup>47</sup> Under the Migration Act whether a person is considered a refugee under Australian law is determined by whether or not a person is a refugee under the Refugee Convention.<sup>48</sup>

The primary assessment process is carried out by Department officers. The Department's case managers interview detainees at the detention facility with an interpreter if needed. The Inquiry heard from children who had formerly been in detention that there were often problems in obtaining appropriate interpreters during the Department interviews. Some children claimed that some of their friends were rejected because they had been wrongly translated:

At Curtin, many people were rejected because of the interpreter. They were wrongly translated. There is no Hazara interpreter. It is so hard to explain.

I had a problem with my interpreter. I had the wrong interpreter for my language.<sup>49</sup>

There do not appear to be any set procedures as to whether children are interviewed at the primary assessment stage if they are named as dependents on their parent's application.<sup>50</sup> Department case managers decide on a case-by-case basis who they wish to interview, which can include those who have no protection claims in their own right. However, where children make their own application the case manager will need to interview the child in a child-friendly manner and apply the appropriate criteria.

The Department states that '[a]ssessment processes accord with natural justice requirements and applicants have the opportunity to comment on information or inference from other sources that are adverse to their case'.<sup>51</sup> Furthermore, 'a case manager will disclose information adverse to the applicant if the information is relevant and significant to the decision'.<sup>52</sup> However, RACS notes in its submission that:

DIMIA refuses to provide copies of the tape or transcripts of these [screening] interviews through the Freedom of Information process. (In the past DIMIA has provided the record of such interviews through the Freedom of Information process and therefore some analysis of these interviews is possible).<sup>53</sup>

The Department states that 'the Freedom of Information process is not an element of the natural justice safeguards for visa decision-making'.<sup>54</sup>

## A last resort?

This is a particular concern because any discrepancy between information provided in the original screening interview and subsequent interviews may be used to undermine the credibility of an applicant.<sup>55</sup> The likelihood of discrepancies increases as children have no lawyer to assist them in the screening process (see further section 7.4):

When we first arrived at Woomera, we had no lawyer for the first and second interview. But at the third interview [the Department] said, 'you didn't tell me that before'.<sup>56</sup>

### 7.2.3 Merits review

If detainee children and their families receive a negative decision from the primary decision maker they can appeal to the Refugee Review Tribunal (RRT). The goal of the RRT is to provide 'a mechanism of review that is fair, just, economic, informal and quick'.<sup>57</sup>

The Department's case officer must provide asylum seekers with a copy of the written primary decision record and inform them of their right of appeal.<sup>58</sup> The government-funded migration agents, IAAAS, are also contractually obliged to ensure that the primary decision and appeal rights are fully explained to children and their families. The IAAAS providers must arrange for, and meet the costs of, translating and interpreting. However, the Inquiry received evidence that the primary decisions were written in English and interpreters were not always available to translate the result. For example, one unaccompanied child reported the following occurring to a friend:

When he was rejected there was no lawyers available. There was no translator available and the reason for rejection he had to answer. He does not know English, so he has to go round round and find someone [another detainee] if he can write a letter for him. Now, what is the quality of the education of that person?<sup>59</sup>

In the case of persons held in immigration detention, the application for review must be made within seven days of notification of the primary decision.

Detainees are entitled to IAAAS assistance to prepare for an appeal to the RRT, but there is no requirement that the IAAAS provider attend the hearing. While the applicant can be assisted by another person at the hearing, such as a friend, a migration agent or a lawyer, there is no absolute right for that person to present arguments or address the RRT.<sup>60</sup>

Children may apply for review in their own right, whether or not they are originally included in their parent's application. Furthermore, the RRT is entitled to question children even when they remain on their parent's application.<sup>61</sup>

Only one RRT member hears a case and there is no possibility of a review by a larger bench. RRT members need not have legal qualifications.

The RRT member examines the facts supporting the protection claim afresh and is not restricted to the facts found by the primary decision maker. If the RRT Member does not think that they can make a decision in favour of the applicant on the basis of the information provided by the applicant and the Department, the RRT will invite the applicant to attend a hearing. However, given the remoteness of the detention facilities, many hearings are held by video-conference. Sometimes the RRT is sitting in one State, the legal adviser in another State and the detainee applicant in a third State.

The RRT is required to inform the applicant of any material specific to the applicant that it intends to use against him or her.<sup>62</sup> However, there is no obligation to disclose or to invite a response in relation to general material that may be used against the applicant.<sup>63</sup> Furthermore, there is no requirement that the material be translated so there may be substantial difficulties in communicating the material to detainees.<sup>64</sup>

All unsuccessful applicants must pay \$1,000 to the Commonwealth within seven days of receiving a negative decision from the RRT.<sup>65</sup> This can be particularly difficult for children and families in immigration detention as they have had little opportunity to earn money while in detention. If all members of one family make separate applications each applicant will have to pay the \$1,000 – whether or not they are children.<sup>66</sup> It is generally understood that the Department does not pursue payment of these fees where it is anticipated that the person has no capacity to pay the fee, however non-payment of the debt can affect eligibility for visas at a later time.

The Department regards the RRT decision as the end of the refugee status determination process. However, an asylum seeker still has a limited right of appeal to a court and can also make an application for an exercise of Ministerial discretion.

### **7.2.4 Judicial review**

Judicial review of administrative decisions is one of the fundamental tenets of the rule of law. The High Court of Australia stated that:

Judicial review is neither more nor less than the enforcement of the rule of law over executive actions; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.<sup>67</sup>

In the context of claims for refugee status, judicial review is the safety-valve that ensures the protection of a child's right to non-refoulement by ensuring that all visa decisions made by the Department and the RRT are made according to law. Therefore, while judicial review of visa decisions is not a process that allows review of the merits of a decision, it is a process that ensures that certain minimum standards of administrative decision making have been observed.

Since 1992, successive Australian governments have enacted legislation designed to curtail the power of the courts to review migration decisions.<sup>68</sup> The most recent of those attempts was contained in the so-called 'Pacific Solution' package of

## A last resort?

legislation, discussed later in this chapter. According to the Department's Fact Sheets, the purpose of the *Migration Legislation Amendment (Judicial Review) Act 2001* was to give 'effect to the Government's long-standing policy commitment to restrict access to judicial review in migration matters in all but exceptional circumstances'.<sup>69</sup>

The legislation introduced a 'privative clause' (section 474 of the Migration Act) which sought to 'give decision-makers wider lawful operation for their decisions' which means that 'the basis on which those decisions can be challenged in the Federal Court, the Federal Magistrates Court and the High Court is narrower than before'.<sup>70</sup>

The constitutional validity of the privative clause was challenged in the High Court in the case of *Plaintiff S157/2002 v Commonwealth of Australia*. While the High Court found that the clause was valid, it also found that the clause could not be read in the way that the Commonwealth sought to apply it. The Commonwealth argued that the privative clause would protect most forms of administrative error from judicial review, even decisions that may have been procedurally unfair, as long as the decision-maker was acting in good faith. In finding that the privative clause could not be construed to have that effect, Chief Justice Gleeson made the following comments:

Decisions-makers, judicial or administrative, may be found to have acted unfairly even though their good faith is not in question. People whose fundamental rights are at stake are ordinarily entitled to expect more than good faith. They are ordinarily entitled to expect fairness. If Parliament intends to provide that decisions of the [RRT], although reached by an unfair procedure, are valid and binding, and that the law does not require fairness on the part of the [RRT] in order for its decisions to be effective under the [Migration] Act, then s 474 does not suffice to manifest such an intention.<sup>71</sup>

There is no time limit for lodging an appeal with respect to most judicially-reviewable decisions.<sup>72</sup>

### 7.2.5 Ministerial discretion to grant a visa

When the RRT makes a negative finding the Minister for Immigration and Multicultural and Indigenous Affairs (the Minister) has a non-compellable discretion to substitute a more favorable decision under s417 of the Migration Act. This discretion is especially important in the case of children and families who may not be refugees according to terms of the Refugee Convention, but who may still have a genuine fear of returning to their home country or other reasons for staying in Australia on the basis of humanitarian considerations.

Although the Minister has unrestricted discretion to make this decision, Migration Series Instruction (MSI) 225 provides some guidelines as to when this discretion should be exercised. Relevant criteria include the age of a person, the health and psychological state of the person and 'the length of time the person has been present in Australia (including time spent in detention)'.<sup>73</sup>

MSI 225 also includes consideration of 'circumstances that may bring Australia's obligations as a signatory to the Convention on the Rights of the Child ... into consideration'.<sup>74</sup> This is referring to the protection of children from non-refoulement where there is a real risk that their rights under the CRC would be breached if they returned to their home country.

The Department states that:

In cases where a person has been found not to be owed protection by a review tribunal, and is subject to removal, they are assessed [with a view to a possible exercise of the Minister's power under s 417] against other relevant treaties, including the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Covenant on Civil and Political Rights ... and the Convention on the Rights of the Child.<sup>75</sup>

Cases can be referred to the Minister by Departmental officers, the RRT, the asylum seekers themselves or any other person.

The Inquiry knows of only two cases during the period of time covered by the Inquiry, in 1999, where the Minister has exercised this discretion in the case of children and families in detention.<sup>76</sup> Furthermore, the Inquiry understands that people who have had their applications for a protection visa rejected are not routinely asked to provide any further information which may be relevant to their rights under these other treaties, making any consideration that may occur unsatisfactory. This raises the risk that children may be returned to their country in contravention to the CRC.

### **7.2.6 Findings regarding the refugee status determination process**

While Australia's refugee status determination procedures do provide a formal process for the determination of refugee status and review of negative decisions, the application of that process to children in immigration detention raises several concerns.

First, the isolation imposed by separation detention creates an intimidating environment that reduces the ability of a child and his or her family to make out the best case possible for engaging Australia's protection obligations. This concern is exacerbated by the fact that the legislation does not require the Department to inform child asylum seekers in detention that they can request asylum and legal assistance. As a result, there is a risk that children, especially unaccompanied children, may be 'screened-out', and removed from Australia, even though they may have a valid claim for protection. If 'screened-out' at the initial entry interview, the possibility of re-engagement through review of the screening decision appears to be a matter of chance. This situation is markedly different to the process enjoyed by asylum-seeking children in the community who can make their case in their own time, and are able to consult a range of people, including lawyers, who may assist them to make a claim.

## A last resort?

Second, the Inquiry is concerned that child asylum seekers and their representatives are unable to access transcripts of their screening interview, as any information provided in this interview may have serious implications for the progress of their claim. The Inquiry is also concerned that inadequate interpreter services during the primary assessment process may impact on the quality of the claim.

Third, the Inquiry is of the view that the merits review stage is especially intimidating for an unaccompanied child. The remoteness of some of the detention facilities mean that children will usually only be involved in the process through a video monitor. The impersonal nature of video communication combined with possible language difficulties and the failure of the IAAAS contract to require a child's migration agent or lawyer to attend the hearing makes this a very difficult process for unaccompanied children in particular. It reduces the likelihood of a child being able to put forward his or her best evidence. Unaccompanied children, and any other child making a separate claim, also face the prospect of paying \$1000 if unsuccessful at this stage.

However, it is the successive governments' deliberate attempts to curtail the right to judicial review that is especially troubling. Courts are an independent body intended to protect the rule of law. Instead of embracing the checks and balances that courts provide to executive decision-making, governments appear to have regarded the courts as an unreasonable restraint of the Department's power to decide the fate of asylum seekers. Recent decisions of the High Court of Australia appear to have partially restored the availability of judicial review.

