THE 'BEST INTERESTS' OF ASYLUM-SEEKER CHILDREN

Who's guarding the guardian?

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Unaccompanied asylum-seeker children — those under 18 years of age who arrive in a country seeking asylum without their parents — are regarded as particularly vulnerable individuals. Given that they lack the protection of both their home State, and their parents, such children are at special risk of being exposed to harm. In recognition of this vulnerability, a number of UN bodies and other international non-governmental organisations have recognised that these children — commonly referred to as 'unaccompanied minors' — require special procedural safeguards, including the appointment of an independent guardian.[1]

In Australia, the guardianship duty to protect the interests of unaccompanied minors is given to the Minister for Immigration, under the *Immigration (Guardianship of Children) Act 1946* (Cth) ('the Guardianship Act'). This role is problematic given that the Minister for Immigration is also given the statutory power under the *Migration Act 1958* (Cth) ('the Migration Act') to grant or refuse a refugee claim and to deport, detain and transfer a child asylum-seeker. As such, refugee advocates and academics have argued that there is a conflict of interest between the Minister's role under the Migration Act to decide on the detention and deportation of child asylum seekers, and their role as guardian of those same children.[2]

The guardianship role of the Minister for Immigration was considered by the High Court as part of its landmark decision on the legality of the so-called 'Malaysian Solution' in 2011: *Plaintiff M70/Plaintiff M106 of 2011* ('Plaintiff M70/106').[3] This case dealt with the application of the guardianship duty in a situation where Australia sought to transfer unaccompanied minors to Malaysia. The High Court declared the Malaysian arrangement to be inconsistent with Section 198A of the Migration Act (as it then was) and held that the written consent of the Minister was required prior to any transfer of unaccompanied asylum-seeker children. The judgment of the High Court in *Plaintiff M70/106* was, however, overturned by amendments made to the Migration Act and Guardianship Act in August 2012. These amendments repealed Section 198A of the Migration Act, allowing the government to re-instigate extraterritorial processing of asylum seekers in Nauru and Papua New Guinea.[4] Under the new provisions, all eligible persons are subject to transfer to a third country and there are no exemptions for unaccompanied children. Further, and controversially, the guardianship duty of the Minister of Immigration ceases in relation to those children transferred to a 'regional processing country'.[5]

As a result, there are significant problems with the structure and content of Australian law in relation to the guardianship of asylum seeker children. This article analyses some of these underlying problems, with particular focus on the inclusion of unaccompanied minors in third-country transfer agreements and how Australian law compares with overseas jurisdictions.

Australian law on guardianship of unaccompanied asylum-seeker children

Australian legislation

Under current Australian legislation, the Minister for Immigration is assigned as the guardian of unaccompanied asylum-seeker children. Section 6 of the Guardianship Act states that the Minister:

> shall be the guardian ... of every non-citizen child who arrives in Australia ... and shall have, as guardian, the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have.

Section 4AAA of the Guardianship Act defines a non-citizen child as a child who: has not turned 18; and enters Australia as a non-citizen; and intends, or is intended to become a permanent resident of Australia. In relation to transfer of unaccompanied minors to other countries, s 6(1) of the Guardianship Act provides that the Minister's guardianship duties cease when the child 'leaves Australia permanently' (which includes transfer to a regional processing country). Section 6A of the Guardianship Act provides, among other things, that the Minister must give consent in writing prior to a non-citizen child leaving Australia.[6] However, the consent provision under s 6A(2) is phrased in a negative way, obligating the Minister not to *refuse* such consent unless the grant would be 'prejudicial' to the child:

> The Minister *shall not refuse* to grant any such consent unless he or she is satisfied that the granting of the consent would be *prejudicial* to the interests of the non-citizen child.[7]

Section 6A(2) therefore does not explicitly place a positive obligation on the Minister to ensure that the transfer or departure would be in the 'best interests' of the child, which is the central protective term used in the international human rights instruments to which Australia is a party. Further, s 8(2) and (3) of the Guardianship Act (introduced in 2012 in response to *Plaintiff M70/106*) now states that the provisions of the Guardianship Act do not affect the operation of

REFERENCES

1. See, eg, UNHCR, 'Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum', February 1997; Refugee Council of Australia, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010*, <www.refugeecouncil.org.au/r/sub/1012-Child-Commissioner.pdf>.

2. See, eg, submissions from Liberty Victoria, Refugee Council of Australia and Australian Lawyers for Human Rights, in Senate Legal and Constitutional Affairs References Committee, *Australia's arrangement with Malaysia in relation to asylum seekers*, October 2011, 38.

