



*Guardianship and independent legal representation for  
unaccompanied minors seeking asylum in Australia – Avoiding  
a Conflict of Interest*

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**Discussion Paper**

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## Abstract

This Discussion Paper examines the various issues associated with Australia's current arrangements for the guardianship of unaccompanied minors seeking asylum in Australia. Under the *Immigration (Guardianship of Children) Act 1946* (Cth), the Commonwealth Minister for Immigration and Citizenship is designated to be the legal guardian of every unaccompanied child who arrives in Australia.<sup>1</sup> As with any fiduciary relationship, the guardian-Minister is expected to act with loyalty and good faith, and is expected to pursue the best interests of their ward-unaccompanied minor at all times.<sup>2</sup>

However, it is evident that these obligations lie in conflict with the Minister's roles under the *Migration Act 1958* (Cth), whereby the Minister is expected to act in the best interests of the Commonwealth in administering the mandatory detention policy and as the decision-maker on the child's visa/protection applications. This conflict of interest has been widely recognised by organisations such as UNICEF, the Australian Human Rights Commission, the Senate Standing Committee on Legal and Constitutional Affairs and the Department of Immigration and Citizenship itself, and has been the subject of substantial research and commentary.

This Discussion Paper recognises this research base and seeks to extend on it by highlighting that the conflict of interest goes beyond visa-status/protection determinations. Specifically, a stark conflict of interest also exists where an unaccompanied minor has, or may have, a right to lodge civil proceedings against the Australian Government, as the Minister for Immigration would be expected to act as the guardian of the applicant and also as the defendant in the proceedings.

The significance of this analysis is heightened by the ambiguous nature of arrangements for unaccompanied minors seeking asylum under the so-called "Pacific Solution Mark II". Under this policy, asylum-seekers, including unaccompanied minors, will be deported and detained in offshore processing centres on Christmas Island, Nauru or Manus Island. While it is clear that unaccompanied minors on Christmas Island remain under Australian jurisdiction in respect of the *IGOC Act*, those sent to Nauru or Manus Island for processing will be designated to have "[left] Australia permanently" in accordance with the *Migration Legislation Amendment (Offshore Processing and Other Measures) Act 2012* and, therefore, may no longer have an effective legal guardian.<sup>3</sup> As a result of the change of jurisdiction, any unaccompanied minors transferred to Nauru or Manus Island will come under the guardianship frameworks in place in those countries, both of which are recognised as inadequate by the incumbent Minister for Immigration, the Hon. Chris Bowen. Transferring unaccompanied minors to a country with inadequate alternate guardianship arrangements

<sup>1</sup> *Immigration (Guardianship of Children) Act 1946* (Cth), s6.

<sup>2</sup> *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 46-7; *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2009) 70 ACSR 1 at [4552] (Owen J).

<sup>3</sup> *Migration Legislation Amendment (Offshore Processing and Other Measures) Act 2012*.

is clearly not in the best interests of the child, and represents a conflict of interest for the Minister for Immigration and a dereliction from his duties as legal guardian.

This Discussion Paper will make recommendations that seek to alleviate these conflicts of interest. Principally, it will be argued that the *IGOC Act* requires amendment to ensure that all unaccompanied minors are assigned an Independent Legal Guardian (who would replace the Minister for Immigration) who would maintain effective guardianship of unaccompanied minors regardless of where detention and immigration processing take place.

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## 1. Introduction

The increased media coverage and political dialogue on the issue of asylum-seekers travelling to Australia by boat has encouraged extensive analysis and discussion of Australia's existing framework for the guardianship of unaccompanied minors. Unaccompanied minors (also referred to as 'unaccompanied children') are children under 18 years of age who have been separated from both of their parents and are not being cared for by a responsible adult.<sup>4</sup>

Unaccompanied minors seeking asylum in Australia have been recognised as a particularly vulnerable group on several accounts.<sup>5</sup> These children have not only faced the challenges of making the journey to Australia alone, but upon their arrival in Australia must then face the process of refugee status determination and the prospect of mandatory immigration detention without familial support. There is substantial evidence to suggest that these experiences have severe and lasting effects on children and young people, including delayed development, separation anxiety and post-traumatic stress disorder.<sup>6</sup>

