

Submission to the Legal and Constitutional Affairs

Legislation Committee

Inquiry into the Guardian for Unaccompanied Children Bill

2014

Prepared by Maria O'Sullivan

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Senate Legal and Constitutional Affairs Committee

Guardian for Unaccompanied Children Bill 2014

Castan Centre for Human Rights Law

Maria O'Sullivan

The Castan Centre for Human Rights Law welcomes the opportunity to make a submission in relation to the Guardian for Unaccompanied Children Bill 2014. The Castan Centre's mission includes the promotion and protection of human rights. It is in that context that we make this submission.

We agree with the object of the Bill, which is to establish an independent statutory office of Guardian for Unaccompanied Non-citizen Children to act as guardian and advocate for the best interests of unaccompanied children who arrive in Australia.

Unaccompanied asylum-seeker children — those under 18 years of age who arrive in a country seeking asylum without their parents — are particularly vulnerable individuals. Given that they lack the protection of both their home State and their parents, such children are at special risk of being exposed to harm.

In recognition of this vulnerability, a number of UN bodies and other international non-governmental organisations have recognised that these children require special procedural safeguards, including the appointment of an independent guardian.

In Australia, the guardianship duty to protect the interests of unaccompanied minors is given to the Minister for Immigration, under the Immigration (Guardianship of Children) Act 1946 (Cth) ('the Guardianship Act').

This role is problematic given that the Minister for Immigration is also given the statutory power under the Migration Act 1958 (Cth) to grant or refuse a refugee claim and to deport, detain and transfer a child asylum-seeker. As such, we argue that there is a conflict of interest between the Minister's role under the Migration Act to decide on the detention and deportation of child asylum seekers, and his/her role as guardian of those same children.

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 manner as their own interests. This includes a duty to protect the child from danger or harm. This has been recognised by the Commonwealth government, which acknowledged in its submissions to the High Court in *Plaintiff M70/106* that the Minister's powers and duties in this context are 'akin to that of a

parent’.¹

When one looks at other jurisdictions, it appears that it is not common practice for a Minister for Immigration or similar decision-maker to be given the legal duty of guardianship. Within the EU for instance, a guardian may be appointed from a government agency dealing with child protection and/or from a non-government organisation (‘NGO’), but *not* the department legally responsible for the child’s detention and deportation.²

The Castan Centre submits that the best interests principle set out the Convention on the Rights of the Child should be reflected in both the Guardianship Act and Migration Act in relation to all decisions regarding children. We note that Clauses 3 and 4 of the Bill reflect Australia’s obligations under the Convention on the Rights of the Child and we support the introduction of these provisions.

Further analysis of these issues can be found in the attached article published by the author in the *Alternative Law Journal* (Vol. 38, No. 4, 2013).

For the reasons set out above, the Castan Centre strongly supports the passage of this legislation.

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¹ Minister for Immigration and the Commonwealth of Australia, ‘Defendant’s Submissions’, *Plaintiff M70/106*, [99] <<http://www.hcourt.gov.au/cases/case-m70/2011>>.

² See European Migration Network, *Policies on Reception, Return and Integration arrangements for, and numbers of, Unaccompanied Minors – an EU comparative study – Synthesis Report*, May 2010, 53–54.