3. *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 ['Plaintiff M70/106'].

4. *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth).

5. *Immigration (Guardianship of Children) Act 1946* (Cth), s 6(2)(b).

6. Ibid s 6A(1) provides that 'A non-citizen child shall not leave Australia except with the consent in writing of the Minister.'

7. Ibid s 6A(2) [emphasis added].

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the Migration Act, particularly in relation to transfer of children to a 'regional processing country'.

The duty of guardian over refugee children is extremely important as that person is considered to hold a 'fiduciary duty' — a special position of trust — and is legally obliged to protect the interests of those children in the same manner as their own interests. This includes a duty to protect the child from danger or harm. This has been recognised by the Commonwealth government, which acknowledged in its submissions to the High Court in *Plaintiff M70/106* that the Minister's powers and duties in this context are 'akin to that of a parent'.[8] In a previous case, *X v Minister for Immigration and Multicultural Affairs*, the Federal Court also held that the responsibilities of the Minister for Immigration under s 6 of the Guardianship Act included protection of the fundamental rights of those children over which they are guardian.[9] Justice North stated:

> The guardian must therefore address the basic human needs of a child, that is to say, food, housing, health and education. Over the course of this century, attention to these needs has come to be recognised as a fundamental human right of children, including in various international instruments to which Australia is a party.[10]

I note that currently, in practice, the guardianship role of the Minister is delegated to officers within state and territory child welfare agencies and certain Department of Immigration employees. [11] However, it remains the case that the legislative guardianship authority vests with the Minister and they have significant powers under the Migration Act, including to detain and deport an asylum-seeker. The conflict between the Minister's role as guardian and these other roles is illustrated by continuing problems with conditions in immigration detention. In 2004, the Human Rights Commission released a major report on children in immigration detention which found, among other things, that the immigration detention of children by the Commonwealth had resulted in 'numerous and repeated breaches' of fundamental principles of the UN Convention on the Rights of the Child ('CROC').[12] Certain improvements have been made since that time. In 2005, the Migration Act was amended to affirm 'as a principle' that a minor should only be detained as a measure of last resort and many children have been transferred into community detention arrangements. However, human rights concerns arising from detention of children continue. For instance, in 2012, the Australian Human Rights Commission published a report in which it criticised the continuing mandatory detention of children on Christmas Island, in breach of Australia's obligations under CROC, the co-location of single men and families, and the fact that unaccompanied minors detained on Christmas Island do not have dedicated carers, but rather, are supervised by Serco officers.[13] In the months prior to the federal election in 2013, the outgoing Labor Minister for Immigration released many children from immigration detention. However, significant numbers of children remain in detention, particularly on Christmas Island.

The ministerial conflict of interest is also of particular concern in relation to the transfer of unaccompanied asylum-seeker children to third countries, which I will now discuss.

Transfer of asylum-seeker children to 'regional processing countries'

As noted above, the guardianship role of the Minister for Immigration was raised before the High Court as part of the challenge to the Malaysian solution in *Plaintiff M70/106*. The main issues considered by the High Court were whether the Minister's declaration of Malaysia had been validly made under s 198A of the Migration Act, and whether the Minister had satisfied the requirements of the Guardianship Act in relation to one of the applicants, an Afghan citizen, who was at that time 16 years old.

In addition to problems with the provisions of the Malaysian Arrangement generally, there were also a number of problems with the arrangements put in place for the protection of unaccompanied minors. For instance, Clause 8(2) of the Malaysian Arrangement provided that '[s]pecial procedures will be developed and agreed to by the Participants to deal with the special needs of vulnerable cases including unaccompanied minors.'[14] However, as the appellants and interveners (the Australian Human Rights Commission) argued, this did not create any binding obligations on Malaysia. Further, under the Malaysian Arrangement, the guardianship duty of the Minister for Immigration ceased to apply to unaccompanied minors once they left the jurisdiction of Australia. That is, there was no transfer of that guardianship duty to an official or government department within Malaysia. In addition, Malaysian law does not require that a guardian must be appointed to unaccompanied minors.[15]

In response, the then Minister for Immigration and Citizenship argued that it may be accepted that a person exercising guardianship powers 'must treat the best interests of the child as the paramount

8. Minister for Immigration and the Commonwealth of Australia, 'Defendant's Submissions', *Plaintiff M70/106*, [99] <http://www.hcourt.gov.au/cases/case-m70/2011>.

9. *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524, 535–38.

10. Ibid 535, cited with approval by the Full Federal Court in *Odhiambo v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 194 (20 June 2002) at [88].

