

5 November 2014



Ms Sophie Dunstone  
Committee Secretary  
Senate Legal and Constitutional Affairs Legislation Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Ms Dunstone

**Inquiry into the Migration Guardian for Unaccompanied Children Bill 2014**

Please find attached the Law Council of Australia's submission to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Inquiry into the Guardian for Unaccompanied Children Bill 2014.

Thank you for agreeing to provide the Law Council of Australia with a short extension to make this submission. We request that the Committee consider it in its Inquiry.

Yours faithfully

MARTYN HAGAN  
SECRETARY-GENERAL



# **Guardian for Unaccompanied Children Bill 2014**

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## **Senate Committee on Legal and Constitutional Affairs**

**5 November 2014**

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## Introduction

1. The Law Council welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) on the Guardian for Unaccompanied Children Bill 2014 (the Bill).
2. The Law Council supports:
  - (a) legislative resolution of the conflicting duties of the Minister for Immigration and Border Protection (the Minister) as both legal guardian of unaccompanied non-citizen children and the officer responsible for determining their visa status, including whether they are to be detained or transferred to another country to have their visa status determined, and
  - (b) establishing the role of an independent guardian of unaccompanied minors and young people seeking asylum in Australia<sup>1</sup>.
3. On this basis the Law Council endorses the principle of the Bill as one way of dealing with a clear and present problem. As the Bill was introduced by the Greens, it will require Government support to be enacted. Regardless of whether the Bill receives this support, it highlights a significant issue of legal policy and the Law Council recommends that the Committee make a clear statement recognising a need to find a solution to the existing problem.
4. The Law Council acknowledges that the Department of Immigration and Border Protection has sought to address the issue of the Minister's conflicting duties by developing clearly articulated roles and responsibilities for officers with guardianship functions delegated from the Minister and establishing a clear framework under which they operate. While welcome, these measures do not remove the inherent legal conflict in the role of the Minister or the potential for conflict with the operational roles of those officers with delegated guardianship functions.
5. A number of the Law Council's Constituent Bodies have raised this conflict as a significant concern.<sup>2</sup>
6. Directors of the Law Council have adopted a Policy on Asylum Seekers (the Policy) (**Attachment B**) with statements about the conflict inherent in the Minister's role as guardian of unaccompanied minors.
7. In addition to referring to Australia's obligations under the *Convention on the Rights of the Child* (CROC),<sup>3</sup> the Policy states:

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<sup>1</sup> As recently suggested by the Australian Children's Commissioners and Guardians (ACCG) in its submission to the Australian Human Rights Commission Inquiry into Children in Immigration Detention, see [Australian Human Rights Commission Inquiry](#) - page 7

<sup>2</sup> For example, in 2012, one of the Law Council's Constituent Bodies, the Law Institute of Victoria wrote to the then Minister of Immigration, the Hon Chris Bowen MP, outlining its concerns with the Government's implementation of regional processing, including that regional processing risks refoulement and that transfer of unaccompanied minors would be contrary to the CROC. These concerns have also been raised by the New South Wales Bar Association, the Law Society of the Northern Territory and the Law Society of South Australia.

<sup>3</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 3 (entered into force 2 September 1990) ('the CROC'). See for example, Law Council Policy on Asylum Seekers, [7(g)]. See also: Law Council of Australia, Policy Statement *Principles Applying to the Detention of Asylum Seekers* (2013) [10(d)], available at: <http://www.lawcouncil.asn.au/lawcouncil/index.php/immigration-detention-and-asylum-seekers>.

*Australia's laws and policies concerning asylum seekers must ... adhere to the Rule of Law. The Law Council considers principles defining the Rule of Law require that...protections must be put in place to avoid conflicts of interest, including conflicts of interest relating to guardianship arrangements for unaccompanied minors seeking protection.<sup>4</sup>*

8. The Law Council will not provide detailed comments in relation to each aspect of the Bill in this short submission. Instead, it will point out some features of the existing legal framework and the relevant principles of international law that may be of interest to the Committee when considering the Bill.

