

The Senate

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Legal and Constitutional Affairs  
Legislation Committee

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Guardian for Unaccompanied Children Bill 2014

February 2015

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ISBN 978-1-76010-140-4

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# CHAPTER 1

## Introduction and Background

### Referral of the inquiry

1.1 On 28 August 2014, the Guardian for Unaccompanied Children Bill 2014 (Bill) was referred pursuant to a recommendation of the Selection of Bills Committee to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 5 February 2015.<sup>1</sup> On 5 February 2015, the reporting date was extended to 9 February 2015. The Bill is a private senator's bill that was introduced into the Senate by Senator Hanson-Young on 16 July 2014.<sup>2</sup>

### Conduct of the inquiry

1.2 In accordance with usual practice, the committee advertised the inquiry on its website and wrote to a number of organisations and individual stakeholders inviting submissions by 23 October 2014. Details of the inquiry were placed on the committee's website at [http://www.aph.gov.au/senate\\_legalcon](http://www.aph.gov.au/senate_legalcon).

1.3 The committee received 14 submissions to the inquiry. The submissions, published on the committee's website, are listed at Appendix 1. The committee did not hold a public hearing for this inquiry.

### Purpose of the bill

1.4 The Bill seeks to establish a position of Guardian for Unaccompanied Non-citizen Children (Guardian) to act as the head of a new statutory agency, the Office of the Guardian for Unaccompanied Non-citizen Children (Office).<sup>3</sup> The Bill sets out the functions and powers of the proposed Guardian and Office, and the general terms and conditions of the Guardian's appointment.<sup>4</sup> Finally, the Bill would make consequential amendments to the *Immigration (Guardianship of Children) Act 1946* (Cth) (IGOC Act) and the *Migration Act 1958* (Cth) (Migration Act) to reflect the role of the Guardian.<sup>5</sup>

1.5 In her second reading speech, Senator Hanson-Young stated that the Guardian would 'provide expert care and advocacy for asylum seeker children who arrive in Australia on their own', stating that:

Under current law, the Minister for Immigration has a responsibility to look after unaccompanied children's best interests as their appointed Guardian under the *Immigration (Guardianship of Children) Act 1946* as well as a

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1 *Journals of the Senate*, No. 48–28 August 2014, p. 1341.

2 *Journals of the Senate*, No. 44–16 July 2014, p. 1212.

3 Guardian for Unaccompanied Children Bill 2014, Part 3 Division 1 and Part 4.

4 Guardian for Unaccompanied Children Bill 2014, cl. 18.

5 Guardian for Unaccompanied Children Bill 2014, Sch. 1.

responsibility for deciding whether or not to detain them under the *Migration Act 1958*.<sup>6</sup>

1.6 The Senator explained that the Bill would aim to rectify this apparent conflict of interest as, if the Bill was passed, in relation to unaccompanied non-citizen children the new Guardian:

...will be responsible for ensuring that the best interests of the child are always the paramount consideration. The Guardian will be in a position to advocate that children should not be detained by reason of their immigration status, or, if detained, for the shortest possible period of time. The Guardian will also be mandated to oversee and ensure the provision of legal and other assistance such as care, accommodation, education, language and health support amongst other functions.<sup>7</sup>

### **Other inquiries examining guardianship of unaccompanied children**

1.7 Although no inquiry has been dedicated to the specific issue of guardianship of unaccompanied non-citizen children, several inquiries have touched on the issue, these include:

- the Human Rights and Equal Opportunity Commission National Inquiry into Children in Immigration Detention 2004 (2004 inquiry);
- the Australian Human Rights Commission (AHRC) 2014 inquiry into children held in immigration detention;
- the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010; and
- a Joint Select Committee on Australia's Immigration Detention Network inquiry into guardianship of unaccompanied non-citizen children in detention in 2012.

These are briefly summarised in the following sections.

#### ***The Human Rights and Equal Opportunity Commission Inquiry***

1.8 The report of the Human Rights and Equal Opportunity Commission 2004 inquiry stated that:

There is a fundamental conflict of interest between the Minister as guardian of unaccompanied children in detention centres and the Minister as the person who makes decisions about visas.<sup>8</sup>

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6 *Senate Hansard*, 16 July 2014, p. 68.

7 *Senate Hansard*, 16 July 2014, p. 69.

8 Human Rights and Equal Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention*, April 2004, p. 12, 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) (accessed 7 January 2015).