To give scale to the issue, on the 4<sup>th</sup> of July 2012 there were 146 children in immigration detention around Australia, almost half of whom were unaccompanied by their parents or relatives. In 2011-12, 11 per cent of total asylum seeker arrivals (889) were registered as unaccompanied minors.<sup>7</sup> It is also significant to note the length of the immigration assessment and detention process, as in the Northern Territory alone there were 16 unaccompanied minors who had been held in immigration detention for over one year in July 2012.<sup>8</sup>

It is generally recognised that effective guardianship is essential in safeguarding the welfare and upholding the human rights of these vulnerable children. Article 20(2) of the *United Nations Convention on the Rights of the Child* ('the *UNCRC*'), for example, requires Australia to 'ensure alternative care' for vulnerable children, a requirement which may be met through the appointment of a legal guardian who holds the 'best interests of the child' as their paramount concern.<sup>9</sup>

A major flaw in Australia's existing guardianship arrangements for unaccompanied minors is the clear conflicts of interest in the various roles of the Minister for Immigration and Citizenship ('the Minister for Immigration'). Specifically, under the *Immigration*

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<sup>4</sup> United Nations General Assembly, *Assistance to unaccompanied refugee minors – Report of the Secretary-General*, 20 August 2003 A/58/299.

<sup>5</sup> UNHCR Guidelines

<sup>6</sup> End Immigration Detention of Children, *Immigration Detention of Children Factsheet*, available at [http://endchilddetention.org/wp-content/uploads/2012/06/Infographic-Australia\\_A3.pdf](http://endchilddetention.org/wp-content/uploads/2012/06/Infographic-Australia_A3.pdf)

<sup>7</sup> A Houston, P Aristotle, & M L'Estrange, *Report of the Expert Panel on Asylum Seekers*, DIAC (August 2012) 95, Table 12.

<sup>8</sup> Law Society of the Northern Territory, *Submission to the Expert Panel on Asylum Seekers*, available at <http://lawsocietynt.asn.au/latest-news/901-latest-news/397-expert-panel-on-asylum-seekers>

<sup>9</sup> Article 18(1) *UNCRC*

(*Guardianship of Children Act 1946* (Cth) (the '*IGOC Act*'), the Minister for Immigration is designated the legal guardian of all unaccompanied minors seeking asylum, while under the *Migration Act 1958* (Cth) (the '*Migration Act*'), the Minister retains responsibility for the administration of Australia's mandatory detention policy and is also the ultimate decision maker in each unaccompanied minor's visa/protection application.<sup>10</sup> It is clear that the best interests of the child and the best interests of the Commonwealth are incompatible in this regard, a state of affairs which renders Australia's current guardianship arrangements under the *IGOC Act* unacceptable.<sup>11</sup> This conflict of interest has been widely recognised by organisations such as UNICEF, the Australian Human Rights Commission, the Senate Standing Committee on Legal and Constitutional Affairs, the Department of Immigration and Citizenship itself and the United Nations High Commissioner for Refugees.

This Discussion Paper builds on the evidence that the Minister for Immigration is conflicted when acting as the guardian of unaccompanied minors seeking asylum in asylum/visa applications and takes this thesis one step further. Specifically, this Discussion Paper seeks to highlight the fact that a conflict of interest also exists where the Minister for Immigration is guardian of an unaccompanied minor seeking asylum in Australia who has, or may have, grounds to commence court proceedings against the Australian Government or any of its related entities. In this situation, the Minister for Immigration is compromised again as he or she would be expected to act simultaneously in the best interests of the unaccompanied minor seeking asylum as their guardian as well as the defendant in the proceedings.

