

Action for Children and Youth Aotearoa

Incorporated



Submission to the
Transport and Industrial Relations Committee
on the
Immigration Bill 2007

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Submission Prepared on Behalf of ACYA by

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Introduction

1. This submission is made by Action for Children and Youth Aotearoa (ACYA). ACYA also intends to make an oral submission to the Transport and Industrial Relations Committee on the Immigration Bill 2007.
2. ACYA is a coalition of non-governmental organisations and individuals interested in children's rights in Aotearoa New Zealand. ACYA's purpose is to promote the well-being of children and young people in Aotearoa New Zealand through: education and advocacy on the rights of children and young people; encouraging the Government to act on the recommendations of the United Nations Committee on the Rights of the Child; and promoting opportunities for the voice and participation of children and young people.
3. In 2003, ACYA produced and published *Children and Youth in Aotearoa 2003*, the Aotearoa New Zealand NGO Report on New Zealand's implementation of the UN Convention on the Rights of the Child (NGO Report). The NGO Report was presented to the UN Committee on the Rights of the Child (the UN Committee) in Geneva in June 2003, accompanied by a video funded by ACYA and produced by Aotearoa New Zealand children called *Whakarongo Mai / Listen Up*.
4. Since then ACYA has advocated that the Aotearoa New Zealand Government act on the recommendations of the Committee on the Rights of the Child and improve the situation of children and youth. ACYA is developing a constructive working relationship with Government. ACYA also networks information about children and youth. ACYA is a member of the international coalition the NGO Group for the Convention on the Rights of the Child.
5. ACYA would like to highlight the fact that a number of the provisions of the Bill have the potential to have a very negative impact upon the human rights of children. In that respect, although much of the *detail* of the Immigration Bill is not

directly related to the rights of children, it has the potential to have a dramatic effect on the lives of children, given that children may themselves be asylum-seekers, refugees and/or deportees or have parents or other caregivers who are asylum-seekers, refugees and/or deportees.

6. ACYA welcomes particularly the inclusion of reference to the ICCPR in the Immigration Bill. As rights-holders, children are entitled to the protection afforded by this human rights treaty. In particular, ACYA would like to highlight a number of articles of the ICCPR that have particular significance for children in the context of the Immigration Bill. Article 17 provides for the right to protection from arbitrary or unlawful interference with the family. Given the special importance of familial relationships to children, the Committee should bear in mind the provisions of Article 23(1) which states, “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”.

Of particular significance is Article 24 of the ICCPR which states:

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
 2. Every child shall be registered immediately after birth and shall have a name.
 3. Every child has the right to acquire a nationality.
7. However, ACYA would like to remind the Committee that Aotearoa New Zealand’s international obligations with regard to children are not confined to the ICCPR. Article 12 of the Universal Declaration of Human Rights 1948 (UDHR) provides that:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

In the context of the Immigration Bill, it is important to note that Article 14(1) provides:

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

Similarly, Article 15 provides:

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

These provisions of the UDHR apply equally to adults and children.

8. Of course the primary treaty relating to children's rights is the United Nations Convention on the Rights of the Child (UNCROC). As previously mentioned, the provisions of the Immigration Bill have the potential to have a very significant impact on the rights and lives of child. ACYA would like to see the codification into domestic law of Aotearoa New Zealand's existing immigration related obligations that stem from its ratification of UNCROC. In particular, ACYA calls for the Immigration Bill to incorporate the provisions of Article 3(1) which states:

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

Other domestic legislation dealing with the rights of children, such the Care of Children Act 2004 (s 4) and the Children, Young Persons and Their Families Act 1989 (s 6), incorporate this principle or a variation thereof.

9. ACYA is concerned that the Bill has the potential to compromise a number of other of Aotearoa New Zealand's international obligations to protect the rights of the child. For example, Article 7 of UNCROC provides:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

In addition, Article 9 provides that:

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. ...

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

ACYA would also like to draw the Committee's attention to the provisions of Article 10 of UNCROC which states:

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

It should also be noted that UNCROC makes specific provision for refugee children in Article 22:

1. 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.