11. *Immigration (Guardianship of Children) Regulations 2001* (Cth); DIAC Fact Sheet on Unaccompanied Children, <http://www.immi.gov.au/media/fact-sheets/69unaccompanied.htm>.

12. CROC, 20 November 1989, UNTS 1577, 3; Australian Human Rights Commission, *A last resort? National Inquiry into Children in Immigration Detention*, 13 May 2004, [17.2].

13. Australian Human Rights Commission, *Immigration Detention on Christmas Island*, 2012, 13. Serco Australia is the company which manages immigration detention centres in Australia.

14. The Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement, 25 July 2011, Clause 8(2).

15. Written Submissions of Plaintiff (17/08/2011) and Human Rights Commission seeking leave to intervene in M106/2011 (17/08/2011), <http://www.hcourt.gov.au/cases/case-m70/2011>.

consideration. However, it does not follow that that obligation ... displaces powers or duties which the guardian has in another capacity.'[16] They submitted that:

> the Minister's *quasi*-parental status as 'guardian' of a non-citizen child does not give him the power, or impose on him the obligation to intervene on the child's behalf in the performance of functions of the exercise of statutory powers under the Act.[17]

The Minister also sidelined the government's obligations under CROC, stating that the obligation to act in the child's best interests in this context is 'of somewhat doubtful force'.[18] This essentially meant that the Minister's guardianship duties were seen by the government as secondary to the Minister's other duties under the Migration Act, including the power to detain and deport.

On 31 August 2011, the High Court found by a majority (6:1) that removal of a non-citizen child from Australia, or the taking of that child to another country pursuant to s 198A of the Migration Act, cannot lawfully be effected without the consent in writing of the Minister (or his delegate) and that such a decision will engage the provisions of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) — in particular, the provisions concerning the giving of reasons and judicial review.[19] This requirement erected a significant administrative hurdle to the removal of unaccompanied minors to a third country (including Malaysia, Nauru, and Papua New Guinea). However, as noted above, this was overturned by amendments to the Migration Act and Guardianship Act in August 2012. In particular, the government amended s 6 of the Guardianship Act to include a provision which ceases the Minister's guardianship duty when 'the child is taken from Australia to a regional processing country' under s 198AD of the Migration Act[20] and specifies that the Migration Act overrides any duties given to the Minister under the Guardianship Act.[21] This means that under current law the Minister's written consent does not have to be obtained prior to an unaccompanied child being transferred to a 'regional processing country'. The policy of the recently-elected Coalition government on this issue does not appear to differ in any meaningful way from that of the previous Labor government and therefore it is likely that the treatment of unaccompanied children will continue to be of concern.

I now turn to examine whether current Australian law on guardianship of asylum seeker children is inconsistent with international standards and comparative jurisprudence.

International standards and comparative jurisprudence

The 'best interests' principle

The first place to start analysing any issue regarding the rights of children is the 'best interests' principle set out in CROC. Article 3(1) of CROC states that:

> [i]n 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.[22]

This best interests principle is obviously of importance in terms of the appointment of guardians, the detention of child asylum-seekers and transfer to 'third safe countries'. In this context, Article 18(1) of the CROC specifically states that a child's legal guardian should have the best interests of the child as their '*basic concern*'.

Article 22(1) of CROC also addresses the particular circumstances of child asylum seekers, noting that they should be given appropriate protection and assistance:

> 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 addition to this, the UN Committee on the Rights of the Child has stated that unaccompanied asylum-seeker children require an independent guardian to protect their rights and interests and has explicitly stated that '[a]gencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship'.[23]

The importance of the 'best interests' principle in relation to unaccompanied minors has been endorsed by many other organisations. For instance, in detailed Guidelines developed by a number of key agencies involved in children's rights, UNHCR and other international organisations have emphasised that the function of the guardianship role is to ensure that 'the child is properly represented; that his/her views are expressed and that any decisions taken are in his or her best interests'.[24]

A significant problem arises in applying these principles in the Australian context, as CROC is not directly incorporated into Australian domestic law. Further, successive governments have, as illustrated in the submissions of the Commonwealth in *Plaintiff M70/106*, frequently denied the applicability of the Convention to refugee and asylum-seeker children. However, the fact remains that Australia is a party to CROC and is bound by its provisions. I would argue that current Australian law and practice, particularly the cessation of guardianship upon transfer of an asylum-seeker child to a 'regional processing country' is contrary to Articles 3(1), 18(1) and 22(1) of CROC.

In addition, Australian practice also appears to be out of step with other jurisdictions, particularly in transfer situations.