### **7.3 Is there priority processing for children in detention?**

Since the length of detention for child asylum seekers is directly related to the time it takes to process a protection visa application (and effect removal), the speed of processing the claims of children is of paramount importance for children in immigration detention if Australia is to meet key obligations under the CRC. UNHCR principles also provide that asylum applications by children should be given priority and decisions on primary applications and appeals should be reached promptly and fairly.<sup>77</sup>

#### **7.3.1 How fast is the primary processing for children in detention?**

After we had been here for two months we had an interview, after another three months we had another interview the same as the first. I understood from what I was told by a DIMA representative, that the first interview has been lost somehow and we were required to repeat it. Another three months later we were called for an interview with the Case Officer. We thought then that we would be released but we heard nothing for another seven months.<sup>78</sup>

The Department states that 'minors in detention are given the highest processing priority'.<sup>79</sup> There is some evidence that unaccompanied child asylum seekers are given priority in processing. During the period of time covered by the Inquiry, the Department's Protection Visa Procedures Manual, which forms part of the internal Procedures Advice Manual, provided that amongst all applications unaccompanied

children were fifth in the priority list after detention cases, torture/trauma cases, Asylum Seeker Assistance cases and reporting cases.<sup>80</sup> The Department also provided some statistical evidence to indicate that, during 1999-2001 at least, unaccompanied children were granted protection visas more quickly than accompanied children.<sup>81</sup> However, the Inquiry did not receive evidence to indicate that unaccompanied children *in detention*, as opposed to unaccompanied children generally, enjoy an accelerated refugee status determination process within the 'detention' group during the period of time covered by the Inquiry.

Further, the Department did not produce any statistical evidence or a written policy suggesting that accompanied children in detention are given priority amongst the 'detention' group.

While it appears that the Department has a target of finalising applications from persons in detention within 42 days of lodgment, there is no distinction between the target for applications made by adults, families with children or unaccompanied children.

Further, the Department appears to have some difficulty in meeting its own targets. In 1999-2000, 68.7 per cent of applications from asylum seekers in detention were finalised within the 42-day target,<sup>82</sup> in 2000-01 only 40 per cent of applications met the target,<sup>83</sup> and in 2001-02 only 47 per cent of the cases were completed within 42 days.<sup>84</sup>

The Department informed the Inquiry that by mid-2001 the time taken for the Department to process protection visa applications had decreased from an average of seven and a half months to twelve and a half weeks for 80 per cent of applicants. It appears that this refers to all applicants as opposed to persons making applications from detention.<sup>85</sup>

The Inquiry welcomes the Department's efforts to reduce processing times. However, it should be kept in mind that the primary processing of applications does not represent the total time spent in detention, as it does not include the time taken to screen-in (time spent in separation detention), nor does it include time taken for merits and judicial review. Children may still spend months in detention waiting for what they consider to be a 'final' outcome of being processed.<sup>86</sup>

The evidence received by the Inquiry suggests that, even if there was a policy to prioritise the claims of children in detention, it was not applied in a uniform manner. A lawyer representing children in Western Australia described it as 'a bit of a lottery':

PROFESSOR THOMAS (INQUIRY): So can you comment on why some cases are quick and some cases long? Because there have been cases that are much shorter. What is the factor that makes a case short and a case very long?

MS le SUEUR: I often describe the whole process to people as a bit of a lottery. If you are lucky, you will get a good lawyer and if you are lucky you get a good case officer. And if you are lucky everything goes okay. If you are not lucky and you do not have a good lawyer and you do not have a good case officer, then you know it is fairly much down hill from there.<sup>87</sup>

## A last resort?

A former detainee child was of a similar view:

In my dealings with DIMA I did not trust them at all – the number of visas that were issued in the beginning was quite high, then it became more difficult to obtain a visa. Then occasionally if objections were made, some people would be released. It felt like a lottery and I couldn't see the method in the decisions.<sup>88</sup>

In the example set out below, it took two months before a protection application was made and more than seven months for the Department to decide that an unaccompanied child did not have a valid protection claim. The example also highlights the protracted length of time taken by the courts to consider his appeal (this is discussed further below). The child was waiting in the Port Hedland detention centre throughout this period.

---

### Processing timetable for an unaccompanied child in Port Hedland

---

May 2000	Arrives as a stowaway in Geelong; interviewed immediately by the Department. Applies for a protection visa with the assistance of an IAAAS lawyer.
July 2000	Interviewed by Department for primary assessment.
February 2001	Department rejects the protection visa application. Appeal to RRT lodged.
March 2001	RRT hearing.
April 2001	RRT rejects the appeal. Application to Federal Court lodged.
August 2001	Single Judge of the Federal Court dismisses the appeal. Appeal lodged to Full Court.
June 2002	Full Court dismisses appeal.
July 2002	Applies for special leave to appeal in the High Court.
August 2002	Withdraws application to the High Court.

---

The Department has subsequently informed the Inquiry that from 14 April 2003 the Protection Visa Procedures Manual order of priority processing, lists minors in detention as the highest priority for processing.<sup>89</sup>

### 7.3.2 How fast is the merits review at the RRT?

As set out above, appeals from a primary decision to the RRT must be lodged by detainees within seven days of receipt. The RRT states in its submission to the Inquiry that:

All applications involving persons in detention are streamed for priority processing. On receipt of an application showing the applicants location as a detention centre, the RRT's case management system electronic record, which is created for each new application is immediately flagged. The hard

copy file cover is also given a marking to draw attention to the fact that it is a priority case. If there are children in detention an additional cover marking is placed on it.<sup>90</sup>

It is unclear what the 'additional cover marking' consists of, but it seems that, in principle at least, there is some attempt to ensure that processing of appeals for children in detention are given some priority. In the written and oral evidence submitted to the Inquiry, the RRT stated that cases involving children in detention took an average of 67.7 days in 1999-2000, 92.4 days in 2000-2001 and 75.1 days in 2001-2002.<sup>91</sup> The RRT testified that in the past financial year 73 per cent of the cases were completed within 70 days and the longest period of time taken would have been around 100 days, although this was an estimate only.<sup>92</sup>

### **7.3.3 How fast is judicial review?**

There is no evidence before the Inquiry to suggest that the courts prioritise judicial review of decisions relating to children in detention. On the contrary, it appears that the Federal Court has generally taken some time to process review decisions, as demonstrated in the case described above.

### **7.3.4 What is the impact of security checks on processing time?**

The Department stated that in 2000 it introduced 'front end loading', or early commencement, of health and character checks to reduce processing times.<sup>93</sup> However, despite efforts, it appears that security checks can extend a child's stay in detention considerably:

And why I was two months after [being found to be a refugee] was because there is one organisation called ASIO [Australian Security and Intelligence Organisation]. It is for the spy and terrorist. [I was detained at Woomera] for two months after my case officer accepted me. I'm two months, I was accepted as refugee, before I didn't know I am refugee! And I thought about ASIO and how they can think that a person under eighteen years old, who didn't see anything in his life, came to Australia to be a terrorist? And they are doing ASIO on us? Maybe the old people, maybe they were in prison and they could be, an example. But how could we be terrorists? We stayed two or three months after we were accepted, because of waiting for the ASIO! Unbelievable!<sup>94</sup>

It appears that there is no outer limit on the time allowed for the conduct of such checks although the Department does have the right to waive security checks in certain circumstances.<sup>95</sup> The Inquiry has not received any evidence from the Department indicating that a child has ever failed a security check. Indeed it would seem unlikely that any child would have sufficient records to conduct such a check. It is therefore disappointing that the Department has not waived the need to conduct security checks in the case of children who have received a positive determination, but who are waiting in detention pending the outcome of such checks.

## A last resort?

The time taken to undertake security checks also affects detainees who are successful at the RRT. The Inquiry received evidence from several children and families who were waiting for many months in detention after having been found to meet the definition of refugee by the RRT.<sup>96</sup>

So after I got accepted from the RRT Court, they said okay now you can go...and the problem now I have accepted five months ago, five months and still they are not releasing me, they are telling me, you have a police check. And what is it? I am not a terrorist, not criminal, what is this police check to keep me? So now she is on a hunger strike and she's not eating few days and it's making very hard for everyone...

They should do the police check the first minute we come to Australia so that they know, like they give us Reject or do anything. But now we have given addresses and the name of the doctor we used to go, everything. School, everything. So if they go on the Internet even they can find the criminal records, okay but like, how long does it take till it gets like, they didn't even do the police check the first minute we got the Accept. They didn't do it. Two months after we got Accept, they did the police check, now this is five months we are here, then what is the paper that they have given Accept?... And then they tell us, You have got Accept so you should not ask about your Visa all the time. We say, 'no' but you know because we have finished our patience, it's like that you have crossed all of the ocean with all of the sharks and everything and now you are at beach but they don't let you to go on the beach.<sup>97</sup>

The Inquiry also received evidence regarding an unaccompanied child, who was detained in Curtin IRPC during 2001. He remained in detention for nearly five months after his case was successful at the RRT while security checks were being carried out.

---

### Processing timetable for an unaccompanied child in Curtin

---

January 2001	Unaccompanied child aged 15, arrives in Australia by boat. He is taken to Curtin detention centre.
March 2001	Receives notification from the Department that his primary application for a protection visa has been rejected.
July 2001	Receives notification that he has succeeded at the RRT.
August 2001	Signs a statutory declaration stating that he had 'never been convicted of a crime or any offence in any country'.
Dec 2001	Released from detention.

---

### 7.3.5 Findings regarding priority processing for children in detention

The Inquiry commends the Department for introducing general initiatives to speed up the processing of primary applications. However, from the statistics and Departmental policies available to the Inquiry, there is no evidence that children enjoyed any extra priority within the general pool of applications made by persons in immigration detention within the period covered by this Inquiry. The Inquiry notes that in April 2003, the Department amended the Protection Visa Procedures Manual to make minors in detention the highest priority for processing. Unfortunately, this occurred after all primary processing had been completed for children in detention at that time.

The RRT has also recently introduced policies intended to expedite the processing of claims from children in detention. However, the effectiveness of these policies has yet to be proven. Appeals to the courts can also take many months.

Despite measures to expedite security checks, the conduct of such checks has sometimes extended the detention of children for months. Although the Inquiry recognises the importance, and the difficulties, of conducting security checks, it is unconvinced that every child who makes an asylum claim needs to remain in detention while these security checks are carried out, especially when they have received positive determination of their status.

Failure to expedite any or all of these processes results in the prolonged detention of unaccompanied children and children with their families. It also extends the period of uncertainty that children face as to their future.

## 7.4 Is there appropriate legal assistance for children in detention?

In recognition of the importance of the protection of the right to non-refoulement, the UNHCR UAM Guidelines require the provision of legal assistance throughout the entire refugee status determination process. UN rules and principles relating to the rights of children and adults in detention also designate legal assistance as a fundamental procedural right for those deprived of their liberty.

### 7.4.1 When is legal assistance available?

The Department asserts that all detainees can ask for a legal aid or a private lawyer at any stage. However, the Migration Act specifically provides that there is no obligation for the Department to notify detainees that they have the right to obtain legal advice. Further, as described in section 7.2.1 above, there is no obligation to provide visa application assistance during the initial screening process.<sup>98</sup> A 1998 Human Rights and Equal Opportunity Commission (the Commission) report on unauthorised arrivals, *Those who've come across the seas*, recommended that, as a minimum, detainees should be informed of their right to legal assistance.<sup>99</sup> However, the Department has consistently rejected any argument that they have a responsibility to inform new arrivals of their rights.<sup>100</sup> Furthermore, legislation was

## A last resort?

enacted to prevent the Commission from initiating contact with detainees to inform them of these rights.<sup>101</sup>

In any event, it is difficult to imagine how a child in separation detention – with no phones or access to the community – could identify a lawyer for the screening interview, especially a lawyer willing to provide advice at no cost. This situation contrasts sharply to that of asylum seekers in the community who can be directed to community legal organisations or can seek the assistance of friends and family to identify and pay a lawyer.

Nevertheless, all children and families in detention are provided with government-funded assistance under IAAAS during primary processing and merits review at the RRT. IAAAS providers are registered migration agents. While some migration agents are lawyers, they need not be. The provision of migration application assistance is an appropriate and essential way of counteracting some of the disadvantages that come from being detained in remote detention facilities – namely a lack of access to a community of lawyers and migration agents.

