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GUARDIAN FOR UNACCOMPANIED CHILDREN BILL 2014

The International Commission of Jurists has as its primary objectives protection of the Rule of Law and promotion of the observance of human rights and fundamental freedoms.

The Western Australian Branch of the ICJ notes that the Senate Legal and Constitutional Affairs Committee is currently considering the above Bill and welcomes the opportunity to make a submission concerning the Bill.

The ICJWA agrees with what the promoter of the Bill Senator Hanson-Young says in the Explanatory Memorandum to the Bill:

> As a signatory to the UN Convention on the Rights of the Child, Australia has obligations to ensure that the best interests of all children are adequately cared for, and particularly the interests of vulnerable cohorts such as unaccompanied asylum seeker children who may require special protection.

The Bill is intended to establish an independent statutory office of Guardian for Unaccompanied Non-citizen Children (the Guardian) to advocate for the best interests of non-citizen children who arrive in Australia or Australian external territories to seek humanitarian protection, who are unaccompanied by their parents or another responsible adult.

The principle effect of the Bill is to provide a mechanism to replace the default position of the Minister for Immigration being the guardian of Unaccompanied Non-citizen Children, which is less

than compatible with the role of the Minister in directing the Commonwealth Government's border protection policy.

The Bill appropriately engages Articles 3, 6, 12 and 37 of the *Convention on the Rights of the Child*. It provides for an agency with the task of

- focussing upon the best interests of the child;
- protection, care and advocacy for such children;
- taking into account the views of children capable of expressing them;
- Inquiring into the appropriateness of detention, when viewed as a measure of last resort; and
- Providing for prompt access to legal and other assistance and a means to challenge the legality of a deprivation of liberty before e competent, independent and impartial authority.

As the Human Rights Commissioner, Dr Sev Ozdowski said in the Preface to the report of the Australian Human Rights Commission: *A last resort? National Inquiry into Children in Immigration Detention*:

> The arrest, detention or imprisonment of a child shall be ... used only as a measure of last resort and for the shortest appropriate period of time. Few people would disagree with these words from the Convention on the Rights of the Child. In fact, most Australians would agree that all other options should be explored before a child is locked up. The words from the Convention form the basis for the title of the report of the National Inquiry into Children in Immigration Detention: A last resort?
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> A last resort? talks about children who arrived in Australia to seek protection from despotic regimes like those of Iraq and Afghanistan where breaches of human rights were the norm. Most of these children arrived with their families, some were unaccompanied. More than 92 percent of all children arriving by boat since 1999 have been recognised by Australian authorities to be refugees. In the case of Iraqi children the figures are as high as 98 percent. This means they left their homelands because they had little real choice. Seeking asylum elsewhere was, for them, a last resort.
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> Yet, since 1992, we have welcomed these children by taking them to remote facilities, detaining them there to wait for a visa. Australia's immigration policy makes the detention of these children the first and only option and it puts no limit on the time that they are held there. Children wait in detention for months or years - one child spent almost five and a half years in detention before being released into the community as a refugee. In fact, as at the end of 2003, the majority of children in detention had been held there for more than two years. This policy seems a complete departure from the principle of detention as a measure of last resort.

The Inquiry made the following major findings in relation to Australia's mandatory immigration detention system as it applied to children who arrived in Australia without a visa (unauthorised arrivals) over the period 1999-2002.

1. Australia's immigration detention laws, as administered by the Commonwealth, and applied to unauthorised arrival children, create a detention system that is fundamentally inconsistent with the *Convention on the Rights of the Child* (CRC).

In particular, Australia's mandatory detention system fails to ensure that:

a. detention is a measure of last resort, for the shortest appropriate period of time and subject to effective independent review (CRC, article 37(b), (d))
b. the best interests of the child are a primary consideration in all actions concerning children (CRC, article 3(1))
c. children are treated with humanity and respect for their inherent dignity (CRC, article 37(c))
d. 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).

2. Children in immigration detention for long periods of time are at high risk of serious mental harm. The Commonwealth's failure to implement the repeated recommendations by mental health professionals that certain children be removed from the detention environment with their parents, amounted to cruel, inhumane and degrading treatment of those children in detention (CRC, article 37(a) - Chapter 9).
3. At various times between 1999 and 2002, children in immigration detention were not in a position to fully enjoy the following rights:
    a. the right to be protected from all forms of physical or mental violence (CRC, article 19(1) - Chapter 8)
    b. the right to enjoy the highest attainable standard of physical and mental health (CRC, article 24(1) - Chapters 9, 10)
    c. the right of children with disabilities to 'enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community' (CRC, article 23(1) - Chapter 11)
    d. the right to an appropriate education on the basis of equal opportunity (CRC, article 28(1) - Chapter 12)
    e. the right of unaccompanied children to receive special protection and assistance to ensure the enjoyment of all rights under the CRC (CRC, article 20(1) - Chapters 6, 7, 14).

A significant recommendation of the Inquiry was that –

> An independent guardian should be appointed for unaccompanied children and they should receive appropriate support.

That recommendation was based on the following findings, at 14.4.4 of the Report:

> The Inquiry finds that the Minister and his delegates failed to exercise their duty to address their mind to the best interests of each unaccompanied child in order to ensure the full enjoyment of their rights within detention centres.
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> The Department's practical involvement in the care of unaccompanied children was minimal and its monitoring of the care provided to unaccompanied children by ACM was ineffective to protect them. There is very little evidence of Departmental monitoring of case management plans; Department officers attended very few meetings within detention centres regarding unaccompanied children, particularly in Woomera; and teleconferences regarding unaccompanied children only commenced in December 2001 - long after unaccompanied children had entered detention centres. Significant incidents involving unaccompanied children were scarcely mentioned in Department monitoring documents.

However, the Inquiry recognises that there were significant impediments to the Department Managers effectively fulfilling their role as delegated guardian for unaccompanied children. They did not have child care qualifications or experience. They were not provided with training specific to ensuring that the needs of unaccompanied children were met. There were no guidelines describing the role of the Department Manager.

Furthermore, 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 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.

Taking into account the findings and recommendations of the Australian Human Rights Commission, the ICJWA strongly supports the passage of this legislation.

Yours faithfully

G McIntyre

G M G McIntyre SC
President
ICJWA
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