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Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
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Via email < legcon.sen@aph.gov.au

Dear Ms Dunstone

SUBMISSION TO THE GUARDIAN FOR UNACCOMPANIED CHILDREN BILL 2014

We welcome the opportunity to makes this submission on the *Guardian for Unaccompanied Children* Bill 2014.

INTRODUCTION

The Migration Law Program, within the Legal Workshop of the ANU College of Law specialises in developing and providing programs to equip people with the necessary knowledge, skills and qualifications to register as Migration Agents. Legal Workshop also provides Continual Professional Development opportunities for Registered Migration Agents.

The Migration Law Program has also been engaged in developing research into the practical operation of migration law and administration in Australia, and has previously provided submissions and presented evidence to a number of Parliamentary Committee inquiries, conferences and seminars. This submission focuses on the …..

OVERVIEW

Our submission supports the purpose of this Bill to establish an independent statutory office of Guardian for Unaccompanied Non-citizen Children (the Guardian). In particular, we are pleased that the Bill seeks to:

- address clear and valid concerns of conflict of interest in the current legislative arrangements;
- remove any unaccompanied non-citizen child from the jurisdiction of the *Immigration (Guardianship of Children) (IGOC) Act 1946* (Cth) if they are an unaccompanied child in accordance with the *Guardian for Unaccompanied Children Act 2014* (Cth);
- remove any possibility that the Minister for Immigration and Citizenship might be the guardian of an unaccompanied child;
- outline the functions, powers and obligations of the Guardian in relation to unaccompanied children; and
- require that children not be removed from Australia without written consent from the Guardian.

RECOMMENDATIONS

1. **Section 12 of the Bill be amended to provide that a child cannot be removed from Australia without written consent of the Guardian, and that consent must not be granted unless the Guardian is satisfied that removal would not be contrary to the 'best interest of the child'.**
2. **Section 12 should be satisfied before the removal of any child from Australia under the Migration Act 1958 (Cth).**
3. **Appointment of guardians and delegates who perform duties under the Act should be required to meet minimum qualification standards.**
4. **Parliament should ensure that the Office of the Guardian is appropriately resourced to carry out the range of functions.**

Our submission is in two parts. The first outlines the current situation in relation to unaccompanied minors in Australia and our international obligations. The second part addresses the points referred to above, and we provide some suggestions for further refinement of the Bill.

Australia's international obligations

In considering this Bill, we urge the Committee to consider the positive impact that the Office of the Guardian would have in ensuring that Australia properly discharges its international obligations towards unaccompanied child asylum seekers.

Australia is a signatory to both the *UN Convention on the Rights of the Child*[1] (CROC) and the *Convention Relating to the Status of Refugees* (the Refugees Convention).[2] Together, these conventions provide a framework for the proper treatment of unaccompanied child asylum seekers. There are also a number of guidelines and conclusions from UNHCR that provide further guidance.[3]

The CROC is underpinned by a number of principles, the most important of which is the 'best interests of the child'. Article 3.1 establishes that:

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.[4]

Other important articles of the CROC that are of relevance to unaccompanied children include:

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1 *Convention on the Rights of the Child*, Opened for Signature 20 November 1989, 1577 UNTS 3 (entered into Force 2 September 1990).

2 *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS 189 (entered into Force 22 April 1954).

3 See eg, UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' (1997); UNHCR, 'Guidelines on International Protection No.8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and Ratifying the 1967 Protocol Relating to the Status of Refugees' (2009).

4 *Convention on the Rights of the Child*, Opened for Signature 20 November 1989, 1577 UNTS 3 (entered into Force 2 September 1990) art 3.1.

- Article 18(1) – states shall assist guardians in carrying out their responsibilities;
- Article 22(1) – unaccompanied children shall 'receive appropriate protection and humanitarian assistance' in the enjoyment of rights under the CROC and other humanitarian instruments to which the state is a party; and
- Article 37(b) – children should not be detained unlawfully or arbitrarily.

