



23 October 2014

Senator the Hon Ian MacDonald
Chair
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Chair,

Submission on the Guardian for Unaccompanied Children Bill 2014

The Australian Human Rights Commission makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee in its inquiry into the Guardian for Unaccompanied Children Bill 2014.

The Commission supports the passage of the Bill.

The Commission would be willing to expand upon the points raised in this short submission at any public hearing of the Committee into the Bill.

Australia's obligations under the Convention on the Rights of the Child regarding unaccompanied children

The Bill proposes 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.¹

Clause 3(2) of the Bill explains that:

The Parliament intends the establishment of the Guardian as a measure to assist Australia in meeting its international obligations under the Convention on the Rights of the Child, particularly as they relate to the following Articles:

- (a) the primacy of the consideration of the child's best interests (Article 4);²
- (b) the child's right to survival and development (Article 6(1));
- (c) the child's right to participate in decision-making (Article 12);

(d) no arbitrary or unlawful deprivation of liberty (Article 37).

In addition to the rights mentioned in clause 3(2), Australia has specific obligations under the *Convention on the Rights of the Child* (the Convention) in relation to unaccompanied children. The Commission submits that these specific obligations are directly relevant to the Bill under consideration.

Article 20 of the Convention specifically relates to unaccompanied children. Article 20 paragraphs (1) and (2) provide:

1. 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.
2. States Parties shall in accordance with their national laws **ensure alternative care** for such a child. (emphasis added)

There is also a specific provision in the Convention for unaccompanied children who are seeking asylum. Article 22(1) of the Convention requires that Australia 'take appropriate measures' to ensure that such children 'receive appropriate protection and humanitarian assistance' in the enjoyment of their rights in the Convention and other instruments.

Effective guardianship is an essential element of the care of unaccompanied children. In the absence of a child's parents, the legal guardian of an unaccompanied child has 'the primary responsibility for the upbringing and development of the child'.³ He or she is under an obligation under article 18(1) of the Convention to act in the best interests of that child.⁴

The United Nations Committee on the Rights of the Child has stated that in order to ensure proper representation of an unaccompanied child's best interests, it is important that his or her guardian:

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, health, psychological, material and educational needs are appropriately covered by, inter alia, the guardian acting as a link between the child and existing specialist agencies/individuals who provide the continuum of care required by the child.⁵

The UN Committee also emphasised that '[a]gencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship'.⁶

Concerns with the existing guardianship arrangements for unaccompanied children

Currently the Minister for Immigration and Border Protection is the guardian for unaccompanied non-citizen children who come to Australia under the *Immigration (Guardianship of Children) Act 1946* (Cth).⁷ For many years the Commission has expressed concern about this arrangement.

In the Commission's 2004 report *A last resort? National Inquiry into Children in Immigration Detention*, the Commission found that:

the legislation providing that the Minister [for Immigration] be the guardian of children (the IGOC Act), and the delegation of those powers to Department Managers, created an insurmountable conflict of interest. In the Inquiry's view 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.⁸

In that report the Commission also raised concerns that the Minister and his Department Managers did not have the appropriate child welfare expertise or experience to properly monitor and ensure the appropriate care and progress of an unaccompanied child.⁹

Given the deficiencies with the guardianship arrangements, the Commission has repeatedly recommended that an independent guardian be appointed for all unaccompanied children in immigration detention.¹⁰

The UN Committee on the Rights of the Child in its review of Australia's compliance with the Convention in 2012 reported it was 'deeply concerned' about the legal guardianship of unaccompanied children being vested with the Minister for Immigration.¹¹ It urged Australia to '[e]xpediently establish an independent guardianship/support institution for unaccompanied immigrant children.'¹²

Also in 2012 the Parliamentary Joint Select Committee on Australia's Immigration Detention Network recognised:

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.¹³

That Committee was of the view that the legal guardianship of unaccompanied children in immigration detention should be transferred from the Minister for Immigration 'as soon as practicable', and recommended that the legislation be amended to achieve this.¹⁴

The Hon Christopher Bowen MP, who was the Minister for Immigration and Citizenship at the time the Parliamentary Joint Select Committee produced its report, was recently questioned about the Committee's recommendation. He stated that he thought it 'could be a worthwhile reform', and had 'commissioned work from the Department [of Immigration and Citizenship] as to how an alternative model would work'.¹⁵

Conclusion

The Commission supports the transfer of the guardianship of unaccompanied non-citizen children to an independent statutory office, as provided by the Bill. Such a reform would bring Australia closer into line with its obligations under the *Convention on the Rights of the Child*.

Please do not hesitate to contact the Commission should you have any queries about this submission.

Yours sincerely,

Gillian Triggs
President

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- ¹ Explanatory Memorandum, Guardian for Unaccompanied Children Bill 2014 (Cth), p 2.
 - ² The Commission notes that the best interests principle is contained in article 3(1) of the Convention, rather than article 4.
 - ³ *Convention on the Rights of the Child*, 1989, art 18(1).
 - ⁴ Article 18(1) of the Convention states that 'the best interests of the child will be [the legal guardian's] basic concern'.
 - ⁵ Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, UN Doc CRC/GC/2005/6 (2005), para 33. At <http://www.refworld.org/docid/42dd174b4.html> (viewed 9 October 2014). See also Separated Children in Europe Programme, *Statement of Good Practice* (4th ed, 2009), D3.3 (p 22). At <http://scep.sitespirit.nl/images/18/219.pdf> (viewed 9 October 2014).
 - ⁶ Committee on the Rights of the Child, *General Comment No. 6 (2005)*, above.
 - ⁷ *Immigration (Guardianship of Children) Act 1946* (Cth), s 6(1).
 - ⁸ Human Rights and Equal Opportunity Commission, *A last resort? National Inquiry into Children in Immigration Detention* (2004), p 742-3. At http://www.humanrights.gov.au/sites/default/files/document/publication/alr_complete.pdf (viewed 9 October 2014).
 - ⁹ Human Rights and Equal Opportunity Commission, above, p 722 and 742.
 - ¹⁰ See for example, Human Rights and Equal Opportunity Commission, above, Recommendation 3; Australian Human Rights Commission, *Submission to the Joint Select Committee on Australia's Immigration Detention Network* (August 2011), Recommendation 26. At <http://www.humanrights.gov.au/australian-human-rights-commission-submission-joint-select-committee-australia-s-immigration#s3> (viewed 9 October 2014).
 - ¹¹ Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention, Concluding Observations: Australia*, UN Doc CRC/C/AUS/CO/4 (2012), para [80(c)]. At http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf (viewed 9 October 2014)
 - ¹² Committee on the Rights of the Child, above, para [81(c)].
 - ¹³ Joint Select Committee on Australia's Immigration Detention Network, Parliament of Australia, *Final Report* (2012), para [5.95]. At http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/immigration_detention/report/index (viewed 9 October 2014).
 - ¹⁴ Joint Select Committee on Australia's Immigration Detention Network, above, paras [5.95]-[5.96].
 - ¹⁵ The Hon Christopher Bowen MP, Fifth Public Hearing of the National Inquiry into Children in Immigration Detention 2014 (9 September 2014). At <http://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/national-inquiry-children-immigration-detention-2014-1> (viewed 9 October 2014).