The Gillard Government's recent announcement of deterrence mechanisms under the so-called "Pacific Solution Mark II" arguably heightens the importance of this analysis. Under this new scheme, asylum-seekers - including unaccompanied minors - will be transported to and detained in offshore processing centres on Christmas Island, Nauru or Manus Island. This process has already begun, with four children being among the first group of asylum-seekers to be sent to Manus Island.<sup>12</sup>

This policy shift clearly has important implications for the guardianship of unaccompanied minors. Specifically, while Christmas Island remains under Australia jurisdiction insofar as the *IGOC Act* is concerned, analysis of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) makes clear that unaccompanied minors who are sent to Nauru or Manus Island for immigration processing may be construed as having "left Australia permanently", thereby shifting the duties of guardianship away from the Minister for Immigration.<sup>13</sup> In the absence of formal guardianship arrangements in Nauru and Papua New Guinea (which the incumbent Minister for Immigration, the Hon.

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<sup>10</sup> *Immigration (Guardianship of Children) Act 1946* (Cth) s 6.

<sup>11</sup> *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2009) 70 ACSR 1 at [4552] (Owen J).

<sup>12</sup> AAP, *Four children among Manus Island transfers*, (21 Nov 2012) *Sydney Morning Herald Online*, available here < <http://news.smh.com.au/breaking-news-world/four-children-among-manus-island-transfers-20121121-29p3x.html> > last accessed at 28/11/2012.

<sup>13</sup> *IGOC Act*, s6.

Chris Bowen has admitted are inadequate), these unaccompanied minors will be left without adequate care, assistance, support and protection to uphold their rights and monitor their interests. The seriousness of this policy is heightened by a recent assessment by Amnesty International who described the living arrangements at Nauru as 'unacceptable',<sup>14</sup> and a report by ABC reporter Kristy O'Brien which alleged that medical support for severely disabled children seeking asylum is 'woefully inadequate' in immigration detention centres on the Australian mainland and that the Immigration Department had confirmed that disabled children are not exempt from being transferred offshore.<sup>15</sup>

Transferring unaccompanied minors seeking asylum to Nauru or Manus Island is clearly not in the best interests of these vulnerable children, a fact which highlights the significant conflict of interest in the various roles of the Minister for Immigration. Carrying out the policies under the 'Pacific Solution Mark II' arguably represents a dereliction of the obligations that the Hon. Chris Bowne's owes to unaccompanied minors as their legal guardian and underscores the need for urgent reform.

**This Discussion Paper aims to highlight the urgent need for the appointment of an Independent Legal Guardian for all unaccompanied minors who arrive in Australia to seek asylum.** This independent legal guardian would be responsible for protecting the welfare and upholding the human rights of the unaccompanied minor, which includes the duty to protect the child from harm, the duty to make decisions relating to the long-term welfare of the child, the duty to provide adequate education for academic and moral development, as well as the obligation to monitor and provide access to an independent legal advisor and legal assistance where necessary.

Part 2 of this paper will examine the existing statutory framework, specifically focusing on how unaccompanied minors seeking asylum in Australia currently come under the guardianship of the Minister for Immigration. Part 3 will analyse the case of *Bennett v Minister for Community Welfare* [2002] which involved conflicts of interest for the Minister of Community Welfare as guardian and will highlight the ways in which the conflict of interest in *Bennett* is identical to that confronting the Minister for Immigration. Part 4 will analyse the issues raised by the "Pacific Solution Mark II" and the potential for unaccompanied minors to be left without effective legal guardianship. Finally, Part 5 will present a number of positive recommendations for reform which will alleviate the conflict issues in Australia's guardianship system for unaccompanied minors seeking asylum, and will ensure better care and protection of this vulnerable group in future.

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<sup>14</sup> Amnesty International, *Nauru camp a human rights catastrophe with no end in sight*, (23 November 2012), Amnesty International Online, available at < <http://www.amnesty.org.au/news/comments/30533/> > last accessed on 28/11/2012.

<sup>15</sup> K O'Brien, *The plight of a family in immigration detention with two severely disabled children*, (21/11/2012), ABC Lateline Programme, available at < <http://www.abc.net.au/lateline/content/2012/s3638188.htm> >, last accessed at 28/11/2012.

## 2. Background

The *ICOG Act* was enacted in the aftermath of the Second World War to ensure that immigrant children from the United Kingdom and Europe were appropriately cared for under Australian law. Despite several amendments, the *IGOC Act* continues to vest overriding legal guardianship of unaccompanied "non-citizen" minors in the Minister for Immigration. It is important to note that while the Minister for Immigration routinely delegates guardianship responsibilities to officers of the Department of Immigration and Citizenship (DIAC) and to relevant child welfare authorities in each state and territory, the Minister for Immigration retains overall responsibility for the care and welfare of the unaccompanied minor.<sup>16</sup>

The obligations of the Minister for Immigration as legal guardian for unaccompanied minors seeking asylum in Australia are outlined in section 6 of the *ICOG Act*, which provides that:

### **6 Guardianship of non-citizen children**

- (1) The Minister shall be the guardian of the person, and of the estate in Australia, of every non-citizen child who arrives in Australia after the commencement of this Act to the exclusion of the parents and every other guardian of the child, and shall have, as guardian, the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have, until the child reaches the age of 18 years or leaves Australia permanently, or until the provisions of this Act cease to apply to and in relation to the child, whichever first happens.<sup>17</sup>

Significantly, these duties encompass the full range of legal rights and fiduciary duties that must be exercised by an adult with responsibility for the general welfare and upbringing of a child, including the duty to protect the child from harm, the right to make decisions relating to the long-term welfare of the child, and the duty to address the basic human needs of the child.<sup>18</sup>

In addition to the generally accepted legal rights and fiduciary obligations of a guardian outlined above, the Federal Court of Australia has articulated various specific rights and obligations of guardianship, including:

- The right to make decisions on behalf of the ward that are contrary to the wishes of the ward;<sup>19</sup>

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<sup>16</sup> *Immigration (Guardianship of Children) Act 1946*, s5

<sup>17</sup> *Immigration (Guardianship of Children) Act 1946*, s6

<sup>18</sup> *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524; *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 29; *Trevorrow v South Australia (No. 5)* 106 SASR 331.

<sup>19</sup> *Ibid*, 104.

- The right and obligation to arrange for others to bear the financial burden of the living expenses of the child;<sup>20</sup>
- The obligation to provide adequate education for academic and moral development;<sup>21</sup>
- The obligation to comply with the responsibilities outlined in the United Nations Convention on the Rights of the Child;<sup>22</sup> and
- The obligation to provide access to legal advice and assistance;<sup>23</sup>

A central element of the fiduciary duties owed by a guardian to their wards is the requirement that the guardian act with 'undivided loyalty' in the ward's best interests at all times, a proposition supported by Article 3(1) of the *United Nations Convention on the Rights of the Child*.<sup>24</sup> Inherent in this obligation is the duty of the guardian to avoid taking any action which may give rise to any conflict of interest.<sup>25</sup>

An obvious issue with the *IGOC Act*, as outlined in previous research, is the significant conflict of interest given that the Minister for Immigration is also responsible for the administration of the *Migration Act 1958* (Cth). In this capacity, the Minister for Immigration maintains overarching responsibility for the mandatory detention of irregular asylum-seekers as well as responsibility for making final determinations on refugee status and visa applications.<sup>26</sup> As Mary Crock suggests:

*The simple and devastating problem for the young asylum seekers is that the Minister [for Immigration] is both legal guardian, by virtue of section 6 of the IGOC Act, and their prosecutor, judge and gaoler within the complicated matrix of the Migration Act. This problem inheres even where the Minister delegates her or his role as IGOC guardian to a state welfare authority because the delegate is also perceived at law to have a conflict of interest in any conflict between the child and the state.*<sup>27</sup>

The existence of a substantial conflict of interest was noted by the Federal Court in the case of *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002), where the Court held that the Minister for Immigration - as the administrator of the *Migration Act* - actually has an underlying interest in resisting administrative challenges lodged by asylum-seekers against decisions made by the Department of Immigration and Citizenship.<sup>28</sup> In addition, a

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<sup>20</sup> Ibid.

<sup>21</sup> *Neale v Colquhoun* [1944] SASR 119; *Youngman v Lawson* [1981] 1 NSWLR 439.

<sup>22</sup> *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1988, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>23</sup> Ibid, 88.

<sup>24</sup> *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2009) 70 ACSR 1; *Aberdeen Railway Co v Blaikie Brothers* [1854] 1 Macq 461; *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 46-7.

<sup>25</sup> *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 511.

<sup>26</sup> *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 29 at [90] – [91].

<sup>27</sup> Mary Crock, 'Lonely Refuge: Judicial responses to separated children seeking refugee protection in Australia' (2005) 22 *Law in Context* 120, 129.

<sup>28</sup> Above n. 32, 90-91.

majority of the High Court agreed in *Jaffari v Minister for Immigration and Multicultural Affairs* (2001) that the *IGOC Act* must be read as subservient to the specific powers vested in the Minister under the *Migration Act*. As such, it is clear that it is impossible for the Minister for Immigration to simultaneously fulfil these opposing duties.<sup>29</sup>

3. The duty to avoid conflicts of interests: *Bennett v Minister for Community Welfare* [1992]

While analysis in this area has typically focused on the conflicts for the Minister for Immigration in terms of visa status/protection determinations, it is clear that the Minister is further conflicted where an unaccompanied minor seeking asylum has, or may have, a right to lodge a civil or criminal claim against the Minister for Immigration personally, DIAC or the Commonwealth Government and any of its related entities. In this case, an important element of a guardian's fiduciary duties to their ward is to recognise situations where a ward may require independent legal advice and to ensure that access to an appropriately qualified advisor is provided where necessary.<sup>30</sup> Alternatively, the Minister for Immigration is arguable obliged to appoint a guardian *ad litem* to assist with the possible litigation.

The High Court case of *Bennett v Minister for Community Welfare* [1992] evidences this common law proposition and emphasises that this duty persists even where that advice may lead to an action against the guardian themselves.<sup>31</sup> In this case, involving litigation commenced against the Western Australian Minister for Community Welfare in 1973, Wayne Bennett (the appellant) suffered a serious injury while operating a bench saw in the woodwork shop of the state-run Riverbank detention centre in which he was being detained. The appellant was inadequately trained in the use of the bench saw and the saw blade was not properly guarded which furnished the appellant with a cause of action for common law damages. However, the appellant was not aware or made aware of his right to this action against his guardian - the Minister of Community Welfare - until April 1982, by which time any claim he may have had was barred by the *Limitation Act 1935* (WA). The High Court unanimously held that the failure on the part of the Minister of Community Welfare as guardian to recognise that Bennett had a legitimate cause of action and to provide him with access to independent legal advice constituted a breach of the guardians' fiduciary duties.<sup>32</sup>

The decision in *Bennett* has clear ramifications for guardianship law in Australia, particularly in relation to the existing mechanisms for dealing with unaccompanied minors seeking

<sup>29</sup> Australian Human Rights Commission, 'Information concerning Australia and the Convention on the Rights of the Child', Submission to the Committee on the Rights of the Child, August 2011, 109.

<sup>30</sup> *Ibid*, 88.

<sup>31</sup> [1992] HCA 27.

<sup>32</sup> *Bennet v Minister for Community Welfare* [1992] HCA 27 at [2] (Mason CJ, Deane and Toohey JJ) and at [8] (McHugh J) & at [5] (Maason CJ, Deane and Toohey JJ).

asylum in Australia. The Minister for Immigration, as legal guardian of all unaccompanied minors seeking asylum, is arguably subject to the same principles and fiduciary duties as articulated in *Bennett v Minister for Community Welfare*.<sup>33</sup> As such, the Minister for Immigration retains a fiduciary duty to monitor each unaccompanied minor under his or her guardianship and to ensure that where a legitimate claim against the Minister for Immigration personally, DIAC or the Commonwealth Government arises (or may arise), the unaccompanied minor in question is furnished with appropriate independent legal advice.

However, whether this duty can be appropriately executed under the current framework is questionable given the Minister for Immigration's multiple conflicts of interest as highlighted above. The Minister for Immigration is most obviously conflicted in this regard as he or she is expected to act as the legal guardian of the unaccompanied minor while also acting as the defendant in the potential litigation. As with the conflict of interest relating to protection/visa status determinations outlined above, the Minister for Immigration is clearly unable to simultaneously uphold his or her obligations to the Commonwealth and to an unaccompanied minor applicant who arguably have diametrically opposing obligations. At the same time, it is evident that the appointment of a guardian *ad litem* is insufficient in the case of unaccompanied minors seeking asylum, as these vulnerable children may often be unaware of their rights under Australian law and may not realise that their rights have been breached and that they have a cause of action against the Minister for Immigration or the Commonwealth.

It is evident that these arrangements are unsatisfactory and that maintaining this status quo puts the welfare and human rights of highly vulnerable unaccompanied minors seeking asylum in Australia in serious jeopardy. An alternative arrangement is required whereby responsibility for recognising possible causes of action and for furnishing independent legal advice is not the responsibility of the Minister for Immigration, DIAC or the Commonwealth Government. Reform is required to establish an independent guardian to help protect unaccompanied minors and to ensure that all causes of action are recognised and pursued.

4. "Pacific Solution Mark II" - Legal guardianship of unaccompanied minors and off-shore processing
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The importance of reforming Australia's current guardianship framework for unaccompanied minors seeking asylum in Australia is arguably highlighted by the Gillard Labour Government's recent amendments to the *Migration Act* in what has come to be known as the "Pacific Solution Mark II". Under this new scheme, asylum-seekers - including unaccompanied minors - will be transported to and detained in offshore processing centres on Christmas Island, Nauru or Manus Island.

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<sup>33</sup> *Bennet v Minister for Community Welfare* [1992] HCA 27.

Significantly, subsection 6(2)(b) of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) states that a non-citizen child will be taken to have left Australia permanently if "the child is taken from Australia to a regional processing country". This is noteworthy as section 6 of the *IGOC Act* states that the Minister for Immigration will maintain the duties, obligations and liabilities as a natural guardian until the child "leaves Australia permanently". In addition, the Explanatory Memorandum to the *Migration Legislation Amendment* explicitly states the Parliament's intention that the *Migration Act* have precedence over the *IGOC Act*, which is significant in that section 6A of the *IGOC Act* (requiring written consent from the Minister for Immigration for the deportation from Australia of any non-citizen child) will no longer apply.

It is clear that the *Migration Legislation Amendment* will affect the guardianship arrangements for unaccompanied minors in each regional processing country in different ways. While Christmas Island is declared to be an 'excised offshore place' under the *Migration Amendment (Exclusion from Migration Zone) Act 2001* (Cth), this declaration only applies insofar as the *Migration Act* is concerned. As such, Christmas Island remains under Australian jurisdiction for the purposes of the *IGOC Act*, meaning that section 6 continues to apply and that the Minister for Immigration remains the legal guardian of all unaccompanied non-citizen children on Christmas Island.

However, given that Nauru and Papua New Guinea's Manus Island have now been designated as regional processing countries under section 198AB(1) of the *Migration Act*, it would appear that the Minister for Immigration's guardianship obligations cease once the unaccompanied minor is handed over to authorities on Nauru or Manus Island. There is significant ambiguity over whether the guardianship of unaccompanied minors will be transferred to another appropriate authority, or whether these vulnerable children will be left without effective guardianship once they leave Australia. It appears that the guardianship arrangements under the Pacific Solution Mark II are no clearer for Australia's regional partners, as on 22 September 2012 the Nauruan Justice Minister Lisa Lo Piccolo was quoted in *The Sydney Morning Herald* as saying that it was her understanding that "Australia will be the one who will send guardians to care for such children". The United Nations High Commissioner for Refugees has warned that Australia will remain accountable for unaccompanied minors sent to Nauru and Manus Island, with the UNHCR's regional representative, Richard Towle, stating that "[unaccompanied minors seeking asylum are] a vulnerable group and care and responsibility rests with both governments".

