Refugees, Children's Rights and Rhetoric

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The ‘refugee situation’ in Australia has fuelled intense public debate. Currently there is minimal public support for refugee protection and even less compassion for the plight of refugees. The government along with the media has fuelled a high level of confusion between immigrants who choose to leave their countries and refugees who have no choice but to seek refuge and who have a legal right to do so. Consequently, the terms ‘refugee’ and ‘boat person’ or ‘illegal immigrant’ have become interchangeable in public debate.

The Australian public is not generally informed about international obligations towards refugees and the many false perceptions that migrants are a major cause of economic and social problems remain largely unchallenged. In many instances, the government has demonised asylum seekers in emotive language and as a result many people consider that refugees are liars, criminals, ‘forum shoppers’, welfare cheats and queue jumpers.

The government time and again has reiterated that those who arrive by boat are ‘queue jumpers’. Under international law this term does not exist nor does it exist in other countries. Australia has adopted it simply because it prefers to offer refugee status to a carefully selected number of peoples from overseas countries and it does not like being ‘forced’ to consider applications from those who it had not already selected.

The government and media response to the recent arrival of so named ‘boat people’ has convinced many that Australia is a particularly popular target for asylum-seekers when, in fact, globally, it receives a relatively low number of applications. Australia’s approach unfortunately reflects current trends for richer western societies who, despite their small share of the world’s population and their large share of the world’s economy, choose to make it nearly impossible for refugees to pass their borders and then deny protection to the few who do succeed.

This paper encompasses Children’s Rights and uses the detention of the children of asylum seekers as a case study. In order to do this the difference between an asylum seeker and a refugee must be understood. Asylum seekers are normally in, or at the border of, the country where refuge is sought and are known by various labels throughout the Western world depending on the legality of border entrance. These are people who once at the country of choice have applied for, but have not yet been granted, refugee status.¹ For many reasons the government seems to find asylum seekers much harder to assist than refugees. Refugees apply for admittance to a country as a refugee through nominated governmental agencies thereby gaining permission to enter a country as a refugee before their arrival. They have a common international definition and once identified are generally treated in like manner unlike asylum seekers who face varying situations around the world.

Many refugees and asylum seekers recount disturbing stories of drought, famine and the deaths of families due to the lack of relatively simple medications. Others continuously re-live the horror of torture, rape and random killings - often by those who are meant to be protecting them. Ethnic cleansing is a theme that runs through these accounts along with arbitrary imprisonment and the disappearance of husbands, wives, children and whole communities. Among these vulnerable people are the most vulnerable people of all - children.

A Study on the Impact of Armed Conflict on Children (Machel Report) estimates that more than one-half of the global refugee population are children and adolescents under the age of 18. One in every 230 persons in the world is a child or adolescent who has been forced to flee their home through no fault of their own, in fact, each day another 5000 children become refugees.

Often these children are members of civilian populations who have been targeted by military actions seeking to create fear and social instability. In certain instances the children themselves are targets of explicit violence. This is evident in the chilling announcement broadcast on Radio in Rwanda to the forces of Interahamwe that instructed them to “remember to kill the little rats as well as the big rats”. In times of conflict and natural disaster children’s experience is very much intermeshed with that of adults and it is these experiences that help to make the children the most vulnerable of all refugees. Unfortunately, refugee children are often simply considered as part of a broad category of vulnerable persons without much attention being paid to their specific rights and needs.

I will not be discussing the parents who are alleged to have broken the law nor will I be addressing whether these parents should have arrived as they did or whether they should be allowed to stay. This discussion will concentrate on the protection of children who have committed no crime and have been detained in prison like detention.

The fundamental purpose of children’s rights is to identify children as human beings who because of their vulnerability and special needs require special protection. To address this special status the United Nations Convention on the Rights of the Child (UNCROC) was developed.

By ratifying UNCROC in 1990 Australia has given general commitment to check existing laws and practices and then identify the need for change to bring them in line with the minimum standards of the Convention. The general rule is that treaties/conventions do not become a part of law until they are put into force by domestic legislation - in this case, legislation enacted by the Australian Commonwealth Government. As will become evident in this lecture Australia is dragging its feet! Unfortunately, there are far too many arguments as to why this has not happened to discuss here.

