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GUARDIANSHIP FOR UNACCOMPANIED CHILDREN BILL 2014

SUBMISSION TO SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE INQUIRY

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INTRODUCTION

UnitingJustice Australia (UJA) strongly endorses the *Guardian for Unaccompanied Children Bill 2014*.

UJA is the justice policy and advocacy unit of the Assembly of the Uniting Church in Australia (the national council of the Uniting Church), pursuing matters of social and economic justice, human rights, peace and the environment.

UJA works in collaboration with other Assembly agencies, Uniting Church synod (state) justice staff around the country, and with other community and faith-based organisations and groups. It engages in advocacy and education and works collaboratively to communicate the Church's vision for a reconciled world. In the Christian tradition of providing hospitality to strangers and expressing in word and deed God's compassion and love for all who are uprooted and dispossessed, the Uniting Church in Australia has been providing direct services to refugees and asylum seekers for many years through its network of congregations, employees, lay people and community service agencies.

In July 2002, the Uniting Church released its *Policy Paper on Asylum Seekers, Refugees, and Humanitarian Entrants*¹. In this paper, the Church advocates for a just response to the needs of asylum seekers and refugees that recognises Australia's responsibilities as a wealthy global citizen, upholds the human rights and safety of all people, is culturally sensitive, and is based on just and humane treatment, including non-discriminatory practices and accountable transparent processes.

The Uniting Church is committed to working for a compassionate, socially responsible society and government that takes seriously its national and international obligations. It has consistently expressed its disappointment in the recent policy decisions of the current Government with regards to asylum seeker and refugee children² and made

a submission with UnitingCare Australia to the inquiry conducted by the Australian Human Rights Commission (AHRC) investigating the immigration detention of children in 2002³ and to the AHRC National Inquiry into Children in Immigration Detention in 2014⁴. In both these submissions we highlight our concerns for the welfare of unaccompanied minors.

THE SITUATION FOR UNACCOMPANIED CHILDREN

There are guidelines within international law that govern the welfare of unaccompanied non-citizen children. The Convention on the Rights of the Child (CRC) states that all actions concerning children should be based on the primary consideration of the best interests of the child. Specifically, the guardian shall provide care and protection to ensure that children who are seeking protection on their own will not suffer harm or maltreatment on the basis that they are an asylum seeker who has arrived without a visa. The guardian will also have responsibility for the legal representation of unaccompanied minors and for ensuring that they are encouraged to participate in decision making about their life⁵. The United Nations High Commissioner for Refugees (UNHCR) sets out guidelines for the protection and care of unaccompanied minors:

The guardian or adviser should have the necessary expertise in the field of child caring, so as to ensure that the interests of the child are safeguarded, and that the child's legal, social, medical and psychological needs are appropriately covered during the refugee status determination procedures and until a durable solution for the child has been identified and implemented⁶.

1 <http://www.unitingjustice.org.au/refugees-and-asylumseekers/uca-statements/item/477-asylum-seeker-and-refugee-policy>

2 <http://www.unitingjustice.org.au/refugees-and-asylumseekers/news>

3 <http://www.unitingjustice.org.au/refugees-and-asylumseekers/submissions/item/609-inquiry-into-children-in-immigration-detention>

4 <http://www.unitingjustice.org.au/refugees-and-asylumseekers/submissions/item/954-ahrc-national-inquiry-into-children-in-immigration-detention-2014>

5 <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

6 <http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/unhcr-handbooks-recommendations-and-guidelines/unhcr-guidelines-on-dealing-with-unaccompanied-children-seeking-asylum-1997.html>

In blatant disregard of the international human rights treaties to which Australia is a signatory, the Minister for Immigration and Border Protection Scott Morrison has emphasised that all asylum seekers – including children – are to be subjected to the Government’s policy of indefinite offshore detention:

It doesn’t matter whether you’re a child, it doesn’t matter whether you’re pregnant, it doesn’t matter whether you’re a woman, it doesn’t matter whether you’re an unaccompanied minor, it doesn’t matter if you have a health condition. If you’re fit enough to get on a boat, then you can expect you’re fit enough to end up in offshore processing.⁷

The UNHCR has consistently stated that detention is harmful to all asylum seekers, particularly children, and has been a vocal opponent of Australia’s offshore detention network.⁸ The UNHCR has produced guidelines for the protection and care of refugee children to assist states in upholding the rights of this most vulnerable group.⁹ We believe that the current detention centre network arrangements discount these guidelines in their entirety.

GUARDIANSHIP OF UNACCOMPANIED CHILDREN

By de facto, according to the Migration Act 1958, the Minister for Immigration and Border Control is the guardian of unaccompanied children. UnitingJustice has long been concerned with the role of the Minister for Immigration and Border Protection as legal guardian of unaccompanied children. The power of the Minister to detain children and young people and to determine their refugee status is highly inappropriate.

UnitingJustice is aware that the Department of Immigration and Border Protection (DIBP) currently contracts MAXimus Solutions to provide support for children without parents in detention. However, too often these services are not adequately encoded into detention centre management policies, resulting in children being left without independent observers during interviews, and no written policies on who is responsible for the supervision of unaccompanied children in detention. The situation

⁷ Minister for Immigration and Border Protection and Commander of Operation Sovereign Borders Joint Agency Task Force press conference, 15 November 2013, www.customs.gov.au/site/131115_osb_transcript.asp

⁸ “UNHCR reports harsh conditions and legal shortcomings at Pacific Island asylum centres,” 26 November 2013, www.unhcr.org/52947ac86.html

⁹ “Refugee Children: Guidelines on Protection and Care,” www.unhcr.org/3b84c6c67.html

for children and young people relocated to offshore centres is even more dire. The Australian Churches Refugee Taskforce, of which the Uniting Church in Australia is a member, released a discussion paper in October 2013 noting the gross inadequacies of the guardianship arrangements for children in detention. The paper noted that

guardianship of these vulnerable children and young people is not merely a legislative function to be discharged. It is a multifaceted responsibility that encompasses statutory duties, duties under common law, the fulfilment of Australia’s international obligations, and a serious moral and ethical concern for the wellbeing of a child that flows from such responsibility.¹⁰

THE BILL

The Guardian for Unaccompanied Children Bill 2014, introduced by Senator Hanson-Young seeks to establish an independent statutory office of Guardian for Unaccompanied Non-citizen Children (the Guardian) to advocate for the best interests of non-citizen children who arrive in Australia or Australian external territories to seek humanitarian protection, who are unaccompanied by their parents or another responsible guardian. Together with responsibilities for promoting the rights and care of unaccompanied children, the Guardian will consult with other services and agencies in relation to the wellbeing of unaccompanied children, and will report directly to Parliament.

Under Schedule 1, item 5, the Act proposes to repeal a subsection of the Migration Act 1958 which covers a situation wherein the Minister for Immigration might be the unaccompanied child’s guardian. As indicated above, this scenario, even as a last resort, is highly inappropriate.

Clause 18 sets out obligations of the Guardian including:

- consult with non-citizen children in age appropriate ways;
- listen to their concerns, views and wishes;
- adopt accessible office practices to encourage the participation of unaccompanied children; and
- utilise external referrals to services as appropriate.

¹⁰ Australian Churches Refugee Taskforce (2013). “All the Lonely Children: Questions for Policy Makers Regarding Guardianship for Unaccompanied Minors,” Draft Paper, October 2013, National Council of Churches in Australia.

UJA supports this Bill, and particularly welcomes the fact that the Guardian will be independent of the Minister for Immigration and Border Protection, and also that it will protect the rights of unaccompanied minors, involve them in decision making, and monitor their condition when they are being accompanied. Under the guidelines issued by the UNHCR, all unaccompanied minors should be assigned an independent guardian who can advocate on behalf of the child and take responsibility for his or her welfare¹¹. We support the repeal of the section of the Migration Act setting the Minister as default guardian. We also support the obligations of the Guardian as one of legal guardian, promoting the needs and rights of unaccompanied children, involving unaccompanied children in decision making about their situation, monitoring policies and practices and advocating for provision of care.

In addition, UJA recommends that the Guardian be a qualified child carer, trained and appointed to represent the best interests of the unaccompanied minors in detention. The Guardian should be present for all interviews with DIBP, assist the child to access legal services and should check on their welfare on a regular basis.

We recommend that the Bill be passed.

¹¹ UNHCR Guidelines on Unaccompanied children, para 5.7 <http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/unhcr-handbooks-recommendations-and-guidelines/unhcr-guidelines-on-dealing-with-unaccompanied-children-seeking-asylum-1997.html>