## How the Conflict Arises

9. The current Australian process for dealing with unaccompanied children is mandated by the *Immigration (Guardianship of Children) Act 1946* (Cth) (IGOC Act).<sup>5</sup> This legislation provides that the Minister is considered to be the legal guardian of every unaccompanied child who arrives in Australia. It states:

*The Minister shall be the guardian of the person, and of the estate in Australia, of every non-citizen child who arrives in Australia after the commencement of this Act to the exclusion of the parents and every other guardian of the child, and shall have, as guardian, the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have, until the child reaches the age of 18 years or leaves Australia permanently, or until the provisions of this Act cease to apply to and in relation to the child, whichever first happens.<sup>6</sup>*

10. Under the IGOC Act, the Minister may delegate his powers and functions as guardian to Commonwealth officers, or officers of a State or Territory government. A private individual or entity may be appointed as 'custodian' by the Minister or delegated guardian. The custodian provides for the care and welfare needs of the unaccompanied minors and can make decisions about routine, day-to-day matters. The delegated guardian retains legal responsibility for the unaccompanied minor. The care arrangements for unaccompanied minors in the community will generally be a relative or approved carer under the supervision of the relevant State or Territory child welfare agency, or a contracted service provider, such as Life Without Barriers.<sup>7</sup>

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<sup>4</sup> At [9(g)].

<sup>5</sup> Commonwealth, *Parliamentary Debates*, Senate, 9 August 1946 (Joseph Collings): The IGOC Act was introduced with the intention of serving a dual purpose: (a) To enable the Minister for Immigration to continue to act as the legal guardian of overseas children who remain in Australia after the *National Security (Overseas Children) Regulations 1940* cease to have effect;<sup>5</sup> and (b) To enable the Minister to act as legal guardian of all children who will be brought to Australia in future as immigrants under the auspices of any governmental or non-governmental migration organization. On 17 August 2012, the IGOC Act was amended by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth), which amended the *Migration Act 1958* (Cth) to permit an 'offshore entry person' to be taken to a regional processing country. These amendments made it clear that, although the Minister is the guardian of unaccompanied children who arrive in Australia, he or she ceases to be the guardian of any such children who are transferred to a regional processing country under the Migration Act. As a result of these amendments, the Minister no longer needs to consent in writing to the removal of unaccompanied children from Australia to a regional processing centre.

<sup>6</sup> See: s 6(1).

<sup>7</sup> MYAN Policy Paper, *Unaccompanied Humanitarian Minors in Australia: An overview of national support arrangements and key emerging issues*, September 2012, 8.

11. As noted by Professor Crock and Associate Professor Kenny, the Minister's rights and duties in respect of the role as guardian are not articulated in the ICOG Act but are to be found in the common law:

*As a matter of common law and equity a guardian stands in loco parentis to the child. This includes the power to make decisions for the welfare and upbringing of a child. With this power come concomitant obligations such as the duty to protect the child from harm and to provide maintenance and education. It is also argued that a guardian must provide affection and emotional support. The overarching principle is that a guardian must always act in the best interests of the child.*<sup>8</sup>

12. These legal duties come into conflict with the Minister's obligations under the *Migration Act 1958* (Cth) as the Minister is empowered to determine the visa status of non-citizens and to make a range of other decisions that affect their rights and liberties. In making these decisions the Minister must take into account a range of factors – many of which lie outside, and are in tension with the factors that as a guardian he must be exclusively influenced by.
13. The Minister's powers to make decisions in respect of non-citizens who arrive by boat (unauthorised maritime arrivals<sup>9</sup>), are particularly extensive and largely non-compellable, discretionary powers. These powers exist against a legislative regime that requires the mandatory detention of non-citizens who arrive without a valid visa. For example, the Minister can:
- decide whether or not an unauthorised maritime arrival can make a valid visa application;<sup>10</sup>
  - decide what facility and under what conditions an unauthorised maritime arrival is detained;<sup>11</sup>
  - decide whether or not an unauthorised maritime arrival can be released from immigration detention into community arrangements;<sup>12</sup>
  - decide whether or not an unauthorised maritime arrival can be issued with a bridging visa or other temporary visa;<sup>13</sup>
  - determine the process for assessing an unauthorised maritime arrival's protection claim;<sup>14</sup>
  - decide to refuse to grant protection on character or public interest grounds;<sup>15</sup> and
  - transfer the person to another country to have their protection claim assessed and if found to be owed protection, resettled in that country.<sup>16</sup>

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<sup>8</sup> Mary Crock and Mary Anne Kenny, 'Rethinking the Guardianship of Refugee Children after the Malaysian Solution' (2012) 34 Sydney Law Review 437, 449.