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2 Refugee Participation Network, 12, Refugee Children, March, 1992, at 7
3 Above, n2, at 7
UNCROC has seven main principles and 41 articles. As there is no time to analyse each article in turn, this lecture will primarily deal with only one of the articles. The overriding principle, contained in Article 3 of the Convention - the Best Interests of the Child:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Various laws in Australia mention the Best Interests of the Child and propose to support this principle. The law that relates to onshore asylum seekers is not one of these laws. The Migration Amendment Act of 1992 identifies asylum seekers as designated persons. Section 189 states that a designated person must be detained during the processing of their refugee status and Section 192 goes on to identify two options for release - obtaining a Temporary Protection Visa or being deported. Under this section everyone is detained until they are either accepted or rejected as refugees, regardless of age or infirmity. This is where politics becomes involved in children’s rights and the immigration detention of children.

The Australian government has been heavily criticised regarding the immigration detention of children. Globally thousands of children are identified as asylum seekers each year. Australia, in comparison with most other western societies, has a small number of children arriving, nevertheless, in relation to the total number of asylum seekers arriving in Australia overall, children remain a significant percentage. Some travel with parents or guardians and others often travel alone. The children travelling without parents or significant guardians who are under the age of 18 are identified as unaccompanied children. Many States encounter unaccompanied children seeking asylum at their borders and the circumstances in which these children find themselves are mixed and often perplexing for those ultimately charged with their care.

Frequently these children are sent willingly or not so willingly by their parents to what is deemed to be a safer haven. The reasons for this may be fear of persecution, civil unrest or simply to secure a better future for family members left behind. Regardless of the motive, unaccompanied children like all refugee children, have no choice in the decisions that have led them to be many miles away from family and friends and vulnerable to the notions of a new authority. Irrespective of immigration status, these children are first and foremost children, and should be treated as such.

An example of these children can be seen in the children from Gaza - the children who are at the forefront of the Intifada. According to the Gaza Community Mental Health Programme children are torture victims: they have been injured, separated from their parents by detention or have witnessed family members beaten. Many of the children who have experienced the

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6 United Nations Convention on the Rights of the Child, Article 3
8 The Migration Amendment Act, 1992, Sec 54W and 54ZD
10 Conflict between Israel and Palestine at the Gaza Strip.
11 El Sarraj, Eyad, ‘Peace and the Children of the Stone’, Refugee Participation Network,
ravages of conflict are separated from their family and arrive in a foreign country unable to protect themselves from the bureaucratic judgements and the actions of a distrustful government. In Australia, even those children who are with their parents are not protected, as are 'Australia's' children.

Unlike the United States and Canada, Australia has not considered it necessary to formulate specific policy for either accompanied or unaccompanied asylum seeking children. Both the United States and Canada have policy guidelines for the treatment of children detained by immigration services and more detailed guidelines for the detention of unaccompanied minors. In the US children have the same basic right to constitutional protection as adults and this protection is actively pursued. In Canada refugee claims from children are given priority and there is a designated representative for every child regardless of parental supervision.

The Universal Declaration of Human Rights and other international instruments that are designed to protect the vulnerable apply to 'everyone' including the most vulnerable children. The United Nations (UN) had identified the ‘invisibility’ of child refugees in many countries throughout the world.

Interestingly the UN refers to all children in this situation as refugees not asylum seekers. Perhaps the UN considers that children because of their vulnerable status should be classed as refugees when in this situation and that would explain the absence of guidelines for asylum seeking children. Most states and many UN conventions acknowledge the difficulties faced by child refugees and in most instances migration provisions are designed to address the status of refugee children. However, the provisions in place refer to children who have already been granted refugee status. Notwithstanding the importance of this issue, international law in relation to unaccompanied children seeking asylum has no single source. It is found in both specific and general guidelines, the rules of international humanitarian law and the practices of international agencies such as the United Nations International Children’s Emergency Fund (UNICEF) and the United Nations High Commissioner for Refugees (UNHCR).

It is astounding that Australia citizens do not demonstrate any concern at the treatment of asylum seeking children and the conditions that they are forced to live in. It can be argued that the government’s promotion of the illegal status of these children allows the general community to ignore their plight. Ironically when the asylum seekers arrived the media was swamped by letters to the editor stating objections to allowing ‘these people’ to stay but when the alleged improper treatment of children in detention made front page news there was a deafening silence from the Australian community where total outrage could have been absent.