Australia's principal obligation under the Refugees Convention is that of *non-refoulement*. Section 36(2) of the *Migration Act 1958* (Cth) *(Migration Act)* incorporates the definition of a refugee under Article 1A(2) of the Refugees Convention into domestic law. It allows for the grant of a permanent protection visa to those who meet the definition of a refugee under the Convention.

International obligations arising from a treaty do not become part of Australian law until incorporated into domestic law by statute.[5] However, the High Court in *Minister for Immigration and Ethnic Affairs v Teoh* noted that international Conventions can still assist with the interpretation of domestic law:

The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law. But the courts should act in this fashion with due circumspection when the Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law.[6]

In relation to unaccompanied children, the 'best interest' principle has not been specifically incorporated into the *Migration Act*. Much discretion is left to the government as to how they balance the "best interests" of unaccompanied children within the migration

5 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–8, 315. See also, *Kioa v West* (1985) 159 CLR 550.

6 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288.

framework. As discussed below, the current framework provides inadequate and ineffective protection for unaccompanied children in Australia and reform is needed.

The situation of unaccompanied children in Australia

Under the *Immigration (Guardianship of Children) Act 1946* (Cth) *(IGOC Act)*, the Minister for Immigration and Border Protection becomes the guardian of an unaccompanied minor in Australia and 'shall have, as guardian, the same rights, powers, duties, obligations, and liabilities as a natural guardian of the child'.[7] The responsibilities of a guardian include those related to a child's basic needs, including: food, housing health, education; and protection from harm.[8]

The *IGOC Act* distinguishes between two types of unaccompanied minors who enter Australia without a parent or guardian: Unaccompanied Humanitarian Minors (UHMs) and Unaccompanied Minor Asylum Seekers (UMAS). UHMs are those who have arrived in Australia as a result of being granted an offshore protection visa under Australia's Refugee and Humanitarian Programme. On the other hand, a UMAS is a person who has sought, but has not been granted, asylum in Australia.[9]

The Minister for Immigration and Citizenship is automatically appointed as the guardian of both UHMs and UMAs in Australia, until they turn 18 or leave Australia permanently.[10] However, the *IGOC Act* does not provide any guidance on the content of the Minister's duties and obligations as a guardian. In practice, the Minister delegates the day-to-day care

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7 *Immigration (Guardianship of Children) (IGOC) Act 1946* (Cth) s 6. The Minister remains the legal guardian of unaccompanied minors until the child reaches the age of 18 or leaves Australia permanently.

8 These general principles regarding guardianship duties can be found at common law and also in relevant State legislation.

9 Department of Immigration and Border Protection, *Procedures Advice Manual 3*.

10 *Immigration (Guardianship of Children) Act 1946* (Cth) s 6.

of unaccompanied minors to State welfare services and contracted providers, acting as custodians.[11]

Care for UHMs in Australia is delegated to an approved carer under supervision of a state or territory child welfare agency,[12] a contracted service provider,[13] the Refugee Youth Support Pilot,[14] or a relative in the community. Civil society and academics have criticised the arrangements relating to UHMs as being ineffective, including that:

- there is no national framework to ensure allocation of resources and consistent models of care across jurisdictions;[15]
- children are being compelled, in some cases, to seek their own arrangements;[16] and
- there is a lack of transparency in relation to the day-to-day care arrangements for unaccompanied minors in detention centres and in the community.[17]

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11 Under the policy the delegated guardian retains legal responsibility for the UHM and must be consulted on all matters that are not routine: such as to placing the minor in the care of another or to allow the minor to leave the State in which they reside or to travel overseas. See Department of Immigration and Border Protection, *Procedures Advice Manual 3* 'Decisions that must involve delegated guardians'.