Under the contract with the Department, the IAAAS providers must consult with asylum seekers prior to lodging the protection application; prepare and lodge that application; respond to requests for further information and keep the applicant up to date on the progress of their claim. They must also explain the primary decision and any review opportunities.<sup>102</sup> They are not obliged to attend the RRT hearing but are permitted to do so.<sup>103</sup>

There is no government-funded assistance during the screening or judicial review stages of the application process. There is also no government-funded assistance for the purpose of making a bridging visa application or an application for the exercise of Ministerial discretion. However, in some cases IAAAS providers do give assistance on a pro bono basis.

### **7.4.2 What are some of the problems with the IAAAS service?**

Many of the problems regarding the legal assistance provided to children and families in detention relate to the remoteness of some of the facilities themselves and the failure to take into account the special needs of detained children. They are also related to the disempowerment that comes with the deprivation of liberty.

#### **(a) Does it matter that migration agents are not provided at all stages of processing?**

As described above, the screening process is the point at which a child will either gain access to Australia's protection procedures or be removed from the country. It seems that the Department's decision not to provide legal assistance at this stage is a combination of the fact that: (a) the Department is trying to 'protect the integrity of the process'; and (b) the Department has judged this to be a time when

'people are invited to simply tell their story'.<sup>104</sup> However, RACS, an IAAAS provider, states that the lack of legal assistance during the screening process can result in the removal of children who are entitled to refugee protection:

[I]n Woomera IRPC there have been young people who have made claims that they are from a particular persecuted ethnic group in Afghanistan, 13-14 years old without relatives in Australia, and have been 'screened-out' or not received legal assistance for at least a four to five month period.<sup>105</sup>

The difficulties that children face in telling a story that will support an asylum claim are exacerbated by the isolation of separation detention. RACS rightly argues that the integrity of the process can only be improved by the presence of a lawyer who can advise children of their rights. This is especially important in the context of the detention environment. A child interviewed by the Inquiry put it thus:

When you were gaol, you know what your right is, you can get a lawyer. When you are in detention centre, you don't know what your right is, you have to wait for them to [decide] your right to stay, to provide you a lawyer, you have to wait. You have very less facilities.<sup>106</sup>

It is no less important to have the assistance of a lawyer at the judicial review stages. By definition, judicial review occurs in courts and therefore the need for a lawyer is paramount. It appears to the Inquiry that the refusal to provide free legal assistance at this stage is commensurate with the spirit of the legislative amendments designed to discourage detainees from accessing judicial review. However, if true, this position fails to recognise the fact that legal advisers may be in a position to advise clients when particular cases, or aspects of it, are fruitless and therefore the presence of a lawyer may improve rather than disrupt the process.<sup>107</sup> It should also be noted that the Migration Act and Migration Regulations are long and complex, and bringing proceedings for judicial review represents a formidable hurdle, particularly to people who do not speak English and are not familiar with Australian legal processes. It is especially difficult for children.

The Department states that detainees can apply for general community legal aid (as opposed to IAAAS assistance). However, this is only possible at the judicial review stage, not at the screening stage, and even then on an extremely limited basis. In any event, the Inquiry has not seen any evidence of serious efforts to inform detainees of the availability of legal aid in the detention centres and the legal aid agencies do not have the funding to travel to the remote centres.

### **(b) Do migration agents have sufficient time to give proper advice to children in detention?**

The IAAAS contract, which sets out the standards expected of the IAAAS providers, states that 'when attending [remote detention facilities], a minimum of three interview consultations per day must be undertaken'.<sup>108</sup> This means that the time permitted with each child asylum seeker in detention is strictly limited.

## A last resort?

The pressures placed on IAAAS providers during these application interviews were described by RACS during the Sydney hearings, as follows:

MS RYAN (RACS): We were given a list of people that we need to process and we have to process three of those per day and often the people on that list will only be the father, when there is another four people or five people involved in that family application, so three of those per day. We could probably compare that with someone that we assist in the community where it might take us 5 or 6 hours to prepare such an application, or longer. Certainly when we do our referrals at the local detention centre, Villawood, where we don't have that time pressure we'd spend a good part of the day out there. But certainly in remote detention task forces we have to process three per day....

MRS SULLIVAN (INQUIRY): I'm trying to get a sense of how you feel as a professional in the service you're providing.

MS McADAM (RACS): I mean we have experiences where we will do our utmost to provide the best service we can. So we will go to a place like Woomera and we'll stay there 'til after midnight to make sure we get the clients' claims as comprehensively as we can and we can explain the whole process to them as properly as we can. So we work within the restraints but they're not ideal. The tender process is extremely competitive. We think that our centre provides a very good service and that it is important for us to continue to be an IAAAS provider because we're not in there for profit but it is a competitive tendering process.<sup>109</sup>

These time limits are particularly problematic when one of the three interviews involves an application made by a large family. In such circumstances it seems that the IAAAS provider rarely has the opportunity to interview the children and therefore may not be in a position to assess whether they should make a separate application.

Difficulties also arise with respect to unaccompanied children who require special care and attention:

An unaccompanied Hazara teenage boy from Afghanistan told SCALES [Southern Communities Advocacy Legal and Education Service – a Western Australian IAAAS Provider] that when he arrived he was approximately 16 years old. He showed us a statement prepared by his legal representative that was two pages long. He says that he had more to tell his lawyer but she told him not to as he had told her enough and that as long as 'he was a Hazara and from Afghanistan that was all they needed to show' and she had other people to see that day.<sup>110</sup>

### (c) Do migration agents gain sufficient access to children in detention?

Several IAAAS providers gave evidence that the location of the remote detention facilities made it almost impossible to see their clients more than once, given the funds available under the contract.

Some legal advisers have testified that there is good access by fax and phone to their clients. However, many detainees complained to the Inquiry that there were sometimes delays in receiving faxes from their lawyers, and sometimes detainees were charged fees for faxing that they could not afford.

In any event, it is clear that, especially with children, it is much more effective to have face-to-face interviews. The Coordinator of the Refugee and Immigration Legal Centre (RILC) stated that:

We experience considerable problems in terms of access to our clients who are at Port Hedland or Curtin Detention Centre because of the tyranny of distance, if I could call it that... I am not at liberty unfortunately to discuss the contract between the Department of Immigration and our organisation, but to say that it would be out of the question for us to be flying up with any regularity to Curtin or Port Hedland because our centre would have to close down within a few weeks given the costs involved...

So in terms of access, our access is generally by phone and by fax, and our access, I have to say, is pretty good. Our experience is that the Department of Immigration in both of those detention centres does all that it can to facilitate access and I have had situations where I have needed to speak to a client, an unaccompanied minor, very quickly, and that has been facilitated, you know, within a matter of 10 or 15 minutes. So I don't believe, certainly for our organisation, that access is restricted in any way other than through again a highly undesirable system whereby people are detained in remote areas of Australia... I should also add to that that my experience of getting instructions from a child face-to-face as opposed to the phone are vastly different experiences. The quality of instructions face-to-face is vastly superior to getting them over the phone.<sup>111</sup>

RILC also highlighted problems in communicating confidentially with clients in detention by fax:

What I could say and what our organisation has raised as a concern a number of times is that in our view it is entirely inappropriate for facsimile communications between client and adviser, whether a child or an adult, to be coming through the same place, that is the Department of Immigration fax line, and being passed by the Department of Immigration to the client. In our view, we would strongly advocate that there be an independent body set up in detention, a communications centre with an entirely run by entirely independent people to handle that situation, given the sensitive nature of information that is passing between client and adviser.

I will give you one example of why that may be particularly important. If, as is becoming, you know, conspicuously apparent, there are serious situations going on in detention such as self-harm issues, such as potential breach of people's human rights or violations of their rights, the situation where the only way they can communicate by fax is by giving the Department of Immigration a copy of the complaint and then it being put on the fax machine, is not likely to allow people full and free access to communicate with the outside world.<sup>112</sup>

## A last resort?

The Southern Communities Advocacy Legal and Education Service (SCALES) submission highlights similar problems:

Due to the nature of the contract and the remote location IAAAS operators, who provide assistance in remote areas, will often only see their client face to face on a limited number of occasions: at the initial application stage; the DIMIA interview and post DIMIA interview. They then leave and return to the eastern states.

Any further queries regarding the processing of applications must be done by telephone or letter. Given the lack of English skills the only practical way to communicate is via telephone with the use of an interpreter. Detention facilities make private rooms available for telephone calls, but the nature of a pre-booked call with an interpreter allows little room for a broad discussion. Time differences between Western Australia and the eastern states where most IAAAS contractors have their offices also compound communication difficulties.

If a decision by the DIMIA is negative an advisor must go over the reasons for the decision and prepare any further rebuttal evidence over the telephone. Again this is very difficult and inappropriate in dealing with young people and children, it makes trying to establish any rapport and pick up non-verbal cues impossible.<sup>113</sup>

### **(d) Can migration agents get proper instructions from children?**

In addition to the problems caused by the remoteness of some of the detention facilities, some children may have difficulties giving lawyers instructions within the time limits and constraints of detention in remote facilities.

A lawyer for child asylum seekers in Port Hedland told the Inquiry that:

Now there is no way you can take adequate instructions from a young person if that is the amount of time that you allow [3 interviews per day]. In my experience, you know, when I am taking instructions from a young person, I go the first day, I ask questions, I talk to them, I establish some sort of rapport with them. Then I have to come back another time and every time that I see them, because they start to trust me, and because they start to know who I am, you find out more stuff.<sup>114</sup>

### **(e) Is there any quality control regarding the advice given by migration agents?**

The IAAAS contract for provision of services in detention does not specifically mention children at all. It does not require providers to have any experience or training regarding techniques for interviewing children, or the special considerations and investigations that might be made in relation to asylum claims by children (these issues are discussed further below).<sup>115</sup> A lack of experience with children's asylum claims combined with the pressures of time, may result in a failure of IAAAS providers to identify and pursue asylum claims that are specifically related to the situation of children.

During interviews between detainee families and the Inquiry staff, it became clear that many children and parents were very unhappy with the quality of their legal

assistance. They often did not know the name of their lawyer and had little contact with them. They complained of not being informed of the progress of their case. For example, the Inquiry was informed of RRT and court hearings taking place without the knowledge of the applicant.

One example is described in the Commission's legal submissions in the cases of *Odhiambo v MIMA* and *Martizi v MIMA*, concerning two unaccompanied children:

In relation to the application for review to the RRT, from the Minister's refusal of his visa application, it appears that the Appellants had available to them legal assistance of the same general category as is provided to all persons in detention pursuant to the Immigration Advice and Application Assistance Scheme. ... Mr Odhiambo describes the assistance he received from the solicitors in paragraphs 7-9 of his affidavit. The Appellant, Peter Martizi, saw a person whose name was not known to him, but whom he describes as a lawyer from [law firm name deleted], at Port Hedland. The lawyer apparently attended the interview and thereafter did not trouble to contact his client. The lawyer did not assist to fill out an application to the RRT, although he appears to have been allocated a lawyer from the same firm of solicitors for the purpose of the hearing. The lawyer apparently attended the RRT hearing by video conference, but did not speak. He had no further contact from the lawyer.<sup>116</sup>

A lawyer assisting unaccompanied children described the situation in more general terms:

I mean, the boys often don't know who their lawyer is. The boys have told me stories about how they would go to the RRT hearing or the hearing with the case officer and there is a whole bunch of people and the television and they will say and they don't know which one is the case officer and which one is their lawyer.<sup>117</sup>

The IAAAS contract provides for a complaint mechanism. The IAAAS provider is contractually required to give the applicant a Client Information Sheet (CIS) prepared by the Department and to explain the contents, including information about the complaints process, with the assistance of an interpreter where necessary. The applicant is required to acknowledge in writing their understanding of the CIS.<sup>118</sup> Complaints in relation to an IAAAS provider are investigated by either the Department or Migration Agent Registration Authority. However, the existence of a complaints mechanism does not appear to be something that is known to child detainees:

Unaccompanied child: Yeah, I had a lawyer but I did try, I did try but it doesn't work and I did one hunger strike, no eating, no drink for 2 days. After 2 days they come to me and ask from me, What happened? Why you don't eat or why you don't drink? I said, I have been here for a long time for 4 months, why no lawyer told me what happened in my case? Why the case officer don't tell me what happened in my case. I should know and...