<sup>9</sup> As defined at s 5AA of the *Migration Act 1958* (Cth).

<sup>10</sup> Ibid s 46A.

<sup>11</sup> Ibid s 189.

<sup>12</sup> Ibid s 197AB.

<sup>13</sup> Ibid ss 46A and 195A.

<sup>14</sup> Ibid s 46A.

<sup>15</sup> Ibid s 501. Section 502 provides that the Minister may decide in the national interest that certain persons are to be excluded persons.

<sup>16</sup> Ibid s 198AD.

14. These powers apply to children, including children who arrive without a parent or guardian.
15. The conflict between these legal duties and powers also gives rise to a risk that Australia's approach to the guardianship of unaccompanied non-citizen children will fall short of the relevant international standards contained in Conventions to which Australia is party.<sup>17</sup>

## The Relevant International Standards

16. The CROC requires Australia to recognise, protect and promote the rights of all children seeking protection in Australia, which includes the requirement that in all actions concerning children, the best interests of the child be a primary consideration. This principle is reflected in the Law Council's Policy.<sup>18</sup>
17. The Committee on the Rights of the Child (CROC Committee) has stated that in general, this principle requires that the assessment and determination of the best interests should be undertaken in each individual case, in the light of the specific circumstances of each child, group of children, or children in general.<sup>19</sup> The elements to be taken into account when assessing and determining the child's best interests include: the child's views and identity; preservation of the family environment and maintaining relations; care, protection and safety of the child; vulnerability; and the child's rights to health and education.<sup>20</sup> Further, States Parties to the CROC may not exercise discretion as to whether children's best interests are to be assessed and ascribed the proper weight as a primary consideration.<sup>21</sup> As the CROC Committee notes:

*Viewing the best interests of the child as "primary" requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned.*<sup>22</sup>

18. The CROC Committee has also explained what this principle means in respect of the treatment of unaccompanied minors seeking protection.<sup>23</sup> The CROC Committee's

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<sup>17</sup> Australia is a party to the seven key international human rights treaties and has also signed or ratified a number of optional protocols to those treaties. The instruments which are most relevant to the detention of asylum seekers include: the CROC; the *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) and the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (collectively, 'the Refugee Convention'); the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 277 (entered into force 23 March 1976) ('the ICCPR'); the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976); the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('the CAT'); and the *Optional Protocol to the Convention against Torture*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006).

<sup>18</sup> See [7(g)].

<sup>19</sup> Committee on the Rights of the Child, *General Comment 14: (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), CRC/C/GC/14, (29 May 2013), [48].

<sup>20</sup> *Ibid* [52]-[79].

<sup>21</sup> *Ibid* [36]-[37].

<sup>22</sup> *Ibid* [40].

<sup>23</sup> Committee on the Rights of the Child, *General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin*, CRC/GC/2005/6, (1 September 2005), [12]-[30] (General Comment 6). The following principles of the CROC specifically apply to unaccompanied minors:



*General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin*, addresses the appointment of a guardian and advisor or legal representative pursuant to Articles 18(2)<sup>24</sup> and 20(1) of the CROC.<sup>25</sup> It provides:

*Review mechanisms shall be introduced and implemented to monitor the quality of the exercise of guardianship in order to ensure the best interests of the child are being represented throughout the decision-making process and, in particular, to prevent abuse.*<sup>26</sup>

19. These principles led the CROC Committee, in their concluding observations on Australia's Fourth Report, to recommend that Australia '[e]xpediently establish an independent guardianship/support institution for unaccompanied immigrant children'.<sup>27</sup>

