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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee,

Submission concerning Guardian for Unaccompanied Children Bill 2014

Australian Lawyers for Human Rights (**ALHR**) thanks the Senate Legal and Constitutional Affairs Committee for the opportunity to comment on the *Guardian for Unaccompanied Children Bill 2014 (Bill)*.

ALHR was established in 1993 and is a network of legal professionals active in practising and promoting awareness of international human rights. ALHR has a national membership of over 2,600 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

As a general matter, ALHR supports the Bill and its stipulated purpose, especially in relation to ensuring protection of the rights of unaccompanied children and promotion of their needs and views. The Bill is a welcome step to ensuring that

Australia fulfills its international human rights obligations in relation to asylum seekers and, in particular, in relation to ensuring that unaccompanied children have an independent guardian who will protect and promote their rights and interests. ALHR has elaborated on its support for the Bill below and has offered specific suggestions as to how the Bill could be strengthened.

Failure of Current System

ALHR submits that the current framework whereby the Minister for Immigration is the guardian of children who arrive in Australia unaccompanied,¹ is resulting in repeated breaches of Australia's international human rights obligations. More specifically, the current system is resulting in numerous and frequent breaches of Australia's obligations under the *United Nations Convention on the Rights of the Child (CRC)* due to the Minister's conflict of interest in being the guardian of unaccompanied children and his consequential failure to implement the rights of children as set out in the CRC.

Australia's Obligations

The CRC is the key international treaty protecting children's rights and the most widely ratified treaty in the world. Australia became party to the CRC in 1990 and, as such, has a range of obligations it has agreed to fulfill under the Convention. Australia's obligations under the CRC, which are relevant to children who arrive in Australia unaccompanied, can be summarised as follows:

- In all actions concerning children, it must ensure that the "best interests of the child" are a "primary consideration";²
- It must provide "such protection and care as is necessary" for the well-being of every child and, to this end, take all "appropriate legislative and administrative measures";³
- It must ensure that, where parents are absent and a legal guardian has been appointed, the guardian has the "primary responsibility for the upbringing and development of the child" and that the "best interests of

¹ See *Immigration (Guardianship of Children) Act 1946 (Cth)*, s 6.

² *United Nations Convention on the Rights of the Child 1989*, art. 3(1).

³ Above n 2, art. 3(2).

the child” is the guardian’s “basic concern”;⁴

- In relation to children who arrive in Australia unaccompanied, especially those seeking asylum, it must provide them with “special protection and assistance” and with “alternative care”;⁵
- In relation to children seeking asylum, it must provide them with “appropriate protection and humanitarian assistance” in the enjoyment of all the rights set out in the CRC and other human rights treaties to which Australia is a party;⁶
- It must ensure that children can enjoy the rights contained in the CRC which include: protection against all forms of discrimination;⁷ participation in decision-making;⁸ protection from violence, abuse and neglect;⁹ enjoyment of the highest attainable standard of health;¹⁰ standard of living adequate for the child’s development;¹¹ access to education;¹² ability to engage in play and recreational activities;¹³ not to be subjected to torture or other cruel, in human or degrading treatment or punishment;¹⁴ not to be arbitrarily deprived of liberty.¹⁵

Minister’s Conflict of Interest

ALHR submits that the Minister’s multiple roles as guardian of unaccompanied minors, detaining authority for asylum seekers, and visa decision-maker on refugee claims are irreconcilable and lead to a manifest conflict of interest. This conflict of interest is especially cogent with respect to Australia’s hard line laws and policies on asylum seekers and the Government’s express objective of deterring asylum seekers from seeking protection in Australia.¹⁶ In ALHR’s view, the Minister’s

⁴ Above n 2, art. 18(1).

⁵ Above n 2, art. 20(1) and 20(2).

⁶ Above n 2, art. 22(1).

⁷ Above n 2, art 1(2).

⁸ Above n 2, art. 12.

⁹ Above n 2, art. 19(1).

¹⁰ Above n 2, art. 24(1).

¹¹ Above n 2, art. 27(1).

¹² Above n 2, art. 28(1).

¹³ Above n 2, art. 31(1).

¹⁴ Above n 2, art. 37(a).

¹⁵ Above n 2, art. 37(b).