Inquiry Officer: Okay, so you were waiting then for 4 months, and then once you went on hunger strike they listened to you?

Unaccompanied child: Yeah. And the day that I got my visa, also my lawyer sent to me a letter and my lawyer wrote, 'You have a problem with your case officer'. It was very funny. I get visa, what's this?!<sup>119</sup>

## A last resort?

Another unaccompanied child reported:

I have a friend who received a rejection and he found out afterwards that there was a 28 day appeal period – these rights were not explained to him at the time by anyone, so he did not know what he had to do after the initial rejection.<sup>120</sup>

The Department has informed the Inquiry that since 1999 it has received ‘only a small number of complaints, all of which have been fully investigated and found to be without substance’.<sup>121</sup> While it may be that the low numbers mean that detainees have no complaints, given the complaints heard by the Inquiry in confidential interviews, it seems more likely that detainees either do not know how, or are too scared, to complain.

### 7.4.3 Findings regarding legal assistance for the refugee status process

The provision of legal assistance to children is a vital component of ensuring that child asylum seekers are protected in accordance with article 22(1) of the CRC. The Inquiry commends the Department for providing free migration application assistance for all asylum seekers in detention on the Australian mainland during the primary processing and merits review stages. However, the Inquiry has considerable concerns about the quality and scope of the legal assistance provided to children, as well as the absence of assistance at the screening and judicial review stages.

The time limits imposed on IAAAS providers are insufficient to interview all members of a family, and children in particular. This problem is compounded by the remoteness of some of the detention facilities which means that IAAAS providers get very little face-to-face contact with child clients. This appears to have resulted in a shortfall in the quality of advice provided to unaccompanied children in particular, with the possible result that children who are owed protection obligations are inappropriately returned.

The failure to provide either legal or migration application assistance to children in detention during the entry interview stage is of even greater concern. The Migration Act does not require the Department to advise a child of their right to request such assistance. Ignoring the difficulties of paying for a lawyer, a child is unlikely to understand that he or she has such a right in the absence of notification. The isolation of children in separation detention and the absence of advice at this crucial stage in the refugee status determination process raise a serious risk that a child who is owed protection from non-refoulement may be screened-out and returned. This risk is especially high in the case of unaccompanied children.

The Inquiry also considers it to be undesirable that children are denied free legal assistance at the judicial review stage. However, the Inquiry recognises that several children have been able to obtain pro bono assistance and have therefore had their rights protected.

The Inquiry notes that, at the time of writing this report, the IAAAS is being evaluated by an External Reference Group, as part of the requirement that government

programs be evaluated every five years. The Department informs the Inquiry that many of the issues raised in this report are covered by this evaluation.<sup>122</sup>

## **7.5 Is there a child-friendly environment and assessment process for children in detention?**

### **7.5.1 How should interviews be conducted?**

UNHCR guidelines state that interviews with children should be conducted in a child-friendly manner and the interviewer should have training that allows them to take into account the special situation of children and unaccompanied children.<sup>123</sup> This is especially important when interviewing children in detention as the detention environment itself places additional strains on children.

The Department asserts that all interviews with children at the screening stage are:

conducted in a non-threatening setting and the children are asked open-ended questions which enable them to say anything they wish in support of their claims.<sup>124</sup>



View from interview room at Port Hedland, June 2002.

---

Open-ended questions do not necessarily make it easier for children to present their case because they do not understand what they need to show.<sup>125</sup>

## A last resort?

At the primary assessment stage the Department states that:

interviews are conducted in a non-adversarial and sensitive manner, appropriate to the age of the child. Department case officers are culturally sensitive and interpreters are used at all times ... The interview allows a child to discuss freely the elements and details of his or her claim.<sup>126</sup>

However, unlike the United States and Canada, which have issued specific guidelines to decision-makers that adopt and expand on the UNHCR guidelines,<sup>127</sup> the Department has not issued any special instructions to its officers as to how to interview and assess children's claims. This makes it difficult for the Inquiry to assess the assertions made by the Department and be satisfied that procedures are appropriate for children.

### 7.5.2 What training and guidance is given to Department officers?

How can I tell my whole 17 years in just one hour? And there's like a psychologist or might be an officer, and he has to ask the questions. How can you? How can you? A guy [DIMIA interviewer] who hadn't had any education and different background and asking 'Why did you come?' I left my family; I didn't come to have a holiday. And they say, 'Why didn't you bring your documents?' I flew! [fled] I had nothing you know. If I brought my passport and everything, why come here, why would I have flown? If I had a lot of time, why should I have come here? Why shouldn't I have gone to Europe? Or maybe land in America. Why should I come as a...you know, we didn't eat for one week on the way, might have been more. The little children were crying. Do you think they would come happily, to take this way [route]? No way.<sup>128</sup>

The Inquiry was concerned to obtain primary evidence from the Department that supported its claims that interviews of children in detention were conducted in a child-friendly manner and therefore issued the Department with a Notice requiring all relevant documents.<sup>129</sup>

In response to that Notice the Department provided Case Managers Induction Course materials dated March 2000. A document entitled 'Interviewing Skills' appears to be part of this Induction Course and contains a half page discussion about children. The text suggests that:

It may be useful to interview both children and the elderly in the presence of a supportive family member or friend to help them feel relaxed and sometimes clarify things for them. ... Obviously you wouldn't be expecting the same level of detail from a child as an adult and you would need to take a softer approach and more of asking the child questions. Simple clear questioning.<sup>130</sup>

The Department also provided copies of training materials used in the two-day Charles Sturt University Investigative Interview Training in July 2001. However, it appears that this training course was a one-off event. In any case the only training

session that seems to directly address interviewing children lasted a total of 90 minutes.

Furthermore, the Department provided an extract of the Onshore Protection Interim Procedures Advice dated 21 December 2001 which relates to the 'Handling of Sensitive Cases'. The procedures set out in that document did not relate to the way children should be handled but rather in identifying cases 'that could be expected to arouse media interest, affect foreign relations or otherwise be cases on which the Minister or Executive may require briefing'. In any event, it is only unaccompanied children under the age of ten that are automatically included on the 'Sensitive Case Register'.

Finally, the Department provided copies of the UNHCR Procedures Handbook and the UNHCR UAM Guidelines but has not indicated how they are to be used by the Department's case managers other than that they are 'a practical guide to assist signatory countries in assessing claims for refugee status'.<sup>131</sup>

The materials provided by the Department do not reveal any detail on what skills should be employed by interviewing officers nor is there any indication of which officers get this training, how often the training is refreshed or whether there are special officers for children and unaccompanied children.

The Department has not incorporated guidelines in its Protection Visa Procedures Manual on the way to interview and assess children in the same way that it has provided detailed guidelines regarding victims of torture and trauma<sup>132</sup> and guidelines on the interviewing of women.<sup>133</sup> Furthermore, the contract with IAAAS providers does not require any expertise in interviewing children. The failure to incorporate these guidelines contrasts greatly with the detailed guidelines produced by the immigration authorities in the United States and Canada.

### **7.5.3 Are interviews being conducted in a child-friendly manner in detention?**

The fact that the interviews are taking place within the detention environment itself weighs against the Department's assertion that interviews are in a 'non-threatening' setting. This is especially the case in the context of the screening interview which takes place in separation detention.

The mother of a child told Inquiry staff how her family had a primary interview three days after her child had been injured. He had been crying for three nights in pain:

Try to imagine, child in our hand...and we were so tired because not being about to sleep properly then we went into the interview room and the case officer. I could not express what I had gone through because of the tiredness, [my husband] couldn't either and the interpreter didn't care that our situation is like this. At least explain it to the case officer!<sup>134</sup>

## A last resort?

The IAAAS providers who gave evidence to the Inquiry all stated that they did not believe that children were interviewed by the Department any differently than adults, assuming that they were interviewed at all.<sup>135</sup>

[T]here appears to be no difference in the questions or the style of questioning for unaccompanied or for minors as opposed to adults, they are the same form, the same questions, the same setup and to say that asking open ended questions advantages an asylum seeker, it doesn't, it just leaves them as lost as they would be.<sup>136</sup>

The only primary evidence that the Inquiry received that interviews were being conducted in a child-friendly manner was in an email between Department officers regarding the asylum interview for an eight-year-old unaccompanied child.<sup>137</sup> The email states that the case manager 'is an experienced refugee interviewer as well as a trained social worker and psychologist. I have full confidence that she will conduct the interview in a sensitive and non-threatening manner'.<sup>138</sup> Although this may have been the case in this instance, there is no evidence that child-friendly processes were generally adhered to or mandated.

The Refugee Review Tribunal issued a 'Procedural Guide for Members' in October 2001 which has a section on 'Minors as Applicants'. In August 2002, the RRT also issued 'Guidelines on Children Giving Evidence'.<sup>139</sup> Both these documents provide some guidance on treating minors in a child-friendly manner. However, it should be kept in mind that many children in immigration detention appear by video-link, due to the remoteness of the facilities, and this imposes additional hurdles in communicating with children.

### **7.5.4 Findings regarding child-friendly procedures for refugee processing of children in detention**

It is disappointing that the Department has not issued guidelines along the lines of those in the United States and Canada, which provide specific guidance on which Department officers should conduct entry and primary interviews. In the absence of these guidelines and any primary evidence suggesting that there are specially trained officers to interview children, the Inquiry finds that measures to ensure child-friendly interviews have not been a priority for the Department. While this is an issue that is relevant to all child asylum seekers, it is of particular concern regarding children in immigration detention as they face additional stresses by virtue of their detention.

## 7.6 Are special substantive considerations applied to children’s asylum claims?

### 7.6.1 What should officers take into account when assessing a child’s claim?

When assessing the claims of any child there are substantive as well as procedural considerations to take into account. International guidelines set out the following considerations:<sup>140</sup>

- the age and maturity of the children
- the possibility that children may manifest their fears differently to adults
- the likelihood that they will have limited knowledge of the conditions in their country of origin
- the child-specific forms of human rights violations that may amount to persecution, such as the trafficking of children for sexual exploitation
- in the event that the child is unaccompanied, the situation of the child’s family in the country of origin.

Essentially, this means that although the Refugee Convention definition of refugee makes no distinction between adults and children, in assessing the claims of children it may be necessary to employ a more lenient approach regarding credibility and the burden of proof. All decisions should be made on a case-by-case examination of the unique combination of factors,<sup>141</sup> and there should be a liberal application of the benefit of the doubt.<sup>142</sup>

SCALES, an IAAAS provider, summarised:

There are different factors that should be taken into account when assessing, for example, a well-founded fear of persecution. A young person or a child may not be able to articulate as clearly as an adult their fears of persecution and be as specific as often the Department of Immigration seem to want people to be, in terms of laying out their particular claims for persecution.<sup>143</sup>

SCALES highlights that children in detention, unlike children in the community, are deprived of the benefit of independent assistance of psychologists and counsellors who can assist in interpreting the behaviour of children during interviews and that this can be crucial in the decision-maker’s assessment of children.<sup>144</sup>

The SCALES submission goes on to point out that:

Recent amendments contained in *Migration Legislation Amendment Act (No. 6) 2001* mean that in determining claims the decision maker must be satisfied that the Convention reason is the *essential and significant reason* for the persecution.

In considering the asylum claim of a child who has filed a separate asylum application, the nexus requirement may be particularly difficult to determine

## A last resort?

because a child may express fear or have experienced harm without understanding the persecutor's intent. A child's incomplete understanding of the situation does not necessarily mean that a nexus between the harm and a protected ground does not exist.<sup>145</sup>

In its submission to the Inquiry the Department states that:

Claims from minors, as for other applicants, are assessed on a case by case basis. In assessing claims the case officer will consider the age, degree of maturity and cultural background of the child and the capacity of the child to recall past events and to communicate his or her experiences. Where the child is not able to articulate a subjective fear of persecution the case officer will consider objective factors such as the circumstances of a child's departure from his or her country of origin and information about his or her country.<sup>146</sup>

The Inquiry received evidence that the determination process for the eight-year-old unaccompanied child, mentioned in section 7.5.3 above, took into account his age and maturity. In an email to the case manager, a senior Department official reported that the case manager should:

rely on the evidence and claims provided by the minor and information known to the officer which might suggest a person not holding a subjective fear would in fact hold such a fear if they were capable of doing so.