20. Australia is also a party to the *Convention Relating to the Status of Refugees* (as amended by its 1967 Protocol) (the Refugee Convention). The Refugee Convention sets out the rights of refugees as well as the duties of States Parties. The United Nations High Commissioner for Refugees (UNHCR) has provided guidance as to how these rights and obligations apply to unaccompanied children who are refugees in the following statements:

- *Refugee Children: Guidelines on Protection and Care* (the 1994 Guidelines);<sup>28</sup>
- *Guidelines and Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (the 1997 Guidelines);<sup>29</sup>
- *A Framework for the Protection of Children*;<sup>30</sup>
- *Guidelines on Determining the Best Interests of the Child*;<sup>31</sup> and

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- (i) *Legal obligations of State parties for all unaccompanied or separated children in their territory and measures for their implementation;*
  - (ii) *Non-discrimination (Article 2);*
  - (iii) *Best interests of the child as a primary consideration in the search for short and long-term solutions (Article 3);*
  - (iv) *The right to life, survival and development (Article 6);*
  - (v) *Right of the child to express his or her views freely (Article 12);*
  - (vi) *Respect for the principle of non-refoulement; and*
  - (vii) *Confidentiality*

<sup>24</sup> 'For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.'

<sup>25</sup> 'A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.'

<sup>26</sup> General Comment 6, [35].

<sup>27</sup> Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention*, 66<sup>th</sup> sess, CRC/C/AUS/CO/4 (28 August 2012), [81], available at: [http://www2.ohchr.org/english/bodies/crc/docs/co/CRC\\_C\\_AUS\\_CO\\_4.pdf](http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf).

<sup>28</sup> Office of the United Nations High Commissioner for Refugees, 'Refugee Children: Guidelines on Protection and Care' (1994), available at: [http://www.unicef.org/violencestudy/pdf/refugee\\_children\\_guidelines\\_on\\_protection\\_and\\_care.pdf](http://www.unicef.org/violencestudy/pdf/refugee_children_guidelines_on_protection_and_care.pdf).

<sup>29</sup> Office of the United Nations High Commissioner for Refugees, 'Guidelines and Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum' (February 1997) ('1997 Guidelines'), available at: <http://www.refworld.org/docid/3ae6b3360.html>.

<sup>30</sup> Office of the United Nations High Commissioner for Refugees, 'A Framework for the Protection of Children' (2012), available at: <http://www.refworld.org/pdfid/4fe875682.pdf>.

- *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Refugee Convention and/or 1967 Protocol relating to the Status of Refugees (the 2009 Guidelines).*<sup>32</sup>

21. In particular, the 1997 Guidelines contain the following suggestion:

*that an independent and formally accredited organization be identified/ established in each country, which will appoint a guardian or adviser as soon as the unaccompanied child is identified. The guardian or adviser should have the necessary expertise in the field of childcaring, 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 implemented. To this end, the guardian or adviser would act as a link between the child and existing specialist agencies/individuals who would provide the continuum of care required by the child.*<sup>33</sup>

22. The UNHCR's latter publications reaffirm the procedures and recommendations outlined in the 1994 and 1997 Guidelines. Further, UNHCR's *Detention Guidelines: guidelines on the Applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention* specifically refer to unaccompanied minors as a group with special circumstances and particular needs:

*As a general rule, unaccompanied or separated children should not be detained. Detention cannot be justified based solely on the fact that the child is unaccompanied or separated, or on the basis of his or her migration or residence status. Where possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements, such as foster placement or residential homes, should be made by the competent child care authorities, ensuring that the child receives appropriate supervision. Residential homes or foster care placements need to cater for the child's proper development (both physical and mental) while longer term solutions are being considered.*<sup>34</sup>

## Addressing the Conflict

23. There are a number of legal options for resolving the legal conflict in a way that accords with Australia's international obligations. The current Bill provides one such option.

24. The Law Council has also previously suggested:

- (a) the reform or repeal of the IGOC Act; and

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<sup>31</sup> Office of the United Nations High Commissioner for Refugees, 'UNHCR Guidelines on Determining the Best Interests of the Child' (May 2008) ('2008 Guidelines'), available at: <http://www.refworld.org/docid/48480c342.html>.