1.9 The report recommended that 'an independent guardian should be appointed for unaccompanied children and they should receive appropriate support'.<sup>9</sup>

1.10 The AHRC stated that the reason for its decision to establish the National Inquiry into Children in Immigration Detention 2014 (2014 inquiry) was to investigate what has changed in 10 years since the 2004 inquiry and to give a voice to children and families directly affected by detention. The terms of reference of the 2014 inquiry involved an assessment of:

whether laws, policies and practices relating to children in immigration detention meet Australia's international human rights obligations, with particular attention to:

- the appropriateness of facilities in which children are detained;
- the impact of the length of detention on children;
- measures to ensure the safety of children;
- provision of education, recreation, maternal and infant health services;
- the separation of families across detention facilities in Australia;
- the guardianship of unaccompanied children in detention in Australia;
- assessments conducted prior to transferring children to be detained in 'regional processing countries'; and
- progress that has been made during the 10 years since the Commission's 2004 report: *A last resort? National Inquiry into Children in Immigration Detention*.

1.11 The report of the 2014 inquiry was sent to the office of the Australian Attorney-General on 11 November 2014, but at the time of drafting this report it had not been tabled.<sup>10</sup>

### ***Commonwealth Commissioner for Children and Young People Bill 2010 inquiry***

1.12 On 12 May 2011, the Senate Legal and Constitutional Affairs Legislation Committee (committee) tabled a report on the inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010.<sup>11</sup> The report noted that the then Department of Immigration and Citizenship (DIAC):

...submitted that it is aware of the potential perception of a conflict of interest under the current arrangements. Consequently, 'DIAC has been exploring alternative ways in which the IGOC Act [Immigration

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9 Human Rights and Equal Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention*, April 2004, p. 7, 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) (accessed 7 January 2015).

10 Australian Human Rights Commission, *National Inquiry into Children in Detention 2014: Discussion Paper*, at <https://www.humanrights.gov.au/publications/national-inquiry-children-immigration-detention-2014-discussion-paper> (accessed 7 January 2015); see also <https://www.humanrights.gov.au/national-inquiry-children-immigration-detention-index> (accessed 7 January 2015).

11 *Journals of the Senate*, No. 30–12 May 2011, p. 918.

(Guardianship of Children) Act 1946] could better meet the objective of providing for the care and welfare of unaccompanied minors'.<sup>12</sup>

1.13 The inquiry examined the possibility of whether a proposed Commonwealth Commissioner for Children and Young People could take the place of the Minister, by acting as the legal guardian for non-citizen unaccompanied minors as submitted by the UNHCR. However, the committee took the view that it would not be appropriate for the proposed Commissioner to act as the legal guardian of unaccompanied non-citizen minors, but the proposed 'Commissioner should have oversight of the entity acting as guardian, to ensure the rights and wellbeing of children and young people are upheld'.<sup>13</sup>

1.14 The call for the appointment of an independent children's guardian for unaccompanied minors seeking asylum in Australia was repeated by submitters to the committee's inquiry into the Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012 [Provisions].<sup>14</sup>

### ***Joint Select Committee on Australia's Immigration Detention Network***

1.15 On 30 March 2012, the President of the Senate received the Final Report of the Joint Select Committee on Australia's Immigration Detention Network, tabled in the Senate on 10 May 2012.<sup>15</sup> In its report, the Joint Select Committee stated:

The Committee notes community concern regarding the guardianship of unaccompanied minors, and recognises the potential for a conflict of interest to arise where the Minister is simultaneously responsible for detaining asylum seekers for the purposes of processing their claims and acting in the best interest of unaccompanied minors seeking asylum. The Committee is of the view that the legal guardianship of unaccompanied

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12 Senate Legal and Constitutional Affairs Legislation Committee, *Commonwealth Commissioner for Children and Young People Bill 2010: Report*, May 2011, p. 55, at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2010-13/commissionerforchildrenandyoungpeople/report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/commissionerforchildrenandyoungpeople/report/index) (accessed 7 January 2015).

13 Senate Legal and Constitutional Affairs Legislation Committee, *Commonwealth Commissioner for Children and Young People Bill 2010: Report*, May 2011, pp 55 and 66, at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2010-13/commissionerforchildrenandyoungpeople/report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/commissionerforchildrenandyoungpeople/report/index) (accessed 7 January 2015).