If taking all matters – including material known to the case manager – into account, the conclusion is that the fear is well founded, this element of the test would be met. This could occur even if the child is considered too young to fully comprehend the significance of the objective danger facing him if returned. But in the case of a child clearly stating a fear the decision maker might conclude that this be taken at face value as indicating a subjective fear.

The bottom line is that we should not let the (young) age of a person stand in the way of providing protection where, all things considered, we consider that there is a well founded fear of persecution for a Convention ground.<sup>147</sup>

The Department has also provided a description of the interview process for two unaccompanied children which appears to take into account some of the issues raised in the international guidelines. For example, consideration was given to country information relevant to the children's claims, even though they had not specifically articulated these claims.<sup>148</sup>

Unfortunately, the Department has not provided any other persuasive primary evidence to support its statement that it takes into account the specific characteristics of the child in determining applications. It appears to rely on the training documents described in section 7.5.2 above and the fact that all case officers 'are provided with a copy of the Convention and the UNHCR Handbook'.<sup>149</sup> It is not clear to what use that document is put, nor are there any guidelines in the Department's Protection Visa Procedures Manual setting out the different considerations that should be taken into account when coming to a decision in the case of a child asylum seeker.

In addition, the pro forma version of the contract with IAAAS providers, which requires contractors to conform to 'industry standards and guidelines specified in Item D of the Schedule',<sup>150</sup> omits to mention children or make reference to any special care or time that should be taken with respect to applications by children. IAAAS providers have testified that expertise in providing advice to children is not required of them.<sup>151</sup> This is borne out by the fact that there is no mention of children in the contract.

The RRT's 'Guidelines on Children giving Evidence' do not refer to any special considerations for children in detention, but they do spell out the difficulties a child may have in clearly expressing the information necessary to support an asylum claim and asks that RRT members take this into account. As these guidelines were only issued in August 2002, the Inquiry is unable to assess the impact of these new guidelines.

However, the decision recorded in the case of Peter Martizi, an unaccompanied teenager, makes it clear that children have not routinely enjoyed a liberal application of the benefit of the doubt as required by the UNHCR guidelines.<sup>152</sup> In that case the Department's primary decision record states that the decision-maker is 'unconvinced of the applicant's overall credibility'.<sup>153</sup> The decision-maker cites several cases which he took into account when coming to this conclusion but none of them related to special considerations regarding children, nor does he refer to the UNHCR Procedures Handbook or UNHCR UAM Guidelines. Similarly the RRT decision makes no reference to any special considerations taken into account because Martizi was an unaccompanied child.

### **7.6.2 Findings regarding special considerations applied to children's asylum claims**

As the Inquiry has not conducted a detailed analysis of all decision records regarding children, it cannot conclude that decision-makers have systematically ignored the UNHCR guidelines regarding the assessment of claims made by children. However, the evidence before the Inquiry leads it to believe that these special considerations are not embedded into the refugee status determination system. Again, the Inquiry notes that the Department's procedure manuals are in stark contrast to the American and Canadian models which specify how decision-makers should assess asylum claims made by children.<sup>154</sup>

### **7.7 What special measures are taken to assess claims by unaccompanied children in detention?**

Unaccompanied children are children who have arrived in Australia without their parents or close relatives. The CRC, UNHCR, the Australian legislature and courts, the Department and ACM all recognise the special vulnerability of unaccompanied children and youth who are asylum seekers and the need to take special care to ensure that all their rights are enjoyed. Chapter 14 on Unaccompanied Children

## A last resort?

deals with those provisions in some detail. In this section the Inquiry looks specifically at the role of the guardian of unaccompanied children – the Minister and his or her delegates – in the context of the refugee status determination process.

### **7.7.1 Why should unaccompanied children receive different treatment?**

The refugee status determination process is difficult for all children. However, when children are with their parents, they have the benefit of guidance from family. Unaccompanied children have nobody who they can trust to help them make what can be the most important decisions of their lives. In recognition of these added difficulties, article 20 of the CRC requires States to provide ‘special protection and assistance’ to unaccompanied children. UNHCR has applied this principle in the context of the refugee status determination process in its UNHCR UAM Guidelines.

The most important distinction between the application of these provisions to unaccompanied children, as opposed to all other children, is the need for an adviser or guardian. In other words, international law recognises the need to make sure that there is someone who can take the place of a child’s parents in order to promote their best interests. All of the UNHCR guidelines on children and refugee status determination set out this requirement:

Not being legally independent, an asylum-seeking child should be represented by an adult who is familiar with the child’s background and who would promote his/her interests. Access should also be given to a qualified legal representative.<sup>155</sup>

### **7.7.2 Does the Minister as guardian fulfil the special needs of unaccompanied children?**

The Department acknowledges that the Minister, and Department officials as delegates of the Minister, have a special duty of care towards unaccompanied children in detention. It also claims that it ‘fully complies with the refugee status determination procedures’ set out in the UNHCR UAM Guidelines.<sup>156</sup>

However, despite these acknowledgments, the Department has taken the position that the guardian has no role in supporting unaccompanied children throughout the refugee status determination process, other than to ensure that they receive an IAAAS provider like everyone else in detention.

MR WIGNEY (INQUIRY COUNSEL): ...what role, if any, does either the Minister himself or his delegates play in the refugee status determination period when children are in immigration detention as unaccompanied minors.

MS GODWIN (DIMIA DEPUTY SECRETARY): Well, a number of officers in the Department hold a number of delegations but the officers who specifically hold the delegation from the Minister under the IGOC Act do not play any role at all in the determination of refugee status and that is deliberate. That is to ensure that that process happens separate from their sort of on-going management in detention.<sup>157</sup>

Thus, it would appear that the reason that the Department has taken this position relates to the inherent conflict of interest facing the Minister. As guardian, the Minister is obliged to pursue the best interests of the child. As visa decision-maker, the Minister may need to make visa decisions that are contrary to a child's best interests. The Full Federal Court of Australia in *Odhiambo v Minister for Immigration* summarises the problem as follows:

... as the person administering the *Migration Act*, the Minister has an interest in resisting challenges to decisions of delegates and decisions of the Tribunal that uphold delegates' decisions. That interest is directly opposed to the interest of an asylum seeker in setting aside a decision unfavourable to him or her and obtaining reconsideration of the application for a protection visa.<sup>158</sup>

The Department cites another Federal Court case, *Jaffari v Minister for Immigration*, where French J noted that the Minister 'is not their guardian for the purpose of advancing applications for [protection] visas or initiating review of decisions made under such applications'.<sup>159</sup> That case also states that an unaccompanied child can make a protection visa application without the signature of the guardian, as long as a migration agent has been appointed. This smoothes the way for the process to proceed in the absence of the Minister or his or her delegates.

However, the Department appears to interpret these cases to mean that it need do no more than ensure that an unaccompanied child has a migration agent, like every other person. This response fails to recognise the Minister's overarching duty to give unaccompanied children special assistance to ensure that their best interests are protected. The Inquiry's view is that rather than resolving the conflict by leaving unaccompanied children in immigration detention to virtually fend for themselves through the refugee status determination process, the Minister should ensure the appointment of an independent adviser to take his or her place – someone who is not from the Department and who can actively pursue the child's best interests. As the Minister has delegated his authority as guardian to State child welfare authorities, in some circumstances, it is unclear why the Department has not appointed those persons to support children through the refugee status determination process. This is particularly curious given that those authorities are the effective guardians for unaccompanied children who are not in detention. However, the appointment of community groups, as is done in the United Kingdom,<sup>160</sup> may also serve the purpose.

Alternatively, the law should be changed to allow for the appointment of a different Commonwealth Minister as the guardian – for instance the Minister for Family and Community Services.

### **7.7.3 Does the appointment of a migration agent fulfil the special needs of unaccompanied children?**

The Department states that the allocation of an IAAAS provider to unaccompanied children in detention satisfies its obligations towards unaccompanied children. Evidence submitted to the Inquiry suggests that this is not the case.

## A last resort?

Firstly, the Department has failed to recognise that unaccompanied children do not get any legal assistance at the screening, judicial review or ministerial discretion stages unless they specifically request and pay for one. It is unrealistic to expect unaccompanied children to be in a position to make such a choice or provide such payment.

The failure to have legal and other independent assistance during the screening process not only raises the risk of children being excluded from refugee protection, but can have an effect on the time in detention and the place of detention for children (separation detention). Ultimately it has a serious impact on the best interests of the child generally. An eight-year-old boy, discussed in the table below and mentioned in previous sections of this chapter, was detained for three months before his primary interview because he did not present any claims in the screening interview.

---

### Assessment process for an eight-year-old unaccompanied child

---

June 2001	Eight-year-old unaccompanied child arrives in Australia by boat.
July 2001	Detained at Woomera IRPC. The child has no legal assistance and is screened-out. The Department officer reports that:  This boy did not present any claims during the Entry process, only minimal discussion and reasons for travelling were collected. I was the screening officer and did not request further information at that time as we had hoped to find an early resolution on the whereabouts of his parents, unfortunately this was not possible. <sup>161</sup>  Child is ineligible for the Woomera Housing Project or a bridging visa because he has not lodged a protection visa application.
September 2001	Child is screened-in and obtains a lawyer. Primary interview conducted. Child now eligible to move to the Woomera Residential Housing Project.
November 2001	Child is released from detention on a bridging visa.
June 2002	Child found to be a refugee and granted a temporary protection visa.

---

The difficulties faced by unaccompanied children in obtaining legal assistance for judicial review proceedings is illustrated by another advocate who describes how she became involved in a Federal Court case involving two unaccompanied teenagers:

I knew the two boys because of my involvement with the detention centre in Port Hedland and one day one of the boys rang me up and said 'Oh Marg I'm coming to Perth next week' and he was saying like 'could I come and visit him in the detention centre' and I said 'That is nice, why are you coming to Perth'? And he said 'I have got full Federal Court'. And I said 'Oh have you got a lawyer?' 'No'. And so they were unaware of what they needed that they did not even realise that they had to have a lawyer or they kind of knew that would have been nice but they did not have one so they were coming down to tell their story anyway.<sup>162</sup>

Furthermore, the Department's reliance on IAAAS providers to satisfy its responsibility to unaccompanied children also fails to recognise the distinction between the role of a lawyer and the role of a guardian. The role of a lawyer is to provide advice that will inform a decision. The role of the guardian is to weigh up the alternatives available to an unaccompanied child and proactively pursue the best interests of the child, as a parent would, in coming to decisions. The absence of a guardian for unaccompanied children in detention through the refugee status determination process leaves all the decisions up to the child. The need to make decisions starts at the screening process – which requires the child to specifically request and pay for a lawyer if he or she wants one – and continues through to choices about whether or not to pursue review options.<sup>163</sup>

The Inquiry heard from IAAAS providers that not having an independent adult assist the unaccompanied child through the refugee status determination process means that it is not possible to properly act for the child. RILC in Melbourne gave evidence that:

[a practical problem] that is faced by advisers is that in doing so there is no person who has a truly independent role accompanying the child, being there to assist with the preparation of the application.