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13 Above, n13, at 11:23
14 Above, n13, at 23
15 Above, n13, at 22
The promotion of asylum seekers as ‘illegals’ by most western governments encourages apathy within their communities so outrage at the treatment of ‘illegals’ is almost non-existent. The detention of children while their refugee status is ascertained goes unchallenged by the wider community and reports of abuse and unsatisfactory conditions are met with disbelief. The duplicity of this response is evident considering that the same society shows great concern for children from refugee camps in third world countries (and support this concern financially) but allows the immigration detention of children in inappropriate conditions to continue within their own country.

The problem with children and Immigration Detention begins where the Act does not make any distinction between the immigration status of adults and children and therefore there is no legal status between adults and their children and no difference in their treatment. This of course dismisses the idea of the ‘best interests of the child’. The act does not consider the child never alone the child’s’ best interests. This is rather ironic because the Minister for Immigration and Multicultural Affairs, Philip Ruddock, defends the majority of criticisms regarding children in detention by quoting UNCRWC and the ‘best interests of the child.’

In Australia the regulation of immigration detention activities take place behind closed doors often protected by government privilege or the confidence of a commercial contract. Immigration Detention and Processing Centres in Australia are managed by Australasian Correctional Management (ACM) an arm of the international Wackenhu Corporation who manage numerous private prisons globally. The commercial nature of this arrangement allow details such as services provided, staffing selection and internal policy to remain confidential in order to protect the privacy of the company’s contract. The government provides guidelines for the operation of the centres and specific contractual standards that must be maintained but due to the confidentiality it is not possible to evaluate how well ACM upholds its contractual obligations.

Although it could be expected that specific services should be provided for children within ACM’s contract, various reports have been presented to the government that criticise the lack of child friendly services in detention. The services that are lacking including basic necessities such as appropriate health care and education and a safe and appropriate place for outdoor play.

The recent allegations of child abuse within Woomera Detention centre have identified many situations that are not appropriate for children. Well before these allegations were made

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18 Ruddock, P. ‘Children in Detention’, A response to questions relating to Immigration Detention of Children, Department of Immigration and Multicultural Affairs, April, 2000, at 2.
others were made and substantiated although not widely publicised. Take for example the case of young Andrew Chen, aged nine. Andrew had been living in Port Hedland Detention Centre for nearly six years. On a regular visit to the centre a Catholic priest asked about Andrew’s whereabouts and was told by Andrew’s parents that Andrew was sleeping off tranquillisers as he had become unruly and was sedated by centre staff. Andrew’s behaviour would not be surprising considering the amount of time he had spent behind security fences with relatively little stimulation. This situation is all the more appalling considering it was discovered by accident - just a passing question from a visiting priest!

Between 1989-2000 the number of children detained in Australia ranged from 0 to 500. Many of these children are detained in isolated localities in such locations as Port Hedland, Curtin and Woomera.

The overriding principle of UNCROC is the best interests of the child. This is directly squarely at the state (the nation state) and although not adopted into domestic law in Australia this convention is enshrined under the power of the Human Rights and Equal Opportunity Commission. The commission is charged with attending complaints made in regard to human/children’s rights violation. It is also charged with notifying the government when or if its legislation or actions contravene this and other human rights conventions. In Australia the commonwealth government while maintaining ultimate responsibility for those in immigration detention charges the management of the centres for the responsibility of their charges.

The Woomera Riots in August 2000 raised various issues that had been consistently canvassed by the Human Rights and Equal Opportunity Commission [HREOC] but just as consistently ignored by the Department of Immigration and Multicultural Affairs [DIMA]. During the aftermath of the riots the various allegations of child abuse finally became public knowledge.

Before approaching a specific case from Woomera attention must be drawn to the South Australian Legislation regarding child abuse. The Children’s Protection Act 1993 states very clearly what is considered as abuse and mandates certain people to report and suspicions to the authorities not unlike similar legislation in other states. Although the Woomera Centre is on commonwealth land the Commonwealth Places (Application of Laws) Act of 1970 indicates that the provisions of current state laws are still enforceable.