14 Senate Legal and Constitutional Affairs Legislation Committee, *Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012 [Provisions]*, June 2012, p. 14, at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed%20inquiries/2010-13/nationalchildrenscommissioner/report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/2010-13/nationalchildrenscommissioner/report/index) (accessed 7 January 2015).

15 *Journals of the Senate*, No. 90–10 May 2012, p. 2445.

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minors in immigration detention should be transferred from the Minister for Immigration as soon as practicable.<sup>16</sup>

1.16 The Joint Select Committee recommended that:

...relevant legislation be amended to replace the Minister for Immigration as the legal guardian of unaccompanied minors in the immigration detention system.<sup>17</sup>

### **Immigration (Guardianship of Children) Act 1946**

1.17 Under the IGO Act, a child who intends, or is intended, to become a permanent resident of Australia is considered to be a 'non-citizen child' (IGOC minor) if he or she arrives in Australia without a parent or a carer and without a valid visa.<sup>18</sup> Under the current law, the Minister administering the IGO Act, the Minister for Immigration and Border Protection, is the legal guardian of an IGO minor to the exclusion of the parents and every other guardian of the child.<sup>19</sup> The Minister is empowered to delegate his or her powers and duties of guardianship to any officer or authority of the Commonwealth or of any state or territory<sup>20</sup> and he or she may place the IGO minor into the custody of a person who is willing to act in that capacity and is deemed to be a suitable custodian of the child.<sup>21</sup>

#### ***Current policy***

1.18 In practice, the Minister delegates guardianship of an IGO minor to 'delegated guardians', officers employed by either the Department of Immigration and Border Protection (department) or state or territory child welfare agencies. Delegated guardians are then responsible for the care and welfare of the IGO minor. A delegated guardian can then place an IGO minor into the care of a custodian, a person or organisation to provide for the day-to-day care of the child and make decisions about routine matters. Custodians must consult a delegated guardian on non-routine matters and inform the delegated guardian about any critical incidents that involve the minor. The Minister retains ultimate responsibility for the IGO minor

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16 Joint Select Committee on Australia's Immigration Detention Network, *Final Report*, March 2012, p. 126, at [http://www.aph.gov.au/~media/wopapub/senate/committee/immigration\\_detention\\_ctte/report/report\\_pdf.ashx](http://www.aph.gov.au/~media/wopapub/senate/committee/immigration_detention_ctte/report/report_pdf.ashx) (accessed 7 January 2015).

17 Joint Select Committee on Australia's Immigration Detention Network, Parliament of Australia, *Final Report*, March 2012, p. 126 (Recommendation 19), at [http://www.aph.gov.au/~media/wopapub/senate/committee/immigration\\_detention\\_ctte/report/report\\_pdf.ashx](http://www.aph.gov.au/~media/wopapub/senate/committee/immigration_detention_ctte/report/report_pdf.ashx) (accessed 7 January 2015).

18 *Immigration (Guardianship of Children) Act 1946* (Cth), s. 4AAA.

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

20 *Immigration (Guardianship of Children) Act 1946* (Cth), s. 5.

21 *Immigration (Guardianship of Children) Act 1946* (Cth), s. 7.

and for ensuring appropriate arrangements are in place to protect the child's interests and foster the well-being of the child.<sup>22</sup>

1.19 Where an IGOC minor is being held in immigration detention, including an alternative place of detention, support services are provided by case managers, mental health support teams, medical staff, interpreting services and education staff. Where an IGOC minor is in community detention he or she will attend school and have access to health care. Government policy provides that unaccompanied minors should be accommodated in the community wherever possible. Unaccompanied minors and vulnerable families are moved from detention facilities into community-based accommodation until their immigration status is resolved.<sup>23</sup>

1.20 Upon the grant of a protection visa, an IGOC minor is moved into the Unaccompanied Humanitarian Minors (UHM) Program, which provides the child with welfare, supervision and settlement support. The Commonwealth, state and territory governments work together to oversee the national delivery of the UHM program. The UHM program provides those children living with an approved custodian or carer with the oversight of the relevant state or territory child welfare agency. If the UHM is being cared for in a group-house arrangement, the child is provided with a live-in carer, managed by a non-government service provider appointed as their custodian.<sup>24</sup>