Consequently this:

means that, at the end of the day, quite simply, sitting in the one room is an interpreter, a legal adviser, and a child, on what are, you know, quite – put simply – what are life and death matters that are being given instructions on.<sup>164</sup>

RILC went on to say that:

in not having that independent person it is not possible to fully get instructions and fully provide advice. Particularly if the unaccompanied minor is someone – is a child who doesn't fully comprehend the consequences of what is happening, or what they are actually saying.<sup>165</sup>

### **7.7.4 Does anyone else assist unaccompanied children?**

The Department's submission states that 'it is common practice for a neutral adult to attend Protection Visa interviews to provide emotional support for vulnerable young unaccompanied minors'.<sup>166</sup> The Department's Protection Visa Procedures Manual also stipulates that a friend or relative can provide moral support in an interview.<sup>167</sup> Furthermore, the Interviewing Skills training manual says that:

It is okay for applicants to bring along family members or friends to interview. However if you agree to let them come into the interview you must ensure that

- you mention their presence during interview on the tapes
- make it clear to them at the start of the interview that they cannot answer any of the questions on behalf of the applicant or interrupt the interview process in anyway. If they do so you will have to ask them to leave the interview and wait outside.<sup>168</sup>

## A last resort?

It is unclear whether this adult is also permitted to be present in the screening process where a child might be in separation detention.<sup>169</sup> In any event, there is no specific suggestion or requirement that a friend or adviser be present during interviews involving unaccompanied children, nor any recognition that unaccompanied children – who are likely to be in the most need of moral support – have no family and do not necessarily have friends, at least at the outset.

While there is some evidence that ACM child welfare staff were permitted to sit in on the Department's primary processing interviews,<sup>170</sup> there is no suggestion that there was a system for ensuring that unaccompanied children had someone they trusted sitting with them. IAAAS providers did not report the presence of a third person, nor did children who were interviewed by the Inquiry in focus groups.

### **7.7.5 Findings regarding special measures for unaccompanied children**

The Inquiry is extremely concerned that unaccompanied children are generally left to fend for themselves throughout the refugee status determination process. The Inquiry does not regard the appointment of an IAAAS provider sufficient to satisfy Australia's obligation to provide special assistance to unaccompanied children. Even if it were sufficient, IAAAS providers are not available during the screening or judicial review stages of the process.

The fact that the Minister and Departmental delegates may have an inherent conflict of interest does not excuse the lack of support. On the contrary, the conflict introduces a heightened responsibility to appoint an independent person who can properly take into consideration the best interests of the child.

## **7.8 What is the refugee status determination process for 'offshore entry persons'?**

Since 1999 there have been significant legislative changes which mean that the type of protection visa children will be issued can vary greatly, depending on how and where a child has arrived in Australia.<sup>171</sup> The introduction of the so-called 'Pacific Solution' and the concept of 'excised offshore places' has also led to distinctions in the refugee status determination processes available to children and the ability of Australia to protect child refugees from being returned to their countries.<sup>172</sup>

### **7.8.1 How is the refugee status determination process different for children arriving in 'excised offshore places'?**

Children and their families who arrive on 'excised offshore places' like Christmas Island and Ashmore Reef without a visa (offshore entry persons) have been detained on Christmas Island or transferred to detention facilities in Nauru or Papua New Guinea. They cannot make a valid application for a protection visa unless the Minister decides that it is in the public interest for them to do so.

Nevertheless, once a child seeking asylum comes under Australia's jurisdiction, article 22 of the CRC states that Australia has the obligation to ensure that refugee children are protected from refoulement. Furthermore, article 2 of the CRC requires that all children be in a position to enjoy their right to protection in a non-discriminatory manner.

The Department acknowledges that it has continuing obligations to persons who arrive at 'excised offshore places' and therefore assists in the processing of those persons.<sup>173</sup> However, the refugee status determination process enjoyed by 'excised offshore persons' is quite different to that experienced by children who arrive on the Australian mainland without a valid visa.

The Department describes the process used on Christmas Island, Nauru and Manus Island as a Refugee Status Assessment (RSA). The RSA is conducted by Department officials and is based on the UNHCR procedures rather than the Department's normal refugee status process described above.<sup>174</sup>

The primary differences between the RSA and the process on mainland Australia lies in the process for review for a negative decision and the absence of government-funded legal assistance for children at any stage of the process.<sup>175</sup>

A child who is not found to be a refugee by the RSA process cannot access the RRT but can request an internal review of the decision by a Department officer who is more senior than the one who made the primary decision.<sup>176</sup> There are no further review levels after the senior officer has found that a person is not a refugee. Those children who are rejected by the RSA process must stay in detention on Christmas Island, Nauru or Papua New Guinea until returned to their country of origin. Those children who are found to be a refugee must also wait in the detention facilities until a country, which may include Australia, decides to accept them as temporary or permanent residents.

The Department states that it is unnecessary to 'offer...legal assistance to offshore entry persons or persons in a declared country'<sup>177</sup> because 'the assessment process has been designed to operate without the need for any professional or legal advice for the asylum seekers'.<sup>178</sup> The Department has given no indication as to what aspects of the RSA process have been changed such that children would have any less need for legal assistance on Christmas Island, Papua New Guinea or Nauru than they would in an Australian detention centre.

The Department also states that the absence of legal assistance is 'in line with the approach taken by the UNHCR'.<sup>179</sup> While it may be the case that UNHCR does not provide legal assistance to the children it processes, it is important to reiterate that the principle of non-discrimination in the CRC means that a child arriving in Sydney is entitled to the same level of protection from refoulement as a child arriving on Christmas Island. To the extent that the absence of legal assistance on Christmas Island or Nauru results in a lower quality assessment process than on mainland Australia, it will jeopardise Australia's ability to guarantee that all children who are owed protection by Australia will enjoy that right.

### **7.8.2 What is the impact of the ‘Pacific Solution’ on non-refoulement?**

The Inquiry is also concerned about the impact that the forcible transfer of children to detention facilities in third countries may have on Australia’s ability to protect refugee children from refoulement. The so-called ‘Pacific Solution’ creates a system in which Australia’s non-refoulement obligations are ‘passed on’ to third countries. In other words, Australia places itself in a position which relies on Nauru and Papua New Guinea to comply with the non-refoulement obligations that are in fact owed by Australia to child asylum seekers.

The relocation of children to detention facilities in Nauru is particularly problematic as Nauru has not ratified the Refugee Convention and is therefore not itself bound by the principle of non-refoulement. It is therefore conceivable that Nauru could refoule a child refugee without being in breach itself, but which would result in Australia’s obligations being breached. It is unclear to the Inquiry why the Government would wish to place itself in such a precarious arrangement.

Although Papua New Guinea is a party to the Refugee Convention, it has made several important reservations upon ratification which restricts the extent to which it agrees to be bound by the Convention.<sup>180</sup>

Therefore, while the Inquiry has no evidence that the protection from refoulement has been breached in the case of any one or more children, the transfer of control over the removal of children to Nauru and Papua New Guinea, greatly increases the risk that such a breach might occur.

### **7.8.3 Findings regarding processing and protection of ‘excised offshore persons’**

Although the Inquiry has not been in a position to collect detailed information regarding the processing of children on Nauru and Papua New Guinea, the absence of legal assistance and the removal of the availability of review by the RRT and Australian courts is a matter of some concern to the Inquiry. The principle of non-discrimination in the CRC means that a child arriving in Sydney is entitled to the same level of protection from refoulement as a child arriving on Christmas Island yet the latter group is transferred to Pacific Islands where the processes are inferior. To satisfy the obligation of non-refoulement to all asylum-seeking children in Australia’s jurisdiction, there must be a full and fair refugee status determination process that can properly identify whether children need that protection. Furthermore, Australia must be in a position to guarantee that children who are found to be refugees are protected from return.

## 7.9 Summary of findings on refugee status determination for children in detention

The Inquiry finds that Australia's refugee status determination process, as it applies to children, breaches articles 2(1), 3(1), 20(1) and 22(1). Since Australia's laws require detention throughout the processing period, the time it takes to conduct that processing has contributed to a breach of article 37(b) of the CRC.

These breaches are the result of a failure to incorporate appropriate safeguards to protect the rights of children in detention into Australia's refugee status determination process. The weaknesses are especially serious in the context of unaccompanied children seeking asylum. The Inquiry has not drawn any conclusions about Australia's refugee status determination system generally.

The Department's practice of placing new arrivals in separation detention creates an intimidating environment for unaccompanied children and families to tell their story in a manner which might engage Australia's protection obligations. The Migration Act does not require Department officials to notify children or their parents of their right to request asylum nor to request a lawyer and, as a matter of practice, such advice is not provided to children or their parents unless it is specifically requested. If a family or unaccompanied child *does* specifically request a lawyer, they must pay for that assistance. The restriction on phone calls to the Australian community within separation detention limits the ability to identify a lawyer and seek assistance from friends and family. These conditions are markedly different to those enjoyed by children seeking asylum in the Australian community who can freely access friends, family and lawyers throughout the screening phase.

Regarding primary processing of refugee claims, the Inquiry is concerned that records of interview made during the screening process may be used against asylum seekers but are not provided to their migration agents. The Inquiry is also concerned that there have been some problems in obtaining appropriate interpreting assistance during the primary interviews.

The Department has not issued any guidelines to assist primary decision-makers in creating a child-friendly environment, as exists in the USA and Canada, nor has it designated specially trained officers to conduct interviews with children. Further, there is no evidence that Departmental decision-makers were required to turn their minds to special considerations when assessing the substance of children's asylum claims.

The merits review stage at the RRT can also be very intimidating for children in detention. While the RRT has issued guidelines to assist RRT members in creating a child-friendly environment in the Tribunal, the remoteness of many of Australia's detention facilities has meant that frequently these proceedings have taken place by video-link, which may add to difficulties in communication. Migration agents are not required to attend these hearings and, if they do, they are often in another State of Australia, attending by video-link. Applicants face the prospect of paying a \$1000 fee if they are unsuccessful.

## A last resort?

The Inquiry is particularly concerned about the attempts, through Commonwealth legislation, to restrict access to judicial review of decisions made in relation to visa applications. It is important to keep in mind that visa decisions are an exercise of Executive power, just like any other administrative act. While recent High Court decisions have softened the effect of the legislation, it is troubling that Parliament has attempted to curtail the power of the courts to review the legality of an administrative decision that can be a matter of life and death for an asylum seeker. The Inquiry is concerned that by attempting to deny the review of decisions there is an increased chance of the system failing to protect those children to whom Australia has protection obligations.

The Inquiry commends the Department for the provision of free migration application assistance to all asylum seekers in detention during the primary processing and merits review stages. This is an appropriate measure aimed at overcoming the restricted access of detainees to legal assistance. However, the Inquiry finds that the quality of migration application or legal assistance provided to children during the primary decision and merits review stage is compromised by the difficulties arising from the location of some of Australia's detention facilities. Furthermore, the time restrictions imposed on legal advisers through the IAAAS contract ignore the additional hurdles in obtaining information and instructions from children. The Inquiry is also concerned that migration and legal assistance is not provided to children at either the screening stage or judicial review stages. The low levels of legal and other assistance given to children in detention are especially concerning in light of the Department's failure to ensure that its decision-makers employ child-friendly procedures and special substantive considerations in assessing a child's claim.

Taken together, all of these factors lead the Inquiry to find that the process for refugee status determination as it applies to children has not been developed or implemented with the best interests of children as a primary consideration. There has been a failure to ensure that the system is responsive to the needs of children and the difficulties they face in such processes. This results in a breach of article 3(1) of the CRC.

Furthermore, the failure to adequately accommodate the needs of, and recognise the difficulties faced by, children raises the risk that the refugee status determination system will fail and that a child will be returned to a place where he or she faces persecution, contrary to the right to non-refoulement under article 33 of the Refugee Convention. This results in a breach of article 22(1) of the CRC.

The separation detention of children restricts access to legal assistance and other advice in a way that does not apply to children in the community. Children who arrive on Australia's 'excised offshore places' also experience inferior access to legal assistance and review procedures compared to those who arrive on Australia's mainland. This amounts not only to a breach of article 22(1) but a breach of the right to non-discrimination in article 2(1), which requires that all children to whom Australia owes protection enjoy the same level of rights.

