

# CHAPTER 2

## Key issues

2.1 This chapter discusses the key issues raised in submissions to the inquiry. In principle, submitters supported the main object of the Bill, establishing an independent guardian for unaccompanied children who do not have an appropriate visa or immigration authority for entry into Australia (unaccompanied non-citizen children).<sup>1</sup> Some submitters supported the passage of the Bill in its current form.<sup>2</sup> However, other submitters suggested that the Bill should be amended or take on a different form in order to better achieve its objects.<sup>3</sup>

### Establishing an independent guardian

2.2 Submitters raised a variety of points in arguing the case for an independent guardian for unaccompanied non-citizen children. The arguments centred on the unique situation of unaccompanied non-citizen children, the need to avoid any conflict of interest that may arise from the different roles of the Minister, and the need to satisfy Australia's international obligations. This chapter will deal with each of these points in turn.

### *The unique situation of unaccompanied non-citizen children*

2.3 Unaccompanied children who have fled their home country to come to Australia are far more vulnerable than adults in similar circumstances. As Catholic Social Services Australia noted in its submission:

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- 1 Catholic Social Services Australia, *Submission 1*, p. 3; Western Australian Branch of the International Commission of Jurists, *Submission 2*, pp 3–4; Commissioner for Children and Young People (Western Australia), *Submission 3*, p. 1; Castan Centre for Human Rights Law, *Submission 4*, p. 3; UNSW Human Rights Clinic and the Andrew & Renata Kaldor Centre for International Refugee Law, *Submission 5*, p. 1; Refugee Advice & Casework Service (Aust) Inc, *Submission 6*, p. 1; UnitingJustice Australia, *Submission 7*, p. 4; Asylum Seeker Resource Centre, *Submission 8*, p. 4; Australian Churches Refugee Taskforce, *Submission 9*, p. 2; Australian Human Rights Commission, *Submission 10*, p. 3; ANU College of Law Migration Law Program, *Submission 11*, p. 2; Australian Catholic Migrant and Refugee Office, *Submission 12*, p. 4; Australian Lawyers for Human Rights, *Submission 13*, p. 5; Law Council of Australia, *Submission 14*, p. 2.
  - 2 Western Australian Branch of the International Commission of Jurists, *Submission 2*, p. 4; Monash University Castan Centre for Human Rights Law, *Submission 4*, p. 3; UnitingJustice Australia, *Submission 7*, p. 4; Asylum Seeker Resource Centre, *Submission 8*, p. 2; Australian Churches Refugee Taskforce, *Submission 9*, p. 2; Australian Human Rights Commission, *Submission 10*, p. 1; Australian Catholic Migrant and Refugee Office, *Submission 12*, p. 4.
  - 3 UNSW Human Rights Clinic and the Andrew & Renata Kaldor Centre for International Refugee Law, *Submission 5*, p. 1; ANU College of Law Migration Law Program, *Submission 11*, p. 2; Australian Lawyers for Human Rights, *Submission 13*, p. 6; Law Council of Australia, *Submission 14*, p. 10.

Due to their dependence on the care of adults for access to the requirements of life (food, shelter, education, health care), children are inherently vulnerable and, in times of crisis, are in need of special protection.<sup>4</sup>

2.4 The Castan Centre for Human Rights Law reiterated this point, stating that unaccompanied asylum-seeker children are particularly vulnerable individuals who are at special risk of being exposed to harm given that they lack the protection of both their home state and their parents.<sup>5</sup>

2.5 At present the IGOC Act makes the Minister the legal guardian of all IGOC minors, including those who have been accepted as refugees. In contrast, as explained by the UNSW Human Rights Clinic and the Andrew & Renata Kaldor Centre for International Refugee Law, the Bill would only apply to unaccompanied non-citizen minors who do not have an appropriate visa or immigration authority for entry into Australia. It may be assumed that this would leave the Minister as the guardian of unaccompanied minors who have been accepted as refugees potentially creating two legislative regimes to govern unaccompanied minors. The Kaldor Centre and the Human Rights Clinic submitted:

...the distinction between these categories cannot be justified as a matter of policy, and it would be preferable to consider an integrated approach to both categories of unaccompanied non-citizen children.<sup>6</sup>

### ***The different roles of the Minister***

2.6 As noted in Chapter 1, under the IGOC Act, the Minister is the legal guardian of unaccompanied non-citizen children to the exclusion of the parents and every other guardian of the child. The Law Council of Australia quoted an article by Professor Mary Crock and Associate Professor Mary Anne Kenny which explained that:

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.<sup>7</sup>

2.7 The Castan Centre added to this by stating that:

...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

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4 Catholic Social Services Australia, *Submission 1*, p. 2.