The conflict of interest is clear. The uncertainty of ongoing guardianship arrangements arguably renders any attempt by the Minister for Immigration to transfer unaccompanied minors to Nauru or Manus Island for processing as a significant dereliction of his or her obligations as legal guardians. The Minister for Immigration must act in the best interests of the child at all times, and the Pacific Solution Mark II represents a seemingly unsurmountable conflict of interest.

It is evident that the establishment of an independent legal guardian should be a priority in order to alleviate the conflict of interest issues outlined above. This legal guardian should remain independent of the Commonwealth Government and should retain effective guardianship arrangements and responsibilities even where the unaccompanied minor is transported to Christmas Island, Nauru or Manus Island. Effective legal guardianship is essential to ensure that unaccompanied minors seeking asylum are protected throughout the refugee status determination process.

#### 5. Conclusion/Recommendations:

The above discussion highlights the need to reform the legal framework for the guardianship of unaccompanied minors seeking asylum in Australia as a priority. The conflicts between the *IGOC Act* and the *Migration Act* have been widely acknowledged, and it is evident that current system of guardianship for unaccompanied minors fails to meet Australia's obligations under the *United Nations Convention on the Rights and of the Child*, defies principles of natural justice and seriously jeopardises the human rights of vulnerable children.

Any prospective reforms must conform with Article 18(2) of the United Nations Convention on the Rights of the Child, which states that:

*For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.*<sup>34</sup>

In order for Australia to improve its system of guardianship, the following practical recommendations should be considered for adoption.

#### **7.1 - Updating the *Immigration (Guardianship of Children) Act 1946***

The *IGOC Act 1946* should be amended to introduce an **Independent Legal Guardian** who would replace the Minister for Immigration as legal guardian of all unaccompanied minors seeking asylum in Australia. This recommendation accords with Recommendation 19 of the Final Report of the Senate Committee Joint Select Committee on Australia's Immigration Detention Network.<sup>35</sup>

<sup>34</sup> UN High Commissioner for Refugees, *Refugee Children: Guidelines on Protection and Care*, 1994, 126.

<sup>35</sup> Senate Committee Joint Select Committee, *Final Report on Australia's Immigration Detention Network*, available at

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=immigration\\_detention\\_ctte/immigration\\_detention/report/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=immigration_detention_ctte/immigration_detention/report/index.htm)

This guardianship program must remain independent of the Minister for Immigration, the Department of Immigration and Citizenship and all other government departments. Under this system, each unaccompanied minor seeking asylum in Australia would have an independent guardian caseworker appointed to them who would supervise and support their claims for asylum and refugee status along with any other legal issue which may arise. Furthermore, the guardianship relationship between the Independent Legal Guardian and the unaccompanied minor seeking asylum would be maintained (or formally transferred) in cases where the unaccompanied minor is sent to a regional processing centre on Christmas Island, Manus Island or Nauru. This suggestion has been supported by the Australian Human Rights Commission and the UNHCR.

This recommendation would resolve the conflicts of interest mentioned above as the independent legal guardian could independently advise and advocate for unaccompanied minors while leaving the Minister for Immigration free to uphold the duties and obligations owed to the Department of Immigration and Citizenship and the Commonwealth. Significantly, this recommendation has also been suggested by numerous NGOs in their submissions to the Joint Select Committee on Australia's Immigration Detention Network.

One practical suggestion is that the newly created National Children's Commissioner assumes the guardianship responsibilities for unaccompanied minors. However, while this option may be preferable to the current model, it is arguable that the Commissioner themselves may become conflicted when acting both as a legal guardian for unaccompanied minors and also as an advocate on their behalf. Instead, as recommended by others, a more appropriate role for the National Children's Commissioner in this regard may be to assist the Commonwealth Government and DIAC in developing an improved framework for guardianship for unaccompanied minors seeking asