

Australian Greens Dissenting Report

1.1 The Senate in Inquiry into the Guardian for Unaccompanied Children Bill 2014 revealed overwhelming support for the creation of an independent guardian for unaccompanied non-citizen children. The Australian Greens support the majority of submitters and believe that in order to act in the best interest of unaccompanied asylum seeker children the Minister for Immigration should be stripped of his responsibilities as legal guardian.

1.2 There is no doubt that a conflict of interest exists in the law, as the Minister for Immigration is not only the legal guardian of these children and but also responsible for their detention, visa determination and deportation under the Migration Act.

1.3 Whilst the government members of the committee and the Department of Immigration have tried to argue that this is only a 'perceived' conflict of interest, legal experts and international bodies have argued the contrary for over ten years. In particular, the Australian Human Right's Commission in 2004 found that:

...the legislation providing that the Minister [for Immigration] be the guardian of children (the IGO Act), and the delegation of those powers to Department Managers, created an insurmountable conflict of interest...The Minister cannot possibly make the best interests of an unaccompanied child his or her primary concern when, at the same time, he or she is the detaining authority and visa decision maker. This conflict is not removed by delegation to the Department Managers. Indeed those Managers are placed in the invidious position of trying to gain children's trust while those same children view him or her as the person responsible for their detention.¹

1.4 Further to this, as was raised by a number of submitters, the courts have repeatedly given priority to the Minister of the day's responsibilities under the Migration Act over guardianship duties. Therefore the Minister is unable to give primacy to his or her obligations to act in the best interest of the child whilst they remain beholden to their duties under the Migration Act. As stated by the Refugee Advice and Casework Service:

...this system does not provide adequate protection for the rights and interests of unaccompanied children. Unaccompanied children should have a legal guardian who is capable of exercising the rights and duties of a natural guardian at all times with independence and expertise.²

1.5 It is important to note that in June 2012 Australia appeared before the UN Committee on the Rights of the Child to respond to questions on Australia's commitment to improving the fundamental rights and welfare of its children.

1.6 The Committee drew specific attention to the issue of the conflict of interest in guardianship and strongly recommended that the Australian Government

1 Australian Human Rights Commission, *Submission 10*, pp 2–3.

2 Refugee Advice and Casework Service, *Submission 6*, p. 2.

expeditiously establish an independent guardianship for unaccompanied immigrant children.

1.7 Further to this, the current guardianship arrangement put Australia at risk of breaching its obligations under the Convention on the Rights of the Child (CRC).

1.8 The CRC requires our government to act in the best interest of the child (Article 3.1) and ensure that unaccompanied children who are seeking asylum 'receive appropriate protection and humanitarian assistance' to guarantee enjoyment of all rights set out under the CRC and international law (Article 22(1)). The CRC also states that Australia must provide 'special protection and assistance' to children temporarily or permanently deprived of his or her family environment (Article 20(1)). Unless the Minister's responsibilities as guardian are decoupled from the duties prescribed under the Migration Act, Australia continues to put children at risk.

1.9 Australian Greens believe that there is an urgent need for an independent guardian whose sole responsibility is to ensure the best interests of the child are protected and upheld. As the Bill proposes, the creation of an independent office would remove the conflict of interest that currently exists as well as ensuring that Australia upholds its international obligations under the Convention on the Rights of the Child and the Refugees Convention.

1.10 The Australian Greens acknowledge the recommendations made by submitters to strengthen and refine the Bill. We look forward to working with the sector on these proposed amendments to ensure that the bill delivers the best possible outcome for unaccompanied asylum seeker and refugee children.

1.11 The Australian Greens depart from the committees report and recommend that this Bill be passed with amendments.

Senator Sarah Hanson-Young