12 An approved carer may be a non-relative whom the unaccompanied minor nominates to be their carer. State and territory government child welfare agencies must approve of the carer and the care arrangements. See Multicultural Youth Advocacy Network (Australia), 'Unaccompanied Humanitarian Minors in Australia: An Overview of National Support Arrangements and Key Emerging Issues' 8.

13 Ibid 9. In Brisbane, Perth and Adelaide, the contracted service provider is Life Without Barriers. See Life Without Barriers, *Homepage* <http://www.lwb.org.au/Pages/default.aspx>.

14 Multicultural Youth Advocacy Network (Australia), above n 12. However, the Refugee Youth Pilot is only accessible by unaccompanied minors who have received a protection visa. The Report also provides a useful outline of the national care arrangements as it applies to each state and territory.

15 UNSW (Andrew and Renata Kaldor Centre for International Refugee Law, Human Rights Law Clinic, Faculty of Arts and Social Sciences), 'Submission to the Australian Human Rights Commission's National Inquiry into Children in Immigration Detention'; Australian Churches Refugee Taskforce, 'Protecting the Lonely Children: Recommendations to the Australian Government and the UN Committee on the Rights of the Child with Respect to Unaccompanied Children Who Seek Asylum and Refuge in Australia' (July 2014).

16 See Multicultural Youth Advocacy Network (Australia), above n 12. The Report notes that some children arrange for carers to whom they have a loose connection, for example, someone they know through Facebook. There is a risk that, while well-intentioned, carers may not be able to provide the level of care required. In addition, where the carer relationship breaks down, the person may be homeless without adequate support.

Under current policy, UMAs are to be 'accommodated in community based accommodation wherever possible until their immigration status is resolved'.[18] According to statistics available as at 30 September 2014, 603 children are locked up in immigration detention. Of these, 144 are on Christmas Island and 186 in Nauru. There are 1586 children detained in the community on residence determinations and 2029 living in the community on Bridging Visas.[19]

At the time that this Bill was introduced, it is reported that there are over 32 children in detention on Christmas Island, 24 on Nauru and 338 in community detention.[20]

The need for an independent guardian to remove conflict of interest

Academics have lamented that the arrangements under the *IGOC Act* do not give any substantive content to the Minister's obligations as a guardian. Professors Mary Crock and Sue Kenny argue that 'a gulf has opened between notions of guardianship under common law relative to those pertaining under the migration context'.[21] Immigration case law has been unable to give content to the Minister's obligations under the *IGOC Act*. Instead, the

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17 Australian Churches Refugee Taskforce, 'All the Lonely Children: Questions for Policy Makers Regarding Guardianship for Unaccompanied Minors'; Multicultural Youth Advocacy Network (Australia), above n 12.

18 UMAS have different rights in relation to whether they can be resettled in Australia depending on their date of arrival. Those who arrived before 13 August 2012 and who are found to be genuine refugees may be resettled in Australia. For those who arrived after 13 August 2012 but before 19 July 2013, they may have their asylum claim processed offshore but may be resettled to Australia. Those who arrived after 19 July 2013 have their claims processed offshore in Nauru or PNG, but will not be resettled in Australia.

19 ChillOut, *Detention Statistics* <http://www.chilout.org/statsreports>.

20 Second reading speech (Sarah Hanson-Young MP), Guardianship for Unaccompanied Children Bill 2014 (Cth).

21 Mary Crock and Mary Anne Kenny, 'Rethinking the Guardianship of Refugee Children after the Malaysian Solution' (2012) 34 *Sydney L. Rev.* 437.

courts have repeatedly given primacy to the Minister's duties under the *Migration Act* over guardianship duties under the *IGOC Act*.[22]

There is a clear need for an independent guardian who can ensure the best interests of the child are protected. The need for an independent guardian is recognised around the world, and Australia is the only country where there is no clear distinction between the immigration authorities and the guardian. Both the UNHCR and the UN Committee on the Rights of the Child have emphasised that need for an independent guardian.