¹⁶ See for example, Gary Cox, ‘Refugees angered by Government’s graphic novel campaign’, *SBS*, 13 February 2014: <http://www.sbs.com.au/news/article/2014/02/13/refugees-angered-governments-graphic-novel-campaign>; Australian Government, ‘Government Response to Recommendations by

role as guardian of unaccompanied minors is clearly considered by the Minister to be secondary to his role in fulfilling his duties under the *Migration Act 1958* (Cth) (**Migration Act**) and current Government policy.¹⁷ ALHR suggests that the Minister for Immigration could not possibly have the “best interests of the child” as his “primary concern” in deciding to detain unaccompanied children or transfer them to harsh offshore detention facilities for processing of their claims.

The Minister’s conflict of interest has long been recognised by national and international human rights bodies including the Australian Human Rights Commission (**AHRC**) and the United Nations Committee on the Rights of the Child (**Child Rights Committee**). The Child Rights Committee has said that agencies and individuals whose interests could potentially be in conflict with those of the minor’s should not be eligible for guardianship.¹⁸ The AHRC’s national inquiry into children in immigration detention in 2004 found that, as guardian of unaccompanied minors who arrive in Australia, the Minister for Immigration had failed to make the best interests of unaccompanied minors his “basic concern” in breach of Article 18(1) of the CRC.¹⁹ It also held that there was “the fundamental conflict between the pursuit of a mandatory detention policy and the interests of the individual children who are detained in furtherance of that policy.”²⁰ The AHRC further concluded that the protection and assistance provided to unaccompanied minors by the Government was “inadequate” and fell short of the “special protection and assistance” to which unaccompanied children have a right under Article 20(1) of the CRC.²¹

Apart from the conflict of interest inherent in the Minister’s role as guardian, ALHR submits that the Minister for Immigration is not an appropriate person to be appointed guardian of unaccompanied children due to the Minister’s lack of capacity

Joint Select Committee on Australia’s Immigration Detention Network, November 2012: <https://www.immi.gov.au/media/publications/pdf/2012/response-recommendations-joint-select-committee-aust-immi-detention.pdf> p. 2

¹⁷ See Australian Government’s “Best Interests Assessment for Transferring Minors to a Regional Processing Country”, 13 February 2014, version 1.4, which states that in making a transfer decision “the best interests of the child are outweighed by other primary considerations, including the need to preserve the integrity of Australia’s migration system and the need to discourage children taking, or being taken on, dangerous illegal boat journeys to Australia”:

<http://www.immi.gov.au/About/foi/Documents/FA140201097.pdf>

¹⁸ United Nations Committee on the Rights of the Child, General Comment No. 6, 39th session (2005), [33].

¹⁹ Human Rights and Equal Opportunities Commission, *A Last Resort? National Inquiry into Children in Immigration Detention*, (2004), available at: <https://www.humanrights.gov.au/last-resort-report-national-inquiry-children-immigration-detention-2004>, p. 19

²⁰ Above n 19, p. 19.

²¹ Above n 19, p. 743.

and expertise in safeguarding the rights of unaccompanied children. The Child Rights Committee has expressly conveyed that the guardian of unaccompanied children should have the “necessary expertise in the field of childcare, so as to ensure that the interests of the minor are safeguarded and that the minor’s legal, social, health, psychological, material and educational needs are appropriately covered”.²² This serves to highlight the need for the appointment of an independent guardian with adequate expertise and resources to protect the rights of unaccompanied children.

General Comments on Bill

In light of the discussion above, ALHR submits that if Australia is to fulfill its obligations under the CRC, it is imperative that “unaccompanied non-citizen children” (as defined in the Bill) have an independent legal guardian appointed and that the current law is amended to remove the Minister for Immigration as the guardian of unaccompanied children. The Bill seeks to achieve both outcomes and, as such, ALHR supports the Bill and commends Senator Hanson-Young for its introduction. ALHR notes that “unaccompanied non-citizen children” are an especially vulnerable group in need of immediate and ongoing protection and assistance. At the time the Bill was introduced into the Senate in July 2014, Senator Hanson-Young noted that there were over 32 unaccompanied children in places of detention on Christmas Island, 24 detained on Nauru and over 338 in community detention.²³ This underscores the urgency and necessity in having this Bill proceed to enactment.

ALHR submits that this Bill is long overdue. For at least the past decade, several national and international bodies have recommended that Australia introduce an independent guardian to protect the rights of unaccompanied children who arrive in Australia. The AHRC recommended the same in 2004²⁴ and, in 2012, the Parliamentary Joint Select Committee on Australia’s Immigration Detention Network also recommended that the guardianship of unaccompanied minors be transferred away from the Minister.²⁵ Moreover, the United Nations High Commissioner for

²² Above n 18, [33].

²³ Senator Hanson-Young, *Second Reading Speech on Guardian of Unaccompanied Minors Bill 2014*, 16 July 2014:

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhomo%2Fs968%22>

²⁴ Above n 19, p. 7.

²⁵ Joint Select Committee on Australia’s Immigration Detention Network, Parliament of Australia, *Final Report* (2012), paras 5.95 - 5.96. At

Refugees (UNHCR) has suggested that an independent guardian be appointed to unaccompanied children²⁶ and the Child Rights Committee, in its Concluding Observations on Australia in 2012, recommended that Australia “expeditiously establish an independent guardianship/support institution for unaccompanied immigrant children.”²⁷

ALHR agrees with the statement in subsection 3(2) of the Bill that it is an important measure to assist Australia in meeting its obligations under the CRC. It also supports the Bill’s objects outlined in subsection 3(1), especially that Bill will ensure the rights of “unaccompanied non-citizen children” are protected and that their need and views will be promoted. In ALHR’s view, only an independent guardianship office, as established by the Bill, can adequately ensure that the best interests of unaccompanied children are a “primary consideration” and the “basic concern” of the guardian of unaccompanied children in accordance with the Australia’s obligations under the CRC.

Specific Comments on Bill

As stated above, ALHR supports the Bill as a general matter, but wishes to raise the following issues and suggestions aimed at strengthening the Bill and ensuring it is as robust as possible.

Notification to Guardian

Under current Australian law, asylum seekers who arrive in Australia by boat after 19 July 2013 will have their asylum claim processed in either Nauru or Papua New Guinea.²⁸ Although there do not appear to be any unaccompanied children presently in Papua New Guinea, as at July 2014, there were 24 unaccompanied children detained on Nauru.²⁹ Typically, ALHR understands that groups who are to be transferred offshore spend a very short transit period in Australia, usually on Christmas Island. Under the Migration Act, the Minister for Immigration ceases to be

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/immigrationdetention/report/index.

²⁶ United Nations High Commissioner for Refugees, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, Geneva, 1997, [5.7].

²⁷ United Nations Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc CRC/C/AUS/CO/4, (28 August 2012):

http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf, [81(c)].

²⁸ *Migration Act 1958* (Cth), s 198AD.

²⁹ Above n 23.

the guardian of unaccompanied children who are transferred offshore.³⁰ In the case of Nauru, the guardian of these unaccompanied children becomes the Minister for Justice of Nauru.³¹ ALHR has serious concerns about this arrangement.

Section 12 of the Bill provides that “unaccompanied non-citizen children” must not leave Australia except with the “consent in writing of the Guardian.” This would appear to prevent any unaccompanied minors from being immediately transferred offshore without the consent of the Guardian. However, given the very short amount of time that asylum seekers usually spend on Christmas Island before being transferred offshore, ALHR submits that the Bill would be strengthened by a requirement that the Guardian be immediately notified as soon as any “unaccompanied non-citizen children” are identified. The UNHCR has recommended that States “appoint a guardian or advisor as soon as the unaccompanied or separated child is identified”.³² Thus, the Bill could be strengthened by explicitly stating that the guardian will commence his/her functions “as soon as the unaccompanied child is identified” and be immediately notified of such. This will help to ensure that the Minister can immediately act in the child’s best interest to prevent transfer offshore or any other actions detrimental to the child’s best interests.

Relevant ‘Minister’ for Purpose of Bill

The Bill makes reference to “the Minister” in several sections, the first being section 17 which provides that “the Minister” must be satisfied that the person to be appointed as Guardian has appropriate qualifications, knowledge, commitment etc. However, the Bill does not define *which* Minister is being referred to. Section 19A of the *Acts Interpretation Act 1901* (Cth) provides that where a Minister is referred to using the expression “the Minister”, the reference should be taken to be a reference to the Minister or Ministers who “administer the provision in respect of the relevant matter.” In the case of the relevant matter covered by the provisions of the Bill, it could be inferred that “the Minister” is a reference to the Minister for Immigration but it is possible that it could be intended to be a reference to another Minister such as the Minister for Social Services. In this regard, ALHR recommends that the Bill be amended to clarify to which Minister it is referring.