In the context of this submission, it is pertinent to note the stance of Aotearoa New Zealand in relation to refugee children which is encapsulated in its reservation to this article. The Committee on the Rights of the Child has requested unsuccessfully that this reservation be withdrawn.

10. The proposed changes to immigration legislation seek to deny citizenship to some children born in Aotearoa New Zealand. Such a denial may put Aotearoa New Zealand in contravention of a number of human rights obligations towards children which were identified above. The Committee should be aware of the potential issue of children of asylum seekers being born in Aotearoa New Zealand but who may be unable to claim citizenship in the country of their parents' birth. Such children would be stateless. The Committee needs to ensure that Aotearoa New Zealand complies with its international obligations in this regard.

11. As previous paragraphs indicate, children themselves children also fall into the category of asylum seekers, refugees or overstayers. ACYA is concerned that the Bill does not accord appropriate recognition of this fact. The legal recognition of the child's right to family life and the special protection that should be accorded to the child as a part of the family unit should not detract from the fact that children are *individual* rights-holders whose rights should not be conflated with those of his or her parents. Clause 338 is of particular concern in this regard. It provides that a dependent child who is involved in immigration matters (deportation, refugee or protected person claims, detention, or an appeal), in which one or both of the child's parents are involved, shall have his or her parent designated as the responsible adult for the child. This is of concern because the rights of the child may be overlooked as the immigration system may be geared to a determination based upon the human rights of the parent(s) without sufficient focus upon the rights of the child as an individual rights-holder. It assumes that where a parent and a child are both involved in proceedings or processes under the proposed Act the child's parent is the most suitable person to be the responsible adult. However, this approach overlooks the very real possibility that the parent, English speaking or otherwise, may lack the knowledge required to navigate the highly complex rules and procedures to bring an appeal on behalf of the child or to advocate effectively for the child at any hearing. In contrast, clause 339(c) provides that if the child does not have a parent who is involved in the immigration matter then a 'responsible adult' must be appointed to represent the

child's interests. The responsible adult is nominated by the Tribunal, an immigration officer or a judge and may be a relative of the child, a person suggested by the child, any other suitable person having responsibility for the child, or the chief executive of Ministry of Social Development. The responsible adult must attempt to elicit the views of the child and to make those views known where appropriate. The responsible adult can appear and be heard in any proceedings and can initiate an appeal on behalf of the child.

12. ACYA welcomes the incorporation of the provisions of Article 12 of UNCROC into the Immigration Bill by way of clause 340 so that in any proceedings an opportunity must be given to the child to express his or her views on the matter either personally or through a responsible adult and due regard must be had to those views having regard to the age and level of maturity and understanding of the child. However, ACYA is mindful of the potential for children's views to be dismissed on the basis of lack of maturity and would like to see the Immigration Bill amended so as to echo the provisions of s6(2)(b) of the Care of Children Act which simply states, "any views the child expresses (either directly or through a representative) must be taken into account." Furthermore, the failure to provide a child with the opportunity to suggest or choose a person other than a parent as the responsible adult raises issues for the child's right to have his or her views heard and the right to appropriate representation by a legally trained advocate. These rights are recognised internationally by Article 12 of UNCROC and within domestic law by sections 6 and 7 respectively of the Care of Children Act 2004.
13. ACYA is very concerned about the impact upon children that may flow from the Bill's provisions to allow for increased use of powers of detention of asylum-seekers. Clauses 271 to 276 relate to the detention of individuals suspected of posing a risk to security without warrant for up to 96 hours. Clause 286 concerns the power to detain under warrant of commitment when detention goes beyond 12 months. None of these clauses make special provision for young people and are a breach of Aotearoa New Zealand's obligations under Article 37 of UNCROC.

Similarly, clause 294, which relates to the form of custody of persons detained overnight without warrant, is of concern. This provision would require that persons under 18 years, if they are not married or in a civil union, who have been placed in custody without a warrant to be placed in a Child, Youth and Family residence, or in any other premises agreed upon by an immigration official and the child's parent or guardian. If placed in CYF custody they will be separated from their parents and other family members. These provisions are also particularly concerning as they apply to unaccompanied minors. Article 37(b) of UNCROC provides that detention should only be a measure of last resort. ACYA is of the opinion that such detention provisions are in breach of Article 37 as the Bill does not include other means for accommodating children and young people. Furthermore, ACYA is of the opinion that asylum-seeker children, particularly those who are unaccompanied, should not be kept in detention.

