



## Précis Paper

### AUTHORS' CORNER: CHILDREN AND YOUNG PEOPLE IN ASYLUM AND REFUGEE PROCESSES TOWARDS BEST PRACTICE

A comprehensive discussion about how child asylum seekers navigate through the refugee law process, amidst COVID-19 and contemporary policies, implemented by the government.

#### **Discussion Includes**

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## Précis Paper

# Authors' Corner: Children and Young People In Asylum and Refugee Processes Towards Best Practice

1. In this edition of BenchTV, Mary Crock (Professor at the University of Sydney Law School) and Sarah Dale (Principal Solicitor at RACS) discuss the challenges faced by children, a number of precedents and the ways to improve the operation of refugee law from a governmental standpoint.

### Background

2. Mary has been working with Refugee Advice Casework Service (RACS) since 2005. This book is her third product of collaborative research in relation to child-related legal processes.
3. 'Creating New Futures' is the first book in this series. This book primarily investigates the settlement of children, in the post-acceptance stage of the refugee process.
4. The covers of these books are artworks produced by children who were former clients. For example, a teenager who aspires to be a professional artist created the cover of 'Creating New Futures'. 'Protecting Migrant Children' is the most international addition to the line.

### Life as a Refugee Lawyer

5. Reflecting on her early days as a practitioner, Mary recalls the specific point of time when detention became mandatory.
6. Having witnessed the state of children in Melbourne detention centres, Mary felt innately compelled to choose refugee law as her area of practice.
7. Mary soon discovered that families were generally after maximal protection but there was not much thought invested into the wellbeing of children.
8. One time, a young boy (an unaccompanied minor) was constantly asking a solicitor about his rights and future, because it had barely been discussed. This was and still is alarming on a very fundamental level.
9. Sarah disclosed that she was shocked by the camaraderie of the young boys in detention. The only factor that brought them together was their common fight to achieve asylum. These children demonstrated a genuine sense of care for the larger issues at play beyond their individual struggles. All of these children have unique

stories and voices, and it is absolutely integral to answer the 'What about me?' question.

### The Challenges Faced By Children

10. There are approximately 79 million individuals on the move seeking asylum/protection for various purposes (e.g. war, trapped within country etc.). They are mostly internally displaced. Children make up about half of this population. In terms of understanding the data, there are some challenges to take into consideration. For example, a person might or might not have been a child when he/she entered the refugee process. Once children turn 18, they are often excluded from the statistics.
11. In practice, RACS is effectively assisting 150 unaccompanied children.
12. The first challenge/myth is that children cannot understand the system and cannot explain their lived experiences in an articulate way. Inevitably, it is difficult for a child to keep re explaining his/her trauma. In response to this challenge, RAC developed and implemented a specific practice for unaccompanied children - allows them to see the same lawyer again and again. This ensures continuity, which develops a trust-based rapport, and it also helps children to overcome their fear of authority.
13. Children often become invisible when they are with their family. Chapter 1 of the book explains that children are not miniature adults. They experience harm in differing ways. There are many issues that are unique to children such as child marriage; families attempt to marry off the children in their house (usually girls). Child marriage is not safe in any sense.
14. Sometimes, the child clients can be victims of trafficking. In some cases, children are sold/bought like commodities in trade/commerce. Inarguably, children are more prone to harm in comparison with adults.
15. Children must be identified across all groups. In order to conduct proper investigation/interrogation, the question of 'What happens to the children?' needs to be mandatorily asked. Younger children are often less likely to escape and are more easily affected by factors like hunger or violence.

### The One-Child Policy

16. In the early 1990s, Chinese fugitives aimed to flee the one-child policy. A particular High Court case concerning this issue, communicated that the fugitives cannot be

classified as 'refugees' under the 'refugee convention'. This narrow ruling had broad appeal and was very contentious at the time. Ultimately, the High Court justified this ruling because the fugitives were unable to prove that the future harm is the outcome of a recognised identity. The fugitives tried to argue an identity that was not legally recognised. In essence, it is a circular argument. This particular case went to the High Court once a fugitive mother gave birth to a child. However, the question still remained - Is the child a refugee?.

17. The High Court eventually ruled that the child is a 'refugee' because he/she was born into a situation, which is out of their control. This case went to the highest court of the land, once a 8.5 months pregnant woman was returned to China. The woman argued that if she went back, she would be forced to have an abortion. Despite the pleas, the woman was sent back and as expected, she was forced to have an abortion. This triggered a great degree of controversy. This High Court decision is a reference point for most legal systems across the globe.