5 Castan Centre for Human Rights Law, *Submission 4*, p. 2. See also Asylum Seeker Resource Centre, *Submission 8*, pp 2 and 5; Australian Churches Refugee Taskforce, *Submission 9 Attachment 1*, 'Protecting the Lonely Children', p. 14.

6 UNSW Human Rights Clinic and the Andrew & Renata Kaldor Centre for International Refugee Law, *Submission 5*, p. 1.

7 Law Council of Australia, *Submission 14*, p. 4.

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manner as their own interests...the Minister's powers and duties in this context are 'akin to that of a parent'.<sup>8</sup>

2.8 The Minister also has extensive powers under the Migration Act to determine matters relating to immigration status. Submitters queried whether the Minister's powers under the Migration Act were in conflict with the Minister's duties as guardian.<sup>9</sup> Some submitters also argued that there is a clear conflict of interest between the different roles and the practical delegation of care responsibilities does nothing to rectify this conflict.<sup>10</sup>

2.9 The Refugee Advice & Casework Service (RACS) noted its concerns that where a conflict between the roles becomes apparent:

...courts have held that the Minister's responsibilities under the Migration Act take precedence over the Minister's responsibilities under the Immigration (Guardianship of Children) Act 1946 (Cth)...<sup>11</sup>

2.10 Although the Bill aims to remove this perceived conflict by establishing an independent role of Guardian, ALHR argued that the Bill may not necessarily achieve this goal. ALHR explained that clause 17 of the Bill proposes that the Minister would have an input in the appointment of the Guardian and, under clause 22, the Minister could appoint an acting Guardian during a vacancy in the office of the Guardian. ALHR speculated that these proposed functions of the Minister could impinge on the independence of the proposed office.<sup>12</sup>

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8 Castan Centre for Human Rights Law, *Submission 4*, p. 2.

9 Catholic Social Services Australia, *Submission 1*, p. 1; Western Australian Branch of the International Commission of Jurists, *Submission 2*, p. 4; Commissioner for Children and Young People (Western Australia), *Submission 3*, p. 2; Castan Centre for Human Rights Law, *Submission 4*, p. 2; UNSW Human Rights Clinic and the Andrew & Renata Kaldor Centre for International Refugee Law, *Submission 5*, p. 1; Refugee Advice & Casework Service (Aust) Inc, *Submission 6*, p. 2; UnitingJustice Australia, *Submission 7*, p. 3; Asylum Seeker Resource Centre, *Submission 8*, p. 2; Australian Churches Refugee Taskforce, *Submission 9*, pp 1–2; Australian Human Rights Commission, *Submission 10*, pp 2–3; ANU College of Law Migration Law Program, *Submission 11*, pp 7–11; Australian Catholic Migrant and Refugee Office, *Submission 12*, p. 3; Australian Lawyers for Human Rights, *Submission 13*, pp 3–4; Law Council of Australia, *Submission 14*, p. 2.

10 Catholic Social Services Australia, *Submission 1*, p. 1; UNSW Human Rights Clinic and the Andrew & Renata Kaldor Centre for International Refugee Law, *Submission 5 Attachment*, pp 14–15; Asylum Seeker Resource Centre, *Submission 8*, p. 2; Australian Churches Refugee Taskforce, *Submission 9*, pp 1–2; ANU College of Law Migration Law Program, *Submission 11*, p. 9; Australian Catholic Migrant and Refugee Office, *Submission 12*, pp 1, 3; Australian Lawyers for Human Rights, *Submission 13*, pp 3–4; Law Council of Australia, *Submission 14*, p. 9.

11 Refugee Advice & Casework Service (Aust) Inc, *Submission 6*, p. 2. See also Australian Churches Refugee Taskforce, *Submission 9 Attachment 1*, 'Protecting the Lonely Children', p. 20.