1.21 In its submission to the AHRC's 2014 inquiry, the department noted that it was aware of calls to transfer guardianship responsibilities to an independent guardian. The department argued that there is no inherent conflict of interest between the Minister's responsibilities under the Migration Act and those under the IGOC Act after practical considerations have been taken into account. The department stated that:

The Government's view is that this is a perceived conflict of interest rather than an actual conflict of interest because exercise of the powers is generally separated and because steps, such as the provision of independent advice or assistance to IGOC minors, are taken to manage the possibility of a conflict between the Minister's different roles.<sup>25</sup>

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22 Department of Immigration and Border Protection, 'How does the minister's guardianship work?' at <http://www.immi.gov.au/faqs/Pages/how-does-the-ministers-guardianship-work.aspx> (accessed 7 January 2015).

23 Department of Immigration and Border Protection, 'How do we care for unaccompanied minors until their immigration status is resolved?', at <http://www.immi.gov.au/FAQs/Pages/how-do-we-care-for-unaccompanied-minors-until-their-immigration-status-is-resolved.aspx> (accessed 7 January 2015).

24 Department of Immigration and Border Protection, 'What is the Unaccompanied Humanitarian Minors Program?' at <http://www.immi.gov.au/FAQs/Pages/what-is-the-unaccompanied-humanitarian-minors-program.aspx> (accessed 7 January 2015).

25 Department of Immigration and Border Protection, *Submission 45 to the Australian Human Rights Commission's National Inquiry into Children in Detention 2014*, pp 60–61, at <https://www.humanrights.gov.au/sites/default/files/Submission%20No%2045%20-%20Department%20of%20Immigration%20and%20Border%20Protection.pdf> (accessed 7 January 2015).

1.22 The department admitted that some delegated guardians may have, or have previously had, decision-making delegations under the Migration Act, but it reassured the AHRC that:

If a delegated guardian has previously, or may in the foreseeable future, be making a Migration Act decision involving an IGOC minor for whom they are the delegated guardian, that officer should not continue to exercise their guardianship delegation, and another delegated guardian (or the alternative delegated guardian) for the IGOC minor should exercise the delegation if required instead.<sup>26</sup>

1.23 The department reiterated that a delegated guardian will generally:

...be required to make decisions of the kind faced by natural parents such as decisions relating to medical care, education and extra-curricular activities...These decisions do not, generally, give rise to a conflict of interest and are made in the child's best interests taking account of the views of experts and the child.<sup>27</sup>

### **International obligations**

1.24 Australia is a signatory to the United Nations Convention on the Rights of the Child (CRC). One of the main guiding principles of the CRC is respect for the best interests of the child. Article 3 of the CRC reads:

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.<sup>28</sup>

1.25 Furthermore, Article 18(1) of the CRC specifies that a legal guardian is primarily responsible for 'the upbringing and development of the child' and that the 'best interests of the child will be their basic concern'.<sup>29</sup>

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26 Department of Immigration and Border Protection, *Submission 45 to the Australian Human Rights Commission's National Inquiry into Children in Detention 2014*, p. 61, at <https://www.humanrights.gov.au/sites/default/files/Submission%20No%2045%20-%20Department%20of%20Immigration%20and%20Border%20Protection.pdf> (accessed 7 January 2015).

27 Department of Immigration and Border Protection, *Submission 45 to the Australian Human Rights Commission's National Inquiry into Children in Detention 2014*, p. 61, at <https://www.humanrights.gov.au/sites/default/files/Submission%20No%2045%20-%20Department%20of%20Immigration%20and%20Border%20Protection.pdf> (accessed 7 January 2015).

28 United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Art. 3, at <http://www.refworld.org/docid/3ae6b38f0.html> (accessed 7 January 2015).

29 United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 22, Art. 18, at <http://www.refworld.org/docid/3ae6b38f0.html> (accessed 7 January 2015).

1.26 Article 22 of the CRC requires State Parties to ensure 'a child who is seeking refugee status or who is considered a refugee...receive[s] appropriate protection and humanitarian assistance'.<sup>30</sup>

1.27 One of the obligations under the CRC is that Australia must periodically submit reports to the UN Committee and appear before the UN Committee to explain how the rights contained in the CRC are being implemented in Australia. Australia's most recent report was submitted in 2008 and its most recent appearances before the UN Committee were on 4 and 5 June 2012.<sup>31</sup> In response to Australia's written and oral testimony, the UN Committee stated that:

...the Committee stresses the need for...[Australia] to pay particular attention to ensuring that its policies and procedures for children in asylum seeking, refugee and/or immigration detention give due primacy to the principle of the best interests of the child.<sup>32</sup>

1.28 The committee notes that this assessment provided by the UN Committee pre-dates the policies and conduct of the current government.