Comparative examples

There are two main themes which arise from a comparative analysis of the guardianship duty over asylum-seeker children. First, unaccompanied minors are usually exempted from the transfer rules which

16. Defendant's Submissions, *Plaintiff M70/106*, [101] <http://www.hcourt.gov.au/cases/case-m70/2011>.

17. Ibid [102].

18. Ibid [101].

19. *Plaintiff M70/106*, above n 3, per Gummow, Hayne, Crennan and Bell JJ at 204; Kiefel J at 237.

20. Section 6(2) of the *Immigration (Guardianship of Children Act) 1946* (Cth) - introduced pursuant to the *Migration Legislation Amendment (Regional Processing and Other Measures) Act* 2012 (Cth).

21. *Immigration (Guardianship of Children Act) 1946* (Cth), ss 8(2) and (3).

22. CROC, above n 12.

23. Committee on the Rights of the Child, General Comment 6, Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC/GC/2005/6, 1 September 2005, [33].

24. Red Cross, *Interagency Guiding Principles on Unaccompanied and Separated Children*, January 2004, 47.

Within the EU for instance, a guardian may be appointed from a government agency dealing with child protection and/or from a non-government organisation ('NGO'), but not the department legally responsible for the child's detention and deportation.

pertain to adults (for instance, under European Union law). Secondly, the guardian appointed to such children is not the same official who is legally responsible for deciding that child's asylum application, detention, or deportation. I will address these two issues in turn.

Exemption from third country transfers

It is notable that all other comparable countries which have a formal agreement in place to transfer asylum seekers to other States have an exception for unaccompanied minors. For instance, the 'Safe Country' transfer arrangement between the United States and Canada exempts unaccompanied minors.[25] Significantly, the European regional transfer agreement, called the 'Dublin Convention', exempts unaccompanied children from the normal requirement for transfer of adult asylum seekers and explicitly refers to the 'best interests' principle. Article 6 of the Dublin Convention provides:

> Where the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor.
>
> In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum.[26]

Article 15(3) of the Dublin Convention also states that if the unaccompanied minor has a relative or relatives in another Member State who can take care of them, Member States are obliged to, if possible unite the minor with their relatives.

In addition to this, the 'best interests' principle is referred to in three of the most important European Union instruments on refugee law and procedures: The EU Charter on Fundamental Rights and Freedoms,[27] the EU Procedures Directive[28] and the EU Qualification Directive.[29] For instance, Recital Clause 14 of the EU Procedures Directive (the regulation which sets out common standards for the processing of refugee claims within the EU), states that 'specific procedural guarantees for unaccompanied minors should be laid down on account of their vulnerability' and that in that context 'the best interests of the child should be a primary consideration of Member States'.[30] A recent judgment of the European Court of Justice on the transfer of unaccompanied children to third states within the EU also held that:

> Since unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State.[31]

Guardianship duties internationally

Another feature from the comparative practice in this area is that it is not normal for a Minister for Immigration or similar decision-maker to be given the legal duty of guardianship. Within the EU for instance, a guardian may be appointed from a government agency dealing with child protection and/or from a non-government organisation ('NGO'), but *not* the department legally responsible for the child's detention and deportation.[32]

Proposed reforms

There are several underlying problems with Australian law on guardianship which require reform. Most significantly, the legislative function of the Minister for Immigration as guardian of unaccompanied minors presents a conflict of interest given their other roles as detainer and deporter of such children under the Migration Act. In this context, I note that this is a real not merely perceived conflict of interest. The Department of Immigration argues that the conflict of interest between the Minister's role as guardian and their role under the Migration Act is a perceived conflict only, not an actual conflict. However, evidence given by legal advisers to the Senate Legal and Constitutional Affairs Committee indicates that is not the case. David Manne, from the Refugee and Immigration Legal Centre notes that:

> On a number of occasions I have personally been involved in the representation of children who are 13, 14, 15 or 16. When I met with them, they had literally no-one present or available to assist with providing instructions on life or death matters. … The only person that has ever potentially been available has been … the decider — that is the guardian or the delegated guardian of the minister, being someone from the department of immigration, which of course is completely inappropriate given that their role is to decide the case, not prepare it or present it.[33]

In relation to possible avenues for reform of the present guardianship structure in Australia, one solution may be to transfer the guardianship role to the newly-created National Children's Commissioner.[34] Indeed, UNHCR has indicated that 'one possibility' to avoid the current conflict of interest would be to appoint such an independent Commissioner.[35] However, there are some problems associated with this. First, the new Children's Commissioner is a very small office

25. The Canada-United States Safe Third Country Agreement, 5 December 2002, Article 4(2)(c).

26. Council Regulation (EC) No 343/2003 of 18 February 2003 establishing criteria and mechanisms for determining Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, 1) ('Dublin Convention'), Article 6.