12 Australian Lawyers for Human Rights, *Submission 13*, pp 8–9.

2.11 The Kaldor Centre and the Human Rights Clinic highlighted the current policy and practice of the Minister and the department to engage delegated guardians and custodians, as outlined in Chapter 1.<sup>13</sup> As noted in the department's submission to the AHRC 2014 inquiry, where there is a potential conflict in the roles of the Minister under the Migration Act and the IGO Act, guardianship is automatically delegated to specific officers of the department, to avoid any conflict.<sup>14</sup> The submission of the Law Council of Australia acknowledged 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.<sup>15</sup>

2.12 The Kaldor Centre and the Human Rights Clinic argued that the Bill does not sufficiently define whether and how the Guardian's role is to operate with existing state, territory and non-governmental service providers. The submission acknowledged that:

...subsection 18(4)(d) of the Bill makes it mandatory for the Guardian to refer a matter to another appropriate agency or organisation 'if necessary', but provides no guidance as to when such necessity might arise. Section 19 provides that the Guardian must cooperate with other Commonwealth agencies that provide services affecting unaccompanied non-citizen children, but there is no reference to cooperation or consultation with State, Territory and non-governmental service providers.<sup>16</sup>

2.13 The Kaldor Centre and the Human Rights Clinic opined that 'having the Guardian operate in isolation from State, Territory and non-governmental service providers would fail to adequately utilise accumulated experience and accepted best

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13 See UNSW Human Rights Clinic and the Andrew & Renata Kaldor Centre for International Refugee Law, *Submission 5 Attachment*, p. 4.

14 Department of Immigration and Border Protection, *Submission 45 to the Australian Human Rights Commission's National Inquiry into Children in Immigration Detention 2014*, p. 59 at <https://www.humanrights.gov.au/sites/default/files/Submission%20No%2045%20-%20Department%20of%20Immigration%20and%20Border%20Protection.pdf> (accessed 13 January 2015).

15 Law Council of Australia, *Submission 14*, p. 9.

16 UNSW Human Rights Clinic and the Andrew & Renata Kaldor Centre for International Refugee Law, *Submission 5*, pp 1–2. See also Australian Lawyers for Human Rights, *Submission 13*, pp 9–10.

practice'.<sup>17</sup> The submission went on to claim that further problems could arise from the need to ensure adequate resources for the proposed office. It therefore recommended that prior to establishing an independent office, it would be prudent to properly consult with stakeholders (including the department) about the operational viability of and costs associated with the proposed office.<sup>18</sup>

2.14 This recommendation is echoed in the submission of the ANU College of Law Migration Law Program, which stated:

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.<sup>19</sup>

### ***Obligations arising from international law***

2.15 As noted in Chapter 1, Australia is a signatory to the CRC, which imposes an obligation on the Australian government to legislate using the best interests of the child principle as a primary consideration.

2.16 The ANU College of Law Migration Law Program claimed that the 'best interests' principle of unaccompanied children has not been specifically incorporated into the Migration Act and much discretion is left to the Minister as to how the Minister balances the best interests of unaccompanied children with the migration framework.<sup>20</sup>

2.17 The United Nations High Commissioner for Refugees guidelines for the protection and care of unaccompanied minors state that a 'guardian or adviser should have the necessary expertise in the field of childcare, 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'.<sup>21</sup> ALHR submitted that the Minister is not an appropriate guardian as the Minister lacks the necessary expertise in the field of childcare.<sup>22</sup> However, it is questionable whether the proposed Guardian would help to

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17 UNSW Human Rights Clinic and the Andrew & Renata Kaldor Centre for International Refugee Law, *Submission 5*, p. 2. See also Australian Lawyers for Human Rights, *Submission 13*, p. 9.

18 UNSW Human Rights Clinic and the Andrew & Renata Kaldor Centre for International Refugee Law, *Submission 5 Attachment*, pp 15–16.