³⁰ Above n 1, ss 6(1) and 2(b).

³¹ *Asylum Seekers (Regional Processing Centre) Act 2012* (Nauru), s 15.

³² Above n 26, [5.7].

If the references to “the Minister” in the Bill are references to the Minister for Immigration, ALHR submits that there is potentially a conflict of interest issue with respect to the role provided for the Minister in the Bill. Pursuant to the Bill, the Minister has input in relation to the appointment of the Guardian under section 17 and in exercising other functions such as being empowered to appoint an Acting Guardian under section 22 and being charged with reviewing the operation of the Act under section 34. The Bill clearly intends for the Office of the Guardian to be an independent statutory office. ALHR is concerned that if references to “the Minister” are references to the Minister for Immigration, the role provided for the Minister in the Bill will deprive the Office of the Guardian of that necessary independence.

Appropriate Qualifications of Guardian

In relation to requisite qualifications of the appointed Guardian, subsection 17(2)(a) of the Bill states that the Minister must be satisfied that the person to be appointed as Guardian “has the appropriate qualifications, knowledge or experience and is of good character”. Subsection 17(2)(b) provides that the person must have “a demonstrated commitment to, and capacity to promote, the rights, interests and well-being of non-citizen children.” In ALHR’s view, this provision is somewhat broad and would be strengthened by incorporating a minimum standard of qualifications required for the Guardian with respect to child protection and welfare. In this regard, it is noted that the Child Rights Committee has recommended that the guardian for unaccompanied minors have the “necessary expertise in the field of childcare, so as to ensure that the interests of the minor are safeguarded and that the minor’s legal, social, health, psychological, material and educational needs are appropriately covered.”³³

Function of Guardian in Providing Services

Under section 18 of the Bill, the Guardian’s enumerated functions are to promote, protect, involve, advocate etc in relation to the rights and interests of unaccompanied children. In relation to provision of services, subsection 18(1)(f) stipulates that the Guardian will “act as an advocate for the provision of suitable accommodation, care, education, language support and health care for unaccompanied

³³ Above n 18, [33].

non-citizen children, both during and after the time that their refugee status is being considered”. However, the Bill does not specify a role for the Guardian in actually providing the services. The AHRC has previously stated that the role of Guardian for unaccompanied children should include “ensuring suitable care, accommodation, education, language support and health care provision both during and after refugee status has been determined.”³⁴

Section 13 of the Bill provides that the Guardian may place an unaccompanied child in the custody of an appropriate person. Reading the Bill as a whole, an inference could be made that the custodian of the unaccompanied child would provide the basic services to the child. If the child were detained in closed detention facilities, presumably the detention centre service providers would provide such services. Given that section 18 only specifies that the Guardian will “advocate” for the provision of services, ALHR recommends that the Bill clarify which person or entity will *provide* the unaccompanied child with the necessary services.

Interaction of Bill with State/Territory Agencies

In preceding years, there has been a lack of clear agreement between the Department of Immigration and the States and Territories concerning the care and guardianship of unaccompanied minors. Generally, the position has been that unaccompanied children have remained under the care and responsibility of the Minister for Immigration and the Department whilst in immigration detention facilities.³⁵ However, once they have been released from detention or transferred into community detention, the practice seems to be that the Minister delegates the guardianship and care of unaccompanied children to State/Territory agencies.³⁶

Section 19 of the Bill covers “cooperation and consultation with other agencies” but does not specifically refer to State/Territory agencies. It states that the Guardian may consult with any non-government agencies and, under subsection 19(1)(a) provides that “the Guardian and any other Commonwealth agencies that provide or deal with services or issues affecting unaccompanied non-citizen children must also cooperate in the exercise of their respective functions.” Given the past involvement of State/Territory agencies in the provision of care and services to

³⁴ Above n 19, p. 700.

³⁵ Above n 19, p. 730.

³⁶ Above n 19, p. 730.

unaccompanied children, ALHR submits that the Bill would benefit from some clarity concerning its interaction with State/Territory agencies.

If you would like to discuss any aspect of this submission, please contact Claire Hammerton, ALHR Refugee Sub-Committee Coordinator by email: refugees@alhr.org.au.

Yours faithfully,

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