For example, UNHCR suggests that best practice requires an 'independent and formally accredited organisation be identified/established in each country, which will appoint a guardian or adviser as soon as the unaccompanied child is identified'.[23]

The UN Committee on the Rights of the Child in its concluding observation expressed 'deep concern' about the high risk of a conflict of interest where the legal guardian of unaccompanied minors is vested with the Minister of Immigration who is also responsible for immigration detention and determinations of refugee and visa applications'.[24] It urged Australia to 'expeditiously establish independent guardianship/support institutions for unaccompanied minors' and to ensure that migration and asylum procedures have 'the best interest of the child as a primary consideration'. [25]

The Joint Select Committee on Australia's Immigration Detention Network has previously made similar recommendations for independent guardianship.[26]

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22 Ibid. See also, *Odhiambo v Minister for Immigration & Multicultural Affairs* 122 CLR 29; *WACB v Minister for Immigration Multicultural and Indigenous Affairs* 210 ALR 190; *Plaintiff M168-10 v The Commonwealth* 279 ALR 1.

23 UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum', above n 3.

24 UN Committee on the Rights of the Child, 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations (Australia), CRC/C/AUS/CO/4' 19.

25 Ibid 20.

26 Joint Select Committee on Australia's Immigration Detention Network, 'Final Report' (2012) rec 19.

The Australian government has rejected such recommendations calling the conflict of interest a 'perceived conflict'. The government has sought to 'review and update existing programs, policies and procedures that directly impact upon the wellbeing of unaccompanied minors.[27]

There is a clear conflict of interest in relation to unaccompanied minors, since the Minister is simultaneously the 'guardian and jailer' and the 'guardian and decision-maker' of unaccompanied children – they are functions that are inherently at odds with each other.

On this basis, we support the establishment of Office of the Guardian and the removal of the children from the jurisdiction of the *ICOG Act* where they fall under the definition of an unaccompanied minor for the purposes of the Act. The removal of conflict of interest on behalf of the Minister for Immigration is a crucial reform and should be supported.

Conflict of interest in Refugee Status Determination (RSD) process

An area where the conflict of interest is most obvious is in the refugee status determination system. A cursory examination of the RSD process reveals major gaps in compliance with Articles 3.1 (best interest of the child) and 22 (duty to provide assistance) of the CROC.

For example, in relation to UMAs who make an application for a protection visa in Australia, there is no obligation on Departmental officers to take active measures to assist an unaccompanied child with his or her application. This is further exacerbated by proposed amendments to the *Migration Act 1958 (Cth)* which make it clear that the onus is on the applicant to present his or her case.[28] The Department's Procedures Advice Manual (PAM) notes that:

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27 Australian Government, 'Government Response to Recommendations by the Joint Select Committee on Australia's Immigration Detention Network' (2012) 15.

28 See Migration Amendment (Protection and Other Measures) Bill 2014 (Cth).

A UAM who raises claims or information which prima facie may engage Australia's protection obligations has the opportunity to present their protection claims with the assistance of a migration agent.[29]

However, we note that the Australian Government has recently cut funding to the IAAAS program. Although the Government has stated that it will 'provide a small amount of additional support to those who are considered vulnerable, including unaccompanied minors,' details of any arrangements have not been released.[30]

PAM also notes that interpreters should be used and 'neutral or trusted adult person' should be present during the interview.[31] It is difficult to fathom who could fulfill such a role if there is limited access to publicly funded legal support. In the absence of any such support, this leaves unaccompanied children to navigate the complex RSD procedures themselves. This is entirely inappropriate.

PAM also notes that, where an unaccompanied child makes a protection visa claim,

they should be interviewed by experienced, trained decision makers and, if possible, by decision makers who have knowledge regarding the psychological and emotional development behaviour of children.[32]

The procedures do not provide a guarantee that there will be available, in every case involving an unaccompanied child, a decision maker with relevant psychological and developmental knowledge. This makes it all the more important to have an independent guardian or representative who is adequately trained and who can ensure the best interest of the child.