19 ANU College of Law Migration Law Program, *Submission 11*, p. 15.

20 ANU College of Law Migration Law Program, *Submission 11*, p. 4.

21 See UnitingJustice Australia, *Submission 7*, p. 2; Australian Lawyers for Human Rights, *Submission 13*, p. 5.

22 Australian Lawyers for Human Rights, *Submission 13*, p. 5.

alleviate these concerns given that some submissions have criticised the Bill for its failure to specify the relevant qualifications required to take up the role of Guardian by failing to define terms such as 'suitable person' or 'appropriate qualifications'.<sup>23</sup> The Kaldor Centre and the Human Rights Clinic argued that the Bill lacks adequate accountability mechanisms to ensure that services are provided transparently and appropriately and therefore the proposed framework needs to be amended to ensure minimum qualifications and guidelines for the Guardian and custodians discharging their duty. The Bill would also need to include provisions establishing a mandatory training program and transparent accountability system.<sup>24</sup>

2.18 As the submission of the Kaldor Centre and the Human Rights Clinic explained:

International law and practice demonstrates the need for guardians to be accountable for the performance of their obligations. An effective monitoring and enforcement mechanism is crucial to implement and ensure oversight of, and accountability for, standards of guardianship.<sup>25</sup>

2.19 Finally, both ALHR and the Kaldor Centre and the Human Rights Clinic voiced concerns relating to the Bill's failure to clarify whether the proposed Guardian has any custodial responsibilities outside of nominating a custodian under clause 13 of the Bill. In the current form of the Bill, the Guardian would be obliged to advocate for the provision of basic services, but there would be no legislative duty to provide the services.<sup>26</sup>

## **Comments and Recommendation**

2.20 The committee notes the concerns of submitters in relation to the multiple roles of the Minister for Immigration and Border Protection and the need to take Australia's obligations under international law into account when legislating.

2.21 The committee acknowledges the efforts of the Department of Immigration and Border Protection in developing clearly articulated roles and responsibilities for officers with guardianship functions delegated from the Minister so to as to negate the effect of any perceived conflict. The committee considers that these measures are sufficient to avoid any actual conflict between the roles. As such, the committee agrees with the Department of Immigration and Border Protection that any conflict between the multiple roles of the Minister does not represent an 'actual' conflict but

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23 UNSW Human Rights Clinic and the Andrew & Renata Kaldor Centre for International Refugee Law, *Submission 5*, pp 1–2; ANU College of Law Migration Law Program, *Submission 11*, pp 14–15; Australian Lawyers for Human Rights, *Submission 13*, p. 8.

24 UNSW Human Rights Clinic and the Andrew & Renata Kaldor Centre for International Refugee Law, *Submission 5*, pp 1–2. See also ANU College of Law Migration Law Program, *Submission 11*, p. 15.

25 UNSW Human Rights Clinic and the Andrew & Renata Kaldor Centre for International Refugee Law, *Submission 5 Attachment*, p. 10.

26 UNSW Human Rights Clinic and the Andrew & Renata Kaldor Centre for International Refugee Law, *Submission 5*, p. 2; Australian Lawyers for Human Rights, *Submission 13*, p. 9.

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may be described as a 'perceived' conflict. The committee also questions whether replacing the Minister with an independent guardian would have any practical effect on the best interests of non-citizen unaccompanied minors. Moreover, given that clause 20 of the Bill proposes that the Guardian may delegate functions and powers to a public servant, which could include an officer of the Department of Immigration and Border Protection, the committee queries whether the Bill would result in any substantive change to the existing framework.

2.22 The committee recognises that international law only imposes an obligation on the Australian government to make the 'best interests' principle *a* primary consideration when legislating, not *the* primary consideration. It follows that it would be acceptable for other factors to occasionally outweigh the 'best interests' principle. As such, the committee accepts that the existing legislation sufficiently incorporates the principle of the 'best interests' of the child as *a* primary consideration.

2.23 As noted, the Bill fails to place a legislative duty on the Guardian to provide services that a custodian would normally provide. The Bill also fails to formalise existing agreements that involve cooperation and consultation with state, territory and non-governmental service providers. Both of these omissions could result in a movement away from best practice and, as such, could seriously undermine the principle of 'best interests' of the child.

2.24 Finally, the committee notes that the Bill was drafted without consulting the Department of Immigration and Border Protection. This leads the committee to query the workability of the Bill.

2.25 The Committee recommends that the Department of Immigration and Border Protection consider the submissions made to the inquiry and determine whether amendments and improvements could be made to the current legislation, but the committee recommends that any such changes continue to be made within the existing framework.

### **Recommendation 1**

**2.26 The committee recommends that the Bill not be passed.**

**Senator the Hon Ian Macdonald  
Chair**