#### Uniformity

18. Regardless of being accompanied or unaccompanied, children are put through the same process as adults. From a legal standpoint, this is a prime example of uniformity but there is still room for further accommodations to be made for children. Lawyers can actually make room for such accommodations when the process is unable to do it. A refugee lawyer needs to take a statement of claim from an adult or child to convince the Department of Home Affairs about why he/she needs asylum. On average, the preparation process takes 3 to 4 hours. The statement of claim is basically the client's opportunity to explain their story. For children, it takes almost double the amount of time and it is done over a number of days.
19. A lawyer needs to understand that interacting with children is very different to interacting with an adult. Conversations with child-clients are not straightforward and often demand an immense degree of amicable small talk about school or hobbies. However, it must be noted that all of this acts as key stepping stones in the trust building process.

#### Reflecting on Appendix A

20. In Appendix A of the book, there is a needs and welfare questionnaire. This one-pager will benefit practitioners. The questionnaire for children even uses emojis. Questions surrounding deficiencies like eyesight are listed in the questionnaires.
21. The questionnaire assesses a range of other factors like fatigue and mental illness. Looking into categories like housing and healthcare, it is clear that lawyers must know everything about the client. A lack of awareness about client will obstruct the lawyer from achieving the best possible outcome.

#### The Importance of Legal Interpretation

22. A refugee lawyer is expected to have interpretation-related competencies. Interpreting the law is crucial; breaking down the legal jargon into understandable terms. Whilst being able to speak a non-English language is useful, there are specialist language interpreters available in most cases. An example of a hard question that a refugee lawyer will have to break down for a child is 'Do you have the right to enter and reside in any other country but your home country?'. A lawyer could re interpret this question for a child as 'Are you allowed to go back to your home country?'.
23. It is important for the interviewers at the Department of Home Affairs to have a relationship with the child. There have been improvements in the interviewing process. However, the system is not perfect. For example, children in the fast track system should be interviewed more than once. On a positive note, the rules around age determination have more clarity now.

#### Special Circumstances

24. There are circumstances where it is inappropriate to interview children. For example, recounting horror stories and extensive trauma is deemed as inappropriate. Seeking for asylum is essentially a future-looking test. It will look at what happens when the

client returns. If the element of prospective harm is non-existent, the case will become straightforward.

25. Some children have psychosocial disabilities as an outcome of their trauma/experiences. When possible, the lawyer must constantly strive to make the child feel safe. A one size fits all approach never works in this context. Often, children want a person who can speak their non-English language to be in the presence of the lawyer. This helps the lawyer to understand the child's story and requirements more sufficiently.
26. There are some children who are in the process of figuring out their gender identity/sexuality. These children do not prefer to interact with individuals from their community for various reasons. Lawyers must be considerate and understanding of this. The end goal is safety for the child, but it must be acknowledged that it comes in different forms.
27. Children who tend to withdraw from conversations, often need more space in the conversation. Withdrawal is the top indicator of this. Forcing children to answer questions is inarguably detrimental to all parties involved in the process. Sometimes, breaks need to be taken.

### Cultural Competence

28. One of the chapters in the book deals with the role of cultural competence in effective communications. Mary recalls numerous experiences of cultural mismatches. For example, an unaccompanied 13 year old girl was Mary's client. However, the child was actually travelling with her parents, but the parents wanted to make it seem as though the girl was unaccompanied. The girl is escorted to her interview in the middle of the South Australian desert. She had no assistant. At the interview, the girl was asked to sing a cultural song to prove that she came from the alleged foreign country. The interviewers in this case acted in a culturally insensitive way, because singing at that time was considered as an offense against Islam.
29. The interview process is basically about whether Australia believes in the client's story, and whether that story is legally worthy of granting asylum. This concept is at the crux of the process.

### Documentation of Birth

30. When it comes to birth dates, it is celebrated in the Western world (e.g parties and milestones). However, the child detainees often do not know their birthdates. At times, all they know is that they were born a certain number of years before or after a particular sibling.
31. Sometimes, birth dates are not formally documented (e.g. hospital or religious records) in some non-Western countries and that creates an administrative burden in Australia. From the perspective of Westerners, this is a difficult concept to grapple with.
32. A failure to identify and prove a birth date can negatively impact the child's statement of claim.
33. This book extracts and compiles the lessons learnt by practitioners over the years.