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29 Department of Immigration and Border Protection, *Visa Procedures Advice Manual 3, Annex Guidelines: Unaccompanied Minors.*

30 Scott Morrison MP, *End of taxpayer funded immigration advice to illegal boat arrivals saves $100 million,* (Media Release, 31 March 2014, Canberra).

31 Ibid.

32 Ibid.

The especially vulnerable position of unaccompanied minors, the onshore asylum process may currently amount to a breach of Articles 3.1 and 22 of the CROC. This is a very clear example of where the Minister cannot and is not performing the dual functions of decision-maker and guardian at the same time; the conflict of interest is not merely a perceived conflict, it is a conflict with practical and life changing implications.

As another example, we have previously highlighted in our submission to the Migration Amendment (Protection and Other Measures Bill) 2014 (Cth), that the proposed measures to prevent split-family applications for unlawful maritime arrivals would have a disproportionate impact on unaccompanied minors.[33] We noted in that submission that denying unaccompanied minors access family reunification could amount to breach of Article 10 of the CROC. Again, this is another example of a real conflict of interest between the Minister's duties in relation administering Australia's Refugee and Humanitarian Program and acting in the best interest of the child.

The appointment of an independent Guardian would go a long way to rectifying this issue.

Ensuring that children cannot be removed unless their best interest has been considered

The Bill seeks to insert a provision that would ensure that an unaccompanied child must not be removed from Australia without the consent of the Guardian. The proposed s 12(2) requires that 'the Guardian *must not refuse* to grant any consent unless he or she is satisfied that the consent would be *prejudicial to the interests* of the unaccompanied non-citizen child'.[34]

It also provides that s 12 does not 'affect the operation of any other law regulating the departure of persons from Australia'.[35]

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33 ANU Migration Law Program, Submission to the Senate Legal and Constitutional Affairs Committee on the Migration Amendment (Protection and Other Measures Bill) 2014 (Cth).

34 Guardianship for Unaccompanied Children Bill 2014 (Cth) s 12(2).

35 Ibid s 12(4).

This provision needs to be strengthened and safeguarded from the operation of the *Migration Act* in respect of the provisions relating to removal from Australia. Under s198AD of the *Migration Act*, an unaccompanied minor who is an unauthorized maritime arrival can be removed from Australian and taken for processing in a regional processing country. In determining whether a country can be a regional processing country, the Minister is not required to consider the international obligations or domestic law of that regional processing country.[36] This means that, under current policy, an unaccompanied child can be removed from Australia without a consideration of whether it would be in his or her 'best interest' and without written consent from the Minister.

This situation needs to be addressed. If the proposed s 12 is to be effective, any removal of an unaccompanied minor subject to powers under the *Migration Act* should require consent of the Guardian. Further, in considering whether to give consent to the removal, the Guardian should have to consider whether removal would be in the 'best interest' of the child. The language of 'prejudicial to the interest' in the proposed s 12 is, narrower than the 'best interest' criteria and may give rise to some difficulty in practice. As Maria O'Sullivan has observed:

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.[37]

Adopting the 'best interest' language in the legislation would properly ensure that the Minister is *required* to consider Australia's obligations under the CROC. Currently, the Minister can exercise discretion under s 198AE and determine that s 198AD should not

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36 *Migration Act 1958* (Cth) s 198AA.

37 Maria O'Sullivan, 'The "Best Interest" of Asylum Seeker Children: Who's Guarding the Guardian?' 38 *Alternative Law Journal* 224.

apply to an unaccompanied child. However, this power is discretionary, non-compellable and can only be exercised by the Minister personally. The power is also not subject to any natural justice requirements. The only safeguard is provided for in the PAM, where officers are instructed that:

The best interests of the child should be a primary consideration when planning removal. If the removal is contrary to these obligations, the Minister can consider Australia's international obligations relating to the best interests of the child, along with the principle of family unity (article 23(1) of the ICCPR). The Ministerial Intervention Unit (MIU) may consider persons in these circumstances for referral to the Minister for consideration of exercising public interest powers.[38]

The 'best interest' principle needs to be safeguarded in the legislation. Without this, there is a real risk that unaccompanied children will be removed from Australia without proper consideration as to whether it would be in their 'best interest'.