Now bearing this in mind along with the obligation of the government to abide by UNCROC and various other declarations I will discuss one particular case at Woomera. You may have heard of the allegations of sexual abuse of a 12-year-old boy that surfaced in 2000.

The Flood Report released in February of this year looked at the case of a 12-year-old boy who was allegedly abused at Woomera. This case is important as it was not subject to a formal incident report and was not reported to DIMA Central Office in Canberra until months after the allegations. The material for this case included evidence that runs to over 200 pages.

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22 Child tranquilliser case puts detention centres under question’, PM, Australian Broadcasting Corporation, 29 October 1999, 6:41pm.
23 Above, n20, Annex D, at 50
24 Children’s Protection Act 1993, Section 6 (1(a,b)) and Part 4 Sections 10 and 11
25 Knowler, J., ‘Father and son rapist and victim? The Weekend Australian, 9-10 December
26 Above, n20
This boy's father had been suspected of abusing his son and had been under surveillance by the ACM guards. Four guards took the boy to the medical Centre and informed the nurse of their suspicions. The Nurse reported that she believed that the 12 year old boy had been raped. The guards alleged the father had raped the boy and suspect he had sold his son for sex to other men. The nurse's statement to the press included disturbing statements such as: "they were aware that his was going on and they were trying to break it up" and "they'd barge in and the boy was on someone's lap, or someone was doing up their fly".  

The boy was admitted to the camp's medical clinic by the four security staff because they were concerned for his welfare. The nurse knew that she had a mandatory duty under the Child Protection Act (SA) to report the allegations to the police and to ensure that the child was taken to hospital for examination. This did not happen immediately as required by South Australian law.

The case of this boy is a clear situation where the processes set down in legislation and the administrative requirements of DIMA and of ACM instructions were not followed. Apart from the mandatory reporting requirement this incident also requires official reporting to ACM Corporate office and DIMA central office as per detention guidelines.  

Regardless of whether the Centre Manager believed the child had not been sexually assaulted the examination should have taken place and the incident reported. The state requires that the authorities conduct the inquiry. Policies explicitly forbid the notifier to undertake any type of investigation. The Manager formed the belief that the child had not been abused after personally interviewing the child with the assistance of a detainee interpreter rather than a professional interpreter and without the presence of the nurse involved. This involves various breaches of confidentiality and a significant imbalance of power that unfortunately cannot be discussed here.

The initial medical report stated that the incident occurred on 13 March - the authorities did not investigate it until September 2000. - immediately after the August riots. The initial investigation in September asked for any documentation relating to this case - non was provided. A second investigation commenced on 16 November and the related documentation was delivered on the 20th November.

The Flood report indicated that the files maintained at Woomera betrayed evidence of sloppy and careless procedures and of possible interference. A separate report commissioned by DIMA confirmed the view that existing arrangements for the security of files at the Woomera Centre during 2000 were inadequate.

The incident might well have been avoided if Woomera Based DIMA staff had advised DIMA Central Office of earlier recommendations from an ACM welfare officer and an ACM

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27 Spencer, M. 'Nurse tells of boy rape cover-up', The Australian, 21 November 2000, at 1  
28 Department of Immigration and Multicultural Affairs Guidelines to Australasian Correctional Management issued 5 August 1999, Incident Reporting at Immigration Detention Centres, Immigration Detention Standard 13.3.  
30 Above, n20, Para 10.5, at 36  
31 Above, n20, Para. 6.4, at 22
doctor that the boy and his father should be transferred to a metropolitan Centre to better address their needs.  

The incident highlighted the point that many staff of the center were not well briefed on DIMA and ACM policy. Some nurses and counselors received no formal or informal induction or orientation on arrival to take up duty at Woomera. This is in breach of the Child Protection Act as well as the contractual arrangements that staff would be 'suitably qualified'.

The Flood report also states that the allegations of sexual abuse of the child could not be substantiated. This is not surprising considering the time lapse between the offence and the investigation and conditions within the Centre at the time of the abuse that was also acknowledged by the Family and Youth Services investigation.

Regardless of all instruments both ratified and legally enshrined the government managed to avoid responsibility for what happened and there was no course of recompense for the child.

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32 Above, n20, Para 6.11, at 24
33 Above, n20, Annex E, Immigration Detention Standards, at 51.
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