<sup>32</sup> Office of the United Nations High Commissioner for Refugees, 'Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Refugee Convention and/or 1967 Protocol relating to the Status of Refugees' (22 December 2009) ('2009 Guidelines'), available at: <http://www.unhcr.org/50ae46309.html>.

<sup>33</sup> 1997 Guidelines, [5.7].

<sup>34</sup> Office of the United Nations High Commissioner for Refugees, 'Detention Guidelines: guidelines on the Applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention' (2012), [54], available at: <http://www.unhcr.org/505b10ee9.html>.



- (b) that the guardianship of unaccompanied minors form part of the mandate of the National Children's Commissioner.<sup>35</sup>

25. The Law Council has raised the issue of the legal conflict and support for legal options to resolve the conflict on a number of occasions.<sup>36</sup>

26. The Law Council notes that domestic bodies have considered this issue and possible legal options for resolving the conflict in detail. As the Law Society of Western Australia notes, the (then) Human Rights and Equal Opportunity Commission in its Report on its 2004 Inquiry into Children in Immigration Detention, recommended that an independent guardian be appointed for unaccompanied children<sup>37</sup> on the basis that:

*there is a significant conflict of interest in the role of the Minister as guardian, detention authority and visa decision-maker. The Inquiry is of the view that this*

<sup>35</sup> See: Law Council of Australia, Submission to the Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention*, 30 May 2014, available at: [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2834\\_-\\_Submission\\_to\\_National\\_Inquiry\\_into\\_Children\\_in\\_Immigration\\_Detention\\_2014.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2834_-_Submission_to_National_Inquiry_into_Children_in_Immigration_Detention_2014.pdf); Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, *Commonwealth Commissioner for Children and Young People Bill 2010*, 6 January 2011 ('Law Council submission 2010 Bill'), available at: [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=5C22F15C-9E89-369E-BE52-93A40A939816&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=5C22F15C-9E89-369E-BE52-93A40A939816&siteName=lca); Law Council of Australia, Supplementary submission to Senate Legal and Constitutional Affairs Committee, *Commonwealth Commissioner for Children and Young People Bill 2010*, 21 April 2011, available at: [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=5C22F2B2-BF6E-4C8A-CF3F-90F0E8C0FE5E&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=5C22F2B2-BF6E-4C8A-CF3F-90F0E8C0FE5E&siteName=lca); and Law Council of Australia, Senate Legal and Constitutional Affairs Committee, *Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012*, 1 June 2012, ('Law Council submission 2012 Bill'), available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2500-2599/2593%20-%20Australian%20Human%20Rights%20Commission%20Amendment%20%28National%20Children%27s%20Commissioner%29%20Bill%202012.pdf>. The Law Council also appeared before the Senate Legal and Constitutional Affairs Committee on 29 March 2011 to give evidence at its Inquiry into the *Commonwealth Commissioner for Children and Young People Bill 2010* (Cth).

<sup>36</sup> For example:

- On 18 April 2011, the Minister wrote to the Law Council advising that he was aware of comment regarding his guardianship role and of suggestions and proposals in relation to the appointment of an independent guardian. The advised that the Department was currently considering the issue;
- On 30 April 2012, Law Council officers met Departmental officials to discuss the Department's consideration of the issue;
- On 12 June 2012, the Law Council wrote to a senior Departmental officer, noting its previous communications and requesting further information on this issue;
- On 15 June 2012, the Law Council<sup>36</sup> wrote to the Minister, noting its previous advocacy on this issue and urging immediate action be taken on the recommendations in the Report of the Joint Select Committee on Migration's Inquiry into Australia's Immigration Detention Network, including the recommendation on guardianship;
- On 5 April 2013, the Law Council wrote to the Department requesting an update on the guardianship issue in light of the response it received from the Minister on 22 January 2013 that noted that the Department was exploring and developing options to use the IGOC Act in a more effective way; and
- In 2014, the Law Council has continued to request information on this issue in meetings and correspondence with the Department.