The Inquiry is further concerned about the detention of children throughout the full processing of a visa decision, given the length of time that process can take. There

have been delays at all stages of the process – the lodging of an application, primary processing, merits review, judicial review and security checks. The consequence is that children have been detained for longer than the ‘shortest appropriate period of time’ as required by article 37(b) of the CRC.<sup>181</sup> This creates additional stresses on children regarding their refugee claim. The Inquiry acknowledges efforts by the Department to generally reduce the time it takes to reach a primary decision. However, there is no evidence that either accompanied or unaccompanied children in detention were given a special priority. The Inquiry acknowledges that in April 2003 the Department issued guidelines directing that children be given priority processing. The RRT also issued policies intended to expedite the processing of children in detention in 2002.

However, the Inquiry is most concerned about the absence of adequate protections for unaccompanied children who are seeking asylum from within detention centres. These children are not provided with an independent adviser who can support, advocate and assist them throughout a potentially long, intimidating and confusing refugee status determination process. There is a conflict of interest in having the Minister, or delegated Departmental officer, as both guardian and visa-decision maker. This places a heightened responsibility on the Department to ensure independent advice is provided to these children. The appointment of an IAAAS provider fails to fulfil that obligation for two reasons. First, IAAAS assistance is not available at the screening or judicial review stages. Second, migration agents are employed to *act* on instructions, not *give* them. Without independent support and advice there is no assurance that an unaccompanied child’s best interests will be appropriately considered and the prospect of refolement is heightened. This is a breach of article 20(1) of the CRC.

---

### Endnotes

- 1 UNHCR, *Refugees*, 2001, vol 122, no1, p7.
- 2 UNHCR, *Refugees*, 2001, vol 122, no1, p11.
- 3 Question 127 (2), Commonwealth House of Representatives Hansard, 28 May 2002, p2538.
- 4 See further Chapter 6 on Australia’s Detention Policy.
- 5 See further Chapter 4 on Australia’s Human Rights Obligations.
- 6 Refugee Convention, articles 1A, 33.
- 7 See section 4.3.5 in Chapter 4 on Australia’s Human Rights Obligations.
- 8 See further Chapter 6 on Australia’s Detention Policy.
- 9 DIMIA, ‘Article 31 – Refugees Unlawfully in the Country of Refuge: An Australian Perspective’, A paper prepared as a contribution to the UNHCR’s Expert Roundtable Series, 2002, p130.
- 10 Note that there is some dispute as to whether article 14 of the ICCPR ordinarily applies to the refugee status determination process. For discussion see Michael Alexander, ‘Refugee Status Determination Conducted by UNHCR’, *International Journal of Refugee Law*, vol 11, no 2, 1999, p251.
- 11 DIMIA, Submission 185, p171.
- 12 UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (UNHCR UAM Guidelines), Geneva, 1997, para 8.2.
- 13 UNHCR UAM Guidelines, para 8.2. See also article 14 of the ICCPR as interpreted by the UN Human Rights Committee, General Comment 13, 1984, paras 1, 17.
- 14 UNHCR UAM Guidelines, paras 8.1 and 8.5; CRC, article 37(b), (d).
- 15 UNHCR UAM Guidelines, para 8.3; UNHCR, *Refugee Children: Guidelines on Protection and Care* (UNHCR Guidelines on Refugee Children), Geneva, 1994, ch 8; Save the Children and UNHCR,

## A last resort?

- Separated Children in Europe Programme, *Statement of Good Practice*, para C.11.2. See also the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, Geneva, 1990, rule 18; United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, Geneva, 1955, rule 93; United Nations, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Geneva, 1988, principles 13, 17, 18.
- 16 UNHCR UAM Guidelines, para 8.4.
- 17 See UNHCR Guidelines on Refugee Children, ch 8; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR Procedures Handbook), Geneva, 1992, paras 203-204; UNHCR UAM Guidelines, paras 8.6-8.10.
- 18 UNHCR Guidelines on Refugee Children, ch 8; UNHCR UAM Guidelines, para 8.3.
- 19 UNHCR UAM Guidelines, para 5.12. See also para 8.4.
- 20 UNHCR UAM Guidelines, para 5.13.
- 21 UNHCR UAM Guidelines, para 8.10.
- 22 UNHCR Guidelines on Refugee Children, ch 8.
- 23 DIMIA, Transcript of Evidence, Sydney, 3 December 2002, p111.
- 24 *Migration Act 1958* (Cth) (Migration Act), ss193 and 256.
- 25 IAAAS migration agents may or may not be lawyers. See a description of this scheme in section 7.4 on legal assistance below.
- 26 RACS, Submission 236, p2.
- 27 Former detainee child, Youth Advocacy Centre and Queensland Program of Assistance to Survivors of Torture and Trauma (YAC and QPASTT), Submission 84, p12.
- 28 DIMIA, Submission 185, p172.
- 29 ACM, Policy 2.7, Separation Detention, Issue 2, 5 February 2002, para 5.4.
- 39 ACM, Policy 2.7, para 5.6.
- 31 Inquiry, Focus group, Melbourne, Iraqi refugee boy, ex-Woomera, May 2002.
- 32 YAC and QPASTT, Submission 84, p6.
- 33 YAC and QPASTT, Submission 84, p6.
- 34 ACM, Policy 2.7, para 1.2-1.3.
- 35 See UNHCR Guidelines on Refugee Children, ch 8. The standard of proof – benefit of the doubt – is outlined in UNHCR’s Procedures Handbook, paras 203-204.
- 36 RACS, Transcript of Evidence, Sydney, 15 July 2002, p30.
- 37 DIMIA, Response to Draft Report, 19 May 2003.
- 38 DIMIA, Transcript of Evidence, Sydney, 4 December 2002, p3.
- 39 ACM, Port Hedland, Incident Report 13/01, 15 January 2001, (N5, Case 7).
- 40 RACS, Transcript of Evidence, Sydney, 15 July 2002, p26.
- 41 See also HREOC, *Those who’ve come across the seas*, 1998, pp28-31.
- 42 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review*, June 2002, p117, para 4.29.
- 43 Confidential Submission 263.
- 44 DIMIA, Internal email, Re. Unaccompanied child in Woomera IRPC, 25 September 2001, (N5, Case 13). The email states that there are two unaccompanied children in Woomera whose cases may need to be reviewed in light of changes in Afghanistan. In its response to the draft of this report, the Department states that the children provided new information that prima facie may have engaged Australia’s protection obligations. DIMIA, Response to Draft Report, 19 May 2003.
- 45 Confidential Submission 263.
- 46 DIMIA, Submission 185, p173.
- 47 Migration Act, s36(2)(a).
- 48 DIMIA, Submission 185, pp173, 175. Note that the *Migration Legislation Amendment Act (No 6) 2001* (Cth) introduced s91R of the Migration Act to specify how the concept of ‘persecution’ in the Refugee Convention definition should be interpreted. There is some debate about whether that interpretation is in accordance with international law. While this issue is of concern to the Inquiry, it is beyond its scope to consider in any detail.
- 49 Inquiry, Focus group, Perth, 12 June 2002. The children also said that sometimes interpreters deliberately gave wrong translations due to the conflict between Hazara and other Afghan ethnic groups. The Department has pointed out that there is provision for detainees to lodge formal complaints against interpreters, which are then investigated. It states that no complaints against interpreters have been substantiated. DIMIA, Response to Draft Report, 19 May 2003.
- 50 See for example *Al Raied v Minister for Immigration and Multicultural Affairs* [2001] FCA 313 at [39], cited in Southern Communities Advocacy Legal & Education Service (SCALES), Submission 176, p25.

- 51 DIMIA, Submission 185, p173.
- 52 DIMIA, Response to Draft Report, 19 May 2003.
- 53 RACS, Submission 236, p2.
- 54 DIMIA, Response to Draft Report, 19 May 2003.
- 55 RACS, Transcript of Evidence, Sydney, 15 July 2002, p25.
- 56 Inquiry, Focus group, Adelaide, July 2002.
- 57 Migration Act, s420(1).
- 58 DIMIA, Submission 185, p175.
- 59 Inquiry, Focus group, Brisbane, August 2002.
- 60 Refugee Review Tribunal (RRT), A Brief Guide To Its Role and Procedures, p7. RRT, Submission 17a.
- 61 RRT, Submission 17a; RRT, Submission 17, p2.
- 62 Migration Act, s424A; RRT, Transcript of Evidence, Sydney, 16 July 2002, p62.
- 63 Migration Act, s424A(3).
- 64 RRT, Transcript of Evidence, Sydney, 16 July 2002, p63.
- 65 Those ultimately found to be refugees and those granted a visa following the exercise by the Minister of his public interest power under section 417 of the Migration Act do not pay the fee.
- 66 RRT, A Brief Guide To Its Role and Procedures, p5. RRT, Submission 17a.
- 67 *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70, per Brennan J.
- 68 See The Hon Justice Ronald Sackville, 'Judicial review of Migration Decisions: An Institution in Peril?', *University of NSW Law Journal*, vol 23, no 3, p190; S Harris, 'Another Salvo Across the Bow: Migration Legislation Amendment Bill (No 2) 2000 (Cth)', *University of NSW Law Journal*, vol 23, no 3, p190. See also M Crock and B Saul, *Future Seekers: Refugees and the Law in Australia*, Federation Press, 2002, pp58-62.
- 69 DIMIA, Fact Sheet 71, New Measures to Strengthen Border Control, at [www.immi.gov.au/facts/71border\\_1.htm](http://www.immi.gov.au/facts/71border_1.htm), viewed 10 December 2003 (note that the legislation is incorrectly dated as a 1998 act).
- 70 See DIMIA, Information Resources, Migration Legislation, Regulations, Judicial Review at [www.immi.gov.au/legislation/judicial\\_review.htm](http://www.immi.gov.au/legislation/judicial_review.htm), viewed 11 December 2003. See also DIMIA, Migration Series Instruction 348, Judicial Review of Migration Act Decisions, 22 January 2002.
- 71 *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2 at [37] per Gleeson CJ, 4 February 2003.
- 72 DIMIA argues that, following the High Court decisions in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* [2003] HCA 1 and *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2 of 4 February 2003, there are still some restrictions. DIMIA states that 'it appears that the 35 day time limit on appealing to the High Court is applicable to privative clause decisions and not applicable if a decision involves jurisdictional error'. DIMIA, Response to Draft Report, 19 May 2003.
- 73 DIMIA, Migration Series Instruction 225, Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345, 351, 391, 417, 454 of the Migration Act 1958 (MSI 225), 4 May 1999, para 4.2.10.
- 74 DIMIA, MSI 225, para 4.2.3.
- 75 DIMIA, Submission 185, p175.
- 76 However, more recently in August 2003 it was reported that the Minister had exercised his discretion to release on temporary protection visas two Iranian families. 'Ruddock grants family visa', *The Australian*, 16 August 2003, p4 and 'Ruddock's officers free families', *The Age*, 16 August 2003, p6.
- 77 UNHCR UAM Guidelines, paras 8.1 and 8.5; Separated Children in Europe Programme, *Statement of Good Practice*, para C.11.3.
- 78 Confidential Submission 263. DIMIA points out that it is unaware of any case where the interview information has been lost and that case managers may seek to re-interview an applicant to seek further information or clarification of details provided. DIMIA, Response to Draft Report, 19 May 2003.
- 79 DIMIA, Submission 185, p173.
- 80 DIMIA, Procedures Advice Manual 3, Protection Visa Procedure Manual, para 2.4.
- 81 DIMIA, Letter to Inquiry, 17 July 2003, Attachment D. The data provided by the Department includes both authorised and unauthorised arrivals.
- 82 DIMIA, Annual Report 1999-00, Outcome One Performance Tables, Output 1.2.2 Protection Visas (Onshore).
- 83 DIMIA, Annual Report 2000-01, Outcome One Performance Tables, Output 1.2.2 Protection Visas (Onshore).