Recommendation:

1. **Section 12 of the Bill be amended to provide that a child cannot be removed from Australia without written consent of the Guardian, and that consent must not be granted unless the Guardian is satisfied that removal would not be contrary to the 'best interest of the child'.**
2. **Section 12 should be satisfied before the removal of any child from Australia under the Migration Act 1958 (Cth).**

Adequate resourcing, education and training to perform functions

There is a clear need to provide support to unaccompanied children, both during the asylum process and for the duration of their time in Australia. The Guardian could play a very

38 Department of Immigration and Border Protection, *Visa Procedures Advice Manual 3, Annex Guidelines: Unaccompanied Minors.*

important role in coordinating and working with service providers and welfare agencies to ensure high level and consistent support and care is given across all Australian jurisdictions.

We support the proposed powers and functions that may be conferred on the Guardian. However, we note that these functions encompass a wide range of activities, including monitoring and reviewing laws to intervening in court cases and ensuring access that unaccompanied children have access to legal representation.[39]

Given the range of powers and duties, it is important that the Guardian and the Office of the Guardian be adequately resourced and staffed by appropriately trained personnel.

We agree with a previous recommendation made by the Kaldor Centre and the Human Rights Clinic that there should be 'minimum qualification standards for guardians and delegated guardians'.[40] We also note that the Bill does not define in s 17(2) and 13(1) minimum standards of qualification for the Guardian or any delegated custodian.

We suggest that the Regulations or the Act prescribe minimum training standards. This can take the form of minimum courses that must be completed before appointment as the Guardian or custodian, and the course contents can draw on best practice models developed in Europe and elsewhere.[41] Appropriate training and education should also be required to allow the staff of the Office to support the Guardian in fulfilling his or her obligations under the Act.

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39 Guardianship for Unaccompanied Children Bill 2014 (Cth) s 18.

40 UNSW (Andrew and Renata Kaldor Centre for International Refugee Law, Human Rights Law Clinic, Faculty of Arts and Social Sciences), *'Submission to the Australian Human Rights Commission's National Inquiry into Children in Immigration Detention'* (June 2014).

41 See eg, International Committee of the Red Cross, *Interagency Guiding Principles on Unaccompanied and Seperated Children* (2004); *European Network of Guardianship Institutions, Care for Unaccompanied Minors: Minimum standards, risk factors and recommendations for practitioners* (2011).

This is consistent with best practice provided for at the international level. For example, the UNHCR Guidelines suggest that:

The Guardian or adviser should have necessary expertise in the field of childcare, so as to ensure the best interest of the child are safeguarded and that the child's legal, social, health and psychological, material and educational needs are appropriately covered by, inter alia, the guardian acting as a link between child and existing specialist agencies/individuals who provide the continuum of care required by the child.[42]

We would also consider it appropriate that further consultation take place among relevant stakeholders to ensure that there are appropriate mechanisms and processes to allow the Guardian to coordinate properly with service providers and ensure that consistent, high level care is provided across jurisdictions. This includes not only training and education but also ensuring that systems for reporting and feedback and information exchange between the Guardian and those delegated with custodian functions. The success of these frameworks will depend, in part, on adequate resourcing and training.

Recommendation:

1. **Appointment of guardians and delegates who perform duties under the Act should be required to meet minimum qualification standards**
2. **Parliament should ensure that the Office of the Guardian is appropriately resourced to carry out the range of functions**

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42 UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum', above n 3, 7.