### Prevailing Policies

34. Prevailing policies give rise to a number of uncertainties for children. Individuals who arrive by boat are automatically subject to temporary visas. These are usually 3 year visas and can extend to 5 years, under certain circumstances.
35. Reapplying for a temporary visa can be frustrating for clients. Clients who have finished their HSC, tend to have specific future plans like going to university or taking up a trade. The reapplying process is an obstacle in such situations. Temporary visas can be very limiting. Some universities have tailor-made scholarships that are available to such students but it is not a blanket-solution. It is a step in the right direction, but is most certainly, not a complete solution.
36. It is common for children to not understand why their dreams cannot be realised as a result of temporary visas. Being a part of the Australian community, they feel as though they are 'Australian' but the system keeps telling them that they are not. On a grassroots level, this is an internal clash, birthed from Australian immigration policy. The reality is that the policy is actually not needed. Our system can shift to permanent protection visas.

### The Impact of COVID-19

37. In terms of coping with the COVID-19 situation, clients struggled because they were not eligible for most of the financial support schemes. Temporary visas strips individuals of such rights. It has also been challenging to find employment amidst this unprecedented time.
38. Clients are increasingly becoming homeless and financially weak. This will naturally affect their access to justice.
39. The government is aware of all the above-mentioned issues. Some state governments have provided support but real change will only arise when the system changes the way it perceives asylum seekers.

#### The Legacy Caseload Group

40. The Legacy caseload group refers to people who arrived in Australia by boat and are subject to temporary visas but there is another community who were randomly selected from that group to be removed and processed to another place like Nauru and Manus Island. A large number of people from this group re settle in other Western countries like America or New Zea Land. Some come back to Australia, because of the work of tort lawyers. In saying that, Australia has still breached its duty of care towards these individuals.

#### Model Litigant Rules

41. Last week, there was a High Court decision that the Australian government has responsibility. According to model litigant rules, cases like this should be tried in the Federal Court. Most of the people who are brought back from Nauru and Manus Island are those who suffer from serious medical conditions. They are placed in a closed detention centre once they reach the mainland. An example of a closed detention centre is a hotel.
42. RACS has made a number of successful offshore applications and complaints to the UN in relation to their treatment and lack of care. The organisation has 1000 clients who have been brought to the mainland for medical treatment.
43. Presently, there are two distinct groups. The first group is made up of those individuals who remain in detention and in hotels. Usually, they would have faced 8 years of detention. The second group comprises of individuals who were once in community detention, but are now subject to bridging visas. Many of these



individuals were forced to exit detention amidst COVID-19. They were only given 3 weeks to find a job and to organise their affairs (e.g. accommodation).

44. There is no proper plan for these people. Resettlement is not a solution or option for everyone.

#### Campaigns and Reports

45. Amnesty International is currently running a successful campaign called 'Game Over' - encourages New Zealand to open up more space for resettlement. A number of organisations like Get Up, RACS, the Asylum Resource Centre and the Human Rights Law Centre have launched a joint campaign named 'Time For Home' - a call for the government to release people from detention and to find a resettlement option.
46. Last week, the Australian Human Rights Commission published a report on immigration detention. The report found that the average detention time exceeds 500 days. This is the highest number recorded in Australian history and it indicates that the system is flawed and is inefficient.
47. The proceeds from the book are directed to RACS.

## **BIOGRAPHY**

### Mary Crock

Professor of Public Law, University of Sydney Law School, Sydney

Professor Mary Crock is Professor of Public Law at Sydney Law School, a Fellow of the Australian Academy of Law, solicitor and Accredited Specialist in Immigration Law. Her expertise spans immigration, citizenship and refugee law, administrative and constitutional law, public international law, particularly human rights and international refugee law, and comparative law. She has published 13 books (including a leading text on Australian immigration and refugee law), over 70 refereed articles and book chapters and many other pieces; delivered hundreds of public lectures and has been awarded over 2.2 million dollars in research grants.

### Sarah Dale

Principal Solicitor, Refugee Advice and Casework Advice

Sarah joined RACS after a number of years working with people seeking asylum and refugees in visa cancellation and civil law issues. Having developed an outreach legal service to unaccompanied children within NSW and throughout Australia, Sarah worked extensively with children who were detained on Christmas Island and faced transfer to Nauru.

## **BIBLIOGRAPHY**

### **Cases**

*Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 191 CLR 225.

*Chen Shi Hai v MIEA* (2000) 201 CLR 293.