## A last resort?

- 84 DIMIA, Annual Report 2001-02, Outcome One Performance Tables, Output 1.2.2 Protection Visas (Onshore).
- 85 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p9. There appears to be some inconsistency in figures on processing times. Minister for Immigration and Multicultural and Indigenous Affairs, *Improvements in Immigration Detention*, Media Release, 9 July 2001 stated that 80 per cent of asylum seekers received primary decisions within 15 weeks, not 12 and half weeks as stated above.
- 86 Further, if the outcome of primary applications and subsequent appeal processes is negative, children may remain in detention for many more months awaiting removal from Australia. The entire process, from initial arrival through to a grant of visa or removal can therefore take longer than the processing times. Chapter 3, Setting the Scene, indicates that as at 1 October 2003, the majority of children had been detained for over one year.
- 87 Marg le Sueur, Transcript of Evidence, Perth, 10 May 2002, p19.
- 88 YAC and QPASTT, Submission 84, p15.
- 89 DIMIA, Response to Draft Report, 19 May 2003.
- 90 RRT, Submission 17, p2.
- 91 RRT, Submission 17a, pp1-2.
- 92 RRT, Transcript of Evidence, 16 July 2002, Sydney, pp55-56.
- 93 DIMIA, Transcript of Evidence, Sydney, 2 December 2002, p9. See also Joint Standing Committee on Foreign Affairs, Defence and Trade, *A Report on Visits to Immigration Detention Centres*, June 2001, para 5.19.
- 94 Inquiry, Interview with an Afghan unaccompanied child, Melbourne, May 2002.
- 95 See DIMIA, Migration Series Instruction 339, Temporary protection visa processing: additional advice relating to penal clearances and waivers, 8 October 2001.
- 96 Inquiry, Focus Groups in Adelaide and Brisbane. This issue was also raised with the Human Rights Commissioner during his visits to detention centres in 2001. HREOC, *A report on visits to immigration detention facilities by the Human Rights Commissioner 2001*, August 2002, p20.
- 97 Inquiry, Interview with teenage refugee, 2002.
- 98 Migration Act ss193(2) and 256. However, there is no statutory prohibition on the Department to advise people of their right to legal advice. See HREOC, *Immigration Detention – Human Rights Commissioner’s 1998-99 Review*, p31, at [http://www.humanrights.gov.au/human\\_rights/asylum\\_seekers/index.html#idc\\_review](http://www.humanrights.gov.au/human_rights/asylum_seekers/index.html#idc_review).
- 99 HREOC, *Those who’ve come across the seas*, 1998, pp224-225.
- 100 See *Government Response to the Human Rights and Equal Opportunity Commission 1998 Report into Those who’ve come across the seas: the Detention of unauthorised arrivals* (undated). In that response the Department stated that ‘DIMIA has been advised by the Attorney-General’s Department that Australia’s international obligations extend to providing detainees with access to legal assistance at the detainee’s request. Section 256 gives effect to this obligation’, p44.
- 101 *Migration Legislation Amendment Act (No. 1) 1999* amending s193 of the Migration Act.
- 102 DIMIA, Submission 185, pp172-173.
- 103 Note that the IAAAS contract states that the providers must attend the merits review if it is an adversarial process. However, as the RRT is set up as an inquisitorial process, in effect IAAAS providers are not required to attend RRT hearings. IAAAS Contract, Schedule, Part D, Standards and Best Practice, (N1, Q7, F8).
- 104 DIMIA, Transcript of Evidence, Sydney, 3 December 2002, p111.
- 105 RACS, Submission 236, p3.
- 106 Inquiry, Interview with teenage refugee boy, Brisbane, August 2002.
- 107 This issue was examined by the Senate Legal and Constitutional References Committee in the June 2000 report, *A Sanctuary Under Review*. It recommended that (1) a body such as the Australian Law Reform Commission undertake a comprehensive study of the causes of appeals to courts in refugee matters and whether increases in legal assistance would serve to reduce the numbers of unmeritorious claims (Recommendation 3.6) and (2) the Government amend the legal aid guidelines to enable the Legal Aid Commissions to provide limited legal advice to help applicants consider the value of an appeal (Recommendation 3.7), pp106-107.
- 108 IAAAS Contract, Schedule, Part D, Standards and Best Practice, (N1, Q7, F8).
- 109 RACS, Transcript of Evidence, Sydney, 15 July 2002, pp27-28. See also SCALES, Submission 176, pp26-27.
- 110 SCALES, Submission 176, p27.

- 111 RILC, Transcript of Evidence, Melbourne, 30 May 2002, pp27-28.
- 112 RILC, Transcript of Evidence, Melbourne, 30 May 2002, p28.
- 113 SCALES, Submission 176, pp28-29.
- 114 Marg le Sueur, Transcript of Evidence, Perth, 10 June 2002, p15. See also RILC, Transcript of Evidence, Melbourne, 30 May 2002, pp22-23.
- 115 DIMIA informed the Inquiry in May 2003 that the issue of special considerations in relation to children was being considered in the context of an evaluation of IAAAS. DIMIA, Response to Draft Report, 19 May 2003.
- 116 Cited in SCALES, Submission 176, p28.
- 117 Marg le Sueur, Transcript of Evidence, Perth, 10 June 2002, p16.
- 118 DIMIA, Response to Draft Report, 19 May 2003.
- 119 Inquiry, Focus group, Adelaide, July 2002.
- 120 YAC and QPASTT, Submission 84, p14.
- 121 DIMIA, Response to Draft Report, 19 May 2003.
- 122 DIMIA, Response to Draft Report, 19 May 2003.
- 123 UNHCR UAM Guidelines, paras 8.4 and 8.10; UNHCR Guidelines on Refugee Children, ch 8; Separated Children in Europe Programme, *Statement of Good Practice*, para C.11.5.
- 124 DIMIA, Submission 185, p172.
- 125 Amnesty International, Transcript of Evidence, Sydney, 15 July 2002, p82.
- 126 DIMIA, Submission 185, p174.
- 127 US Immigration and Naturalization Service, 'Guidelines for Children's Asylum Claims' 1998; Canada Immigration and Refugee Board, 'Children Refugee Claimants: Procedural and Evidentiary Issues', Ottawa, Canada, September 30, 1996.
- 128 Inquiry, Focus group with unaccompanied children, Adelaide, July 2002.
- 129 Inquiry, Notice to Produce 1, 18 July 2002.
- 130 DIMIA, Interviewing Skills, undated, (N1, Q7, F8).
- 131 DIMIA, List of documents relating to input on onshore protection visa processes for minors, (N1, Q7, F8).
- 132 DIMIA, Procedures Advice Manual 3, Protection Visa Procedures Manual, para 4.6.
- 133 SCALES, Submission 176, p30.
- 134 Inquiry, Interview with detainee, 2002.
- 135 SCALES, Submission 176, p27; RACS, Transcript of Evidence, Sydney, 15 July, p28.
- 136 RACS, Transcript of Evidence, Sydney, 15 July 2002 pp25-26.
- 137 In its response to the draft of this report, the Department also described the process of interviewing two unaccompanied children mentioned in the next section. DIMIA, Response to Draft Report, 19 May 2003.
- 138 DIMIA, Internal email, 10 September 2001, (N5, Case 13, p145).
- 139 RRT, Guidelines on Children Giving Evidence, at <http://www.rrt.gov.au/publications.htm#procedure>, viewed 11 December 2003.
- 140 UNHCR Procedures Handbook, paras 213-219; UNHCR UAM Guidelines, section 8; Separated Children in Europe Programme, *Statement of Good Practice*, para C.11.6.
- 141 UNHCR UAM Guidelines, para 8.10.
- 142 UNHCR Procedures Handbook, para 219; UNHCR Guidelines on Refugee Children, ch 8.
- 143 SCALES, Transcript of Evidence, Perth, 10 July 2002, p12.
- 144 SCALES, Submission 176, pp30-31. See also RILC, Transcript of Evidence, Melbourne, 30 May 2002, p25.
- 145 SCALES, Submission 176, p33.
- 146 DIMIA, Submission 185, p174.
- 147 DIMIA, Internal Email, 31 October 2001, (N5, Case 13, p29).
- 148 DIMIA, Response to Draft Report, 19 May 2003.
- 149 DIMIA, Transcript of Evidence, Sydney, 3 December 2002, p114.
- 150 IAAAS Contract, cl 2.1, (N1, Q7, F8).
- 151 RACS, Transcript of Evidence, Sydney, 15 July 2002, p30.
- 152 See table in section 7.3.1, entitled 'Processing timetable for unaccompanied child in Port Hedland'.
- 153 See *Martizi v Minister for Immigration and Multicultural Affairs* [2001] FCA 1112.
- 154 US Immigration and Naturalization Service, 'Guidelines for Children's Asylum Claims', 1998; Canada Immigration and Refugee Board, 'Children Refugee Claimants: Procedural and Evidentiary Issues', Ottawa, Canada, 30 September 1996.

## A last resort?

- 155 UNHCR UAM Guidelines, para 8.3. See also UNHCR Guidelines on Refugee Children, ch 8; UNHCR Procedures Handbook, para 214.
- 156 DIMIA, Submission 185, p171.
- 157 DIMIA, Transcript of Evidence, Sydney, 3 December 2002, p106.
- 158 *Odhiambo v Minister for Immigration & Multicultural Affairs* [2002] FCAFC 194 at [91]. The Court also stated that the applicants had received qualified and independent assistance in their applications for protection visas and that 'it is difficult to see how the extent or quality of legal assistance would have been any greater if it had been commissioned by an independent guardian of these applicants' at para 95.
- 159 DIMIA, Submission 185, p174.
- 160 UK Home Office, Immigration and Nationality Directorate, Unaccompanied Asylum Seeking Children Information Note, at <http://www.ind.homeoffice.gov.uk/default.asp?pageid=3164>, viewed 23 November 2003.
- 161 DIMIA, Internal email, 10 September 2001, (N5, Case 13, p145).
- 162 Marg le Sueur, Transcript of Evidence, Perth, 10 June 2002, p14. See also section 7.6.1 for a discussion of this case.
- 163 See further DIMIA, Transcript of Evidence, Sydney, 4 December 2002, pp4-5.
- 164 RILC, Transcript of Evidence, Melbourne, 30 May 2002, pp22-23.
- 165 RILC, Transcript of Evidence, Melbourne, 30 May 2002, p23.
- 166 DIMIA, Submission 185, p174.
- 167 DIMIA, Procedures Advice Manual 3, Protection Visa Procedures Manual, para 4.5.27.
- 168 DIMIA, Interviewing Skills, undated, (N1, Q7, F8).
- 169 DIMIA, Submission 185, p174; DIMIA, Procedures Advice Manual 3, Protection Visa Procedures Manual, paras 4.5.6, 4.5.10.
- 170 ACM Woomera, Unaccompanied Minors (UAM) Committee Meeting, 12 June 2001, (N2, Q5, Supp 1).
- 171 See further Chapter 16 on Temporary Protection Visas.
- 172 See Chapter 6 on Australia's Detention Policy for further discussion of the 'Pacific Solution'.
- 173 DIMIA, Fact Sheet 81, Australia's Excised Offshore Places, at [www.immi.gov.au/facts/81excised.htm](http://www.immi.gov.au/facts/81excised.htm), viewed 10 December 2003.
- 174 Note, however, that for those persons who arrived in Nauru via the Tampa or Aceng it is UNHCR rather than Department officials who processed them. See UNHCR, Transcript of Evidence, Sydney, 17 July 2002, p20.
- 175 The Second Reading Speech of the Minister for Immigration in support of the Migration Legislation Amendment (Further Border Protection) Bill 2002 makes it clear that the intention is to exclude boat arrivals from the Australian refugee processes: 'Without the amendments made by this bill, should that vessel (that is one organized by people smugglers) or any other attempt to come either through the Torres Strait or to outlying islands of Australia, it would be possible for these unlawful arrivals to gain access to Australia's extensive visa application processes and the accompanying very liberal interpretation of the Refugees Convention'. Commonwealth House of Representatives Hansard, 20 June 2002, p4018.
- 176 DIMIA, Submission 185, p179.
- 177 DIMIA, Submission 185, p178.
- 178 DIMIA, Submission 185, p178.
- 179 DIMIA, Submission 185, p178.
- 180 Papua New Guinea made reservations to articles 17(1), 21, 22(1), 26, 31, 32 and 34 of the Refugee Convention.
- 181 See further Chapter 6 on Australia's Detention Policy.