14. ACYA cautiously welcomes clause 315's provision that schools may enrol and educate non-citizen children in state schools regardless of their immigration status. In so doing, Aotearoa New Zealand goes some way to upholding the right of every child to education. However, it is important to point out that this clause only creates a defence where an education provider enrolls or admits to a course of study a student who is in compulsory education (a student below the age of 16 years). It does not grant a positive entitlement to under-16s to free state education. As such, the provision does not satisfy New Zealand's international legal obligations to provide access to education under the provision of Article 26 of the UDHR, Article 13 of the ICESCR and Article 28 of UNCROC.

15. The Immigration Bill conflicts with the prohibition on discrimination contained in the Human Rights Act 1993 and the NZBORA 1990 as it exclude children who are married or in a civil union from the right to have a responsible adult. UNCROC applies to all persons under the age of 18 years irrespective of their marriage or relationship status. Similarly, clause 49, which relates to visa applications by minors who are not married or in a civil union, provides the

Minister or an immigration officer with the grounds to deny an application if the Minister or immigration officer is not satisfied that any parent or guardian of the person consents to the application. It would appear that this provision is intended to reflect the definition of the child, as contained in UNCROC, as being a person under the age of 18 years. However, this prohibition is problematic on a number of counts. It is inconsistent with section 21 of the Human Rights Act 1993 in that it discriminates against 16 and 17 year olds on the basis of both age and marital status. It is inconsistent with Aotearoa New Zealand's domestic laws as to the legal age a person can travel autonomously. The Passport Act 1992 provides that at the age of 16 all New Zealand citizens are automatically entitled to apply for a passport on their own account. A parent or guardian cannot override this entitlement. At the age of 16 years, young people may leave school and enter into full-time work and become independent from parental custody. No rational and proportionate justification has been advanced in support of such inconsistencies and thus they can be regarded as being discriminatory. Similarly, clause 315's defence for those who have enrolled students in compulsory education is confined to those young people under the age of 16, it does not take account of the fact that completion of second level education may bring a child beyond the age of 16 years.

16. A further point of concern relate to the Bill's provisions regarding the collection of biometric information, as contained in clause 29, to be used to verify a person's identity, establish a record of their identity or to assist with decision-making under the Act. Article 16(1) of UNCROC identifies the child's right to protection from arbitrary or unlawful interference with his or her privacy and the collection of biometric information from children and young people raises concerns for the right of children stemming from Article 16(1). This clause also has implications for domestic law in terms of the Privacy Act 1993 and the search and seizure provisions covered by the NZBORA. ACYA is of the opinion that this issue is extremely important given the vulnerability of children who may be subjected to

such intrusive and potentially frightening administrative procedures. We recommend that the Committee give careful consideration to this issue.

17. The limited provision with respect to the right to education echoes another failing of the Immigration Bill as it does not give all children resident in Aotearoa New Zealand access to the full range of social and economic rights including right to health care and an adequate standard of living which incorporates the right to suitable accommodation. Equally, it is rather unfortunate that the clause 49's acknowledgement of UNCROC's definition of the child has been used in such a restricting fashion whilst so many other provisions of the Bill seemingly ignore the rights of children. As such, the Immigration Bill simply reinforces the lesser protection accorded to refugee children and, indeed, all non-national children in Aotearoa New Zealand, and it highlights the incompatibility of New Zealand's reservation to Article 22(1) of the Convention on the Rights of the Child which relates to the assistance to be accorded to refugee children.

18. In conclusion, ACYA has serious concerns with the provisions of the Immigration Bill. The changes would result in violations of Aotearoa New Zealand's international human rights obligations pertaining to children who are themselves asylum-seekers. The proposed changes would also violate the rights of children of asylum-seekers, refugees and/or deportees.