<sup>37</sup> Human Rights and Equal Opportunity Commission, *A last resort?* (April 2004) 7, ('*A last resort?*'), available at: [https://www.humanrights.gov.au/sites/default/files/document/publication/alr\\_complete.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/alr_complete.pdf). See: Recommendation 3. The Report found that Australia's immigration detention laws, as administered by the Commonwealth at that time, and applied to unauthorised arrival children, created a detention system that is fundamentally inconsistent with CROC. For example it was observed that Australia's mandatory detention system failed to ensure that: children seeking asylum receive appropriate assistance (CRC, article 22(1)) to enjoy, 'to the maximum extent possible' their right to development (CRC, article 6(2)) and their right to live in 'an environment which fosters the health, self-respect and dignity' of children in order to ensure recovery from past torture and trauma (CRC, article 39).

*conflict of interest remains despite delegation of the care responsibilities to Department Managers and Deputy Managers. In fact, the delegation to Department Managers creates an additional tension. Department Managers are not in a position to both manage the detention facility and make decisions in the best interests of the child within that context. This is especially the case when consideration of the best interests of the child requires the Manager to find that the detention facility is not adequately meeting the child's needs.*<sup>38</sup>

27. A more recent example is the recommendation of the Joint Select Committee on Migration in its March 2012 Report on Australia's Immigration Detention Network, that:

*relevant legislation be amended to replace the Minister for Immigration as the legal guardian of unaccompanied minors in the immigration detention system.*<sup>39</sup>

28. The Law Council acknowledges that the Department of Immigration and Border Protection and its predecessors have taken steps to develop administrative and practical measures to attempt to address the Minister's legal conflict. For example, the Law Council is aware that the Department has developed clearly articulated roles and responsibilities for officers with guardianship functions delegated from the Minister, and has established a clear framework under which they are to operate. It is aware that the Department is presently reviewing its procedure manual in regard to guardianship, but that on a practical level there is a designated practice management group, in addition to other practical measures, to engage with delegated guardians.
29. While these proposed measures are welcome; it is difficult for the Law Council and other members of the public to assess whether they are effective and to what extent they affect decision-making. These measures also do not address the underlying conflict in the roles of the Minister and there is also potential for conflicts between the delegated guardianship functions of Departmental officers and their operational roles.
30. The Law Council suggests there is value in the Committee learning more about these initiatives and assessing whether they constitute an effective means of resolving the legal conflict in a way that aligns with the relevant international standards.

## Issues to consider

31. If the Bill is not pursued, the Law Council suggests that the Committee recommend that alternative legal and administrative options be explored urgently to address the conflict of duties, with a view to establishing the role of an independent guardian of unaccompanied minors and young people seeking asylum in Australia. The Committee could recommend that the Government conduct a public consultation on the most appropriate models available to implement this role. This would provide institutions such as the National Children's Commissioner and/or the Australian Children's Commissioners and Guardians with the opportunity to advise on how such a role could best be implemented.

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<sup>38</sup> Ibid at [14.4.4].

<sup>39</sup> Recommendation 19 of the Joint Select Committee on Australia's Immigration Detention Network, *Report* (March 2012), xxi.

32. If the Bill is pursued, the Law Council suggests the Committee consider:

- the extent to which this Bill is sufficient to replace the IGOC Act, rather than merely amending the Act as proposed;
- the extent to which the Guardian will have powers comparable to the National Children's Commissioner;
- the necessity of including any offences in the Bill, by reference to the adequacy of existing offences under the *Criminal Code Act 1995* (Cth),<sup>40</sup> and
- the interaction of this Bill with the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, introduced to Parliament on 25 September 2014.

## Acknowledgement

The Law Council of Australia acknowledges the assistance of the Law Council's National Human Rights Committee and the Law Society of Western Australia in the preparation of this submission.

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<sup>40</sup> The Bill creates certain offences at proposed sub-section 12(3); section 15 (this offence reflects that at s 9 of the IGOC Act); and sub-section 37(g) (this offence is similar to that at sub-s 12(f) of the IGOC Act).

## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2014 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.