27. Charter on Fundamental Rights of the European Union, OJ 304/1, Article 24.

28. EU Council Directive on Minimum Standards on Procedures in Member States for granting and withdrawing refugee status, 1 December 2005, 2005/85/EC, Recital Clause (14).

29. EU Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection (recast), [2011] OJ L 337/9, Article 20(5) provides that '[t]he best interests of the child shall be a primary consideration for Member States' in decisions involving minors.

30. EU Directive, above n 28. See also Articles 2(i) and 17(6).

31. European Court of Justice, *Case C-648/11 – MA v Others*, 6 June 2013 (not yet reported) [55].

32. See European Migration Network, *Policies on Reception, Return and Integration arrangements for, and numbers of, Unaccompanied Minors – an EU comparative study – Synthesis Report*, May 2010, 53–54.

33. Evidence to Senate Legal and Constitutional Affairs Committee, 30 March 2011, 16 (David Manne).

34. Minister for Families, Community Services and Indigenous Affairs, 'Gillard Government to establish National Children's Commissioner' (Media Release, 29 April 2012).

35. UNHCR, Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010*, 16 December 2010, [14]

with a restricted budget. Secondly, as submissions to a recent Senate Committee pointed out, it may be more appropriate for the Commissioner to provide oversight of the entity acting as the legal guardian of such minors, rather than hold the guardianship duty itself.[36] These problems could be addressed by either delegating the guardianship duty from the Commission of Children to relevant state and territory child welfare agencies (so that the Commissioner would have an oversight function) or by transferring the guardianship role to the Minister for Social Services and retain the Commissioner for Children as an oversight mechanism.[37] I note, in this context, that the Children's Commissioner for England has an oversight and reporting role in relation to unaccompanied asylum-seeker children.[38]

A related need for reform lies in the importance given to the 'best interests' principle in Australian legislation. As noted above, the best interests principle is regarded internationally as the linchpin of children's welfare. However, this is not adequately reflected in current Australian legislation. The wording of s 6A(2) of the Guardianship Act, which merely refers to satisfaction that removal would 'not prejudice the interests' of an unaccompanied child, is problematic and requires attention. This does not fully reflect the 'best interests' principle, as it simply requires that the transfer not prejudice the child's interests, rather than a positive obligation on the Minister to ensure the transfer is in the child's best interests. In practice this could, for instance, permit the Minister to send unaccompanied minors to Nauru on the basis that there are suitable reception and processing procedures in place and that Nauru is a party to the Refugee Convention. This could be argued to not be 'prejudicial' to the child's interest. In contrast, such conditions may not satisfy the more stringent 'best interests of the child' criteria. Thus, it is the contention of this article that the best interests principle should be reflected in both the Guardianship Act and Migration Act in relation to all decisions regarding children. Further, the cessation of the guardianship role upon transfer of asylum seeker children to a 'regional processing country' is contrary to international standards and must be remedied.

Moreover, under comparative practice in North America and the EU, unaccompanied minors are exempt from the normal transfer rules pertaining to adults. Clearly, Australian practice should accord with the practice of other developed States who are parties to the 1951 Refugee Convention and unaccompanied children should not be subject to transfer to a third country such as Malaysia, Nauru or Papua New Guinea. Thus a specific provision should be put in place in Australian law which exempts unaccompanied asylum-seeker children from the operation of any third country transfer agreement, in a similar manner to that provided by the US/Canada Safe Third Country Agreement and the EU's Dublin Convention.

Conclusions

Unaccompanied asylum-seeker children are particularly vulnerable individuals. Given that they lack the protection of their home State and their parents, such children are at special risk of being exposed to harm. Because of this such children require the appointment of an independent guardian and should be exempted from removal to third countries. The reforms proposed in this article underline the need to ensure that, under Australian law, a truly independent guardian is given the important task of protecting such children from harm and acting in their best interests, and that such children will be exempt from any future third-country transfer arrangements made in relation to adult asylum-seekers. This will bring Australia into line with both international obligations and other comparable jurisdictions.

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36. Senate Legal and Constitutional Affairs Committee, Inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010, 16 December 2010, 66 [5.16].

37. I note that Mary Crock and Mary Anne Kenny also discuss similar options for reform in 'Rethinking the Guardianship of Refugee Children after the Malaysian Solution' (2012) 34 *Sydney Law* Review 437, 464–65.

38. See, eg, Children's Commissioner for England, *Landing in Kent: The experience of unaccompanied children arriving in the UK*, February 2011.