1.29 Australia is due to submit a combined fifth and sixth report to the committee on 15 January 2018.<sup>33</sup>

### Provisions of the bill

1.30 The Bill consists of five Parts and a Schedule. Part 1 sets out preliminary matters specifying the objects of the legislation, the principles underlying the legislation and relevant definitions. Clause 6 provides a definition for the term 'unaccompanied non-citizen child', restricting it to unaccompanied individuals under the age of 18, who enter Australia as non-citizens and who do not have an appropriate visa or other authority for entry into Australia.

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30 United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 22, Art. 22, at <http://www.refworld.org/docid/3ae6b38f0.html> (accessed 7 January 2015).

31 Attorney-General's Department, 'Human rights treaty body reporting' at <http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/default.aspx> (accessed 7 January 2015). In 2008, the Australian Government, through the Attorney-General's Department (AGD), submitted its fourth report under the CRC to the UN Committee: Australian Government, 'Consideration of reports submitted by States parties under article 44 of the Convention: Fourth periodic report of States parties due in 2007', CRC/C/AUS/4, at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fAUS%2f4&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fAUS%2f4&Lang=en) (accessed 7 January 2015).

32 United Nations Committee on the Rights of the Child, Sixtieth session 29 May–15 June 2012, 'Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations: Australia', CRC/C/AUS/CO/4, 28 August 2012, p. 8, at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/AUS/CO/4&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/AUS/CO/4&Lang=En) (accessed 7 January 2015).

33 Attorney-General's Department, 'Human rights treaty body reporting' at <http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/default.aspx> (accessed 7 January 2015).

1.31 Part 2 of the Bill defines the scope of the proposed role of Guardian. Clause 12 of the Bill would require that the written consent of the Guardian is needed for a unaccompanied non-citizen child to leave Australia. Clause 13 of the Bill would allow the Guardian to place a child in the custody of a specified person. Part 2 of the Bill would establish offences in respect of certain dealings with unaccompanied non-citizen children.

1.32 Part 3 of the Bill would establish and define the role of the Guardian. Clauses 19 and 20 of the Bill would empower the Guardian to cooperate and consult with other agencies and delegate his or her authority to a Public Service employee acting at a Senior Executive Service level. Division 3 of Part 3 sets out the general terms and conditions of appointment of the Guardian and provides for the appointment of an acting Guardian in specified circumstances.

1.33 Part 4 of the Bill would establish the Office, outlines the functions of the Office and describes the procedural requirements for engaging staff and consultants for the Office.

1.34 Finally, Part 5 of the Bill deals with miscellaneous matters including funding of the Office, reporting and review requirements, provision of immunity from civil proceedings and powers to make regulations.

1.35 The Schedule to the Bill proposes to make amendments to the IGO Act, ceasing its application in relation to unaccompanied non-citizen children. The Schedule also makes amendments to the Migration Act in recognition of the new role of Guardian for Unaccompanied Children.

### **Parliamentary Joint Committee on Human Rights**

1.36 On 27 August 2014, the Parliamentary Joint Committee on Human Rights tabled its Tenth Report of the 44th Parliament.<sup>34</sup> The report included comments on the Guardian for Unaccompanied Children Bill 2014 concluding:

The committee considers that the bill promotes the rights of children and is therefore compatible with human rights.<sup>35</sup>

### **Acknowledgement**

1.37 The committee thanks the organisations and individuals who made submissions.

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34 *Journals of the Senate*, No. 47–27 August 2014, p. 1318.

35 Parliamentary Joint Committee on Human Rights, 'Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*: Bills introduced 7–17 July 2014 Legislative Instruments received 21 June–25 July 2014', *Tenth Report of the 44th Parliament*, p. 34, at <http://www.aph.gov.au/~media/Committees/Joint/PJCHR/10th/Tenth%20Report%20of%20the%2044th%20Parliament.pdf> (accessed 7 January 2015).



# 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 IGOC 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.

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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**



## **Labor Senators' Additional Comments**

1.1 The Bill is intended to establish an independent statutory office of Guardian for Unaccompanied Non-citizen Children (the Guardian) to advocate on behalf 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.

1.2 Many of the submitters believe there is a conflict of interest under the current system, pointing to the conflict of interest between the Minister as guardian of unaccompanied children in detention centres and the Minister as the decision maker on the outcome of these children's visas.

1.3 Labor Senators retain an open mind to any improvements that can be made to the system to ensure proper safeguards are in place to protect the wellbeing and best interests of children seeking protection. Labor Senators therefore support further exploration of the matters explored in the Bill.

**Senator Sue Lines**

**Senator Catryna Bilyk**



# Australian Greens Dissenting Report

1.1 The Senate in Inquiry into the Guardian for Unaccompanied Children Bill 2014 revealed overwhelming support for the creation of an independent guardian for unaccompanied non-citizen children. The Australian Greens support the majority of submitters and believe that in order to act in the best interest of unaccompanied asylum seeker children the Minister for Immigration should be stripped of his responsibilities as legal guardian.

1.2 There is no doubt that a conflict of interest exists in the law, as the Minister for Immigration is not only the legal guardian of these children and but also responsible for their detention, visa determination and deportation under the Migration Act.

1.3 Whilst the government members of the committee and the Department of Immigration have tried to argue that this is only a 'perceived' conflict of interest, legal experts and international bodies have argued the contrary for over ten years. In particular, the Australian Human Right's Commission in 2004 found that:

...the legislation providing that the Minister [for Immigration] be the guardian of children (the IGO Act), and the delegation of those powers to Department Managers, created an insurmountable conflict of interest...The Minister cannot possibly make the best interests of an unaccompanied child his or her primary concern when, at the same time, he or she is the detaining authority and visa decision maker. This conflict is not removed by delegation to the Department Managers. Indeed those Managers are placed in the invidious position of trying to gain children's trust while those same children view him or her as the person responsible for their detention.<sup>1</sup>

1.4 Further to this, as was raised by a number of submitters, the courts have repeatedly given priority to the Minister of the day's responsibilities under the Migration Act over guardianship duties. Therefore the Minister is unable to give primacy to his or her obligations to act in the best interest of the child whilst they remain beholden to their duties under the Migration Act. As stated by the Refugee Advice and Casework Service:

...this system does not provide adequate protection for the rights and interests of unaccompanied children. Unaccompanied children should have a legal guardian who is capable of exercising the rights and duties of a natural guardian at all times with independence and expertise.<sup>2</sup>

1.5 It is important to note that in June 2012 Australia appeared before the UN Committee on the Rights of the Child to respond to questions on Australia's commitment to improving the fundamental rights and welfare of its children.

1.6 The Committee drew specific attention to the issue of the conflict of interest in guardianship and strongly recommended that the Australian Government

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1 Australian Human Rights Commission, *Submission 10*, pp 2–3.

2 Refugee Advice and Casework Service, *Submission 6*, p. 2.

expeditiously establish an independent guardianship for unaccompanied immigrant children.

1.7 Further to this, the current guardianship arrangement put Australia at risk of breaching its obligations under the Convention on the Rights of the Child (CRC).

1.8 The CRC requires our government to act in the best interest of the child (Article 3.1) and ensure that unaccompanied children who are seeking asylum 'receive appropriate protection and humanitarian assistance' to guarantee enjoyment of all rights set out under the CRC and international law (Article 22(1)). The CRC also states that Australia must provide 'special protection and assistance' to children temporarily or permanently deprived of his or her family environment (Article 20(1)). Unless the Minister's responsibilities as guardian are decoupled from the duties prescribed under the Migration Act, Australia continues to put children at risk.

1.9 Australian Greens believe that there is an urgent need for an independent guardian whose sole responsibility is to ensure the best interests of the child are protected and upheld. As the Bill proposes, the creation of an independent office would remove the conflict of interest that currently exists as well as ensuring that Australia upholds its international obligations under the Convention on the Rights of the Child and the Refugees Convention.

1.10 The Australian Greens acknowledge the recommendations made by submitters to strengthen and refine the Bill. We look forward to working with the sector on these proposed amendments to ensure that the bill delivers the best possible outcome for unaccompanied asylum seeker and refugee children.

1.11 The Australian Greens depart from the committees report and recommend that this Bill be passed with amendments.

**Senator Sarah Hanson-Young**

# Appendix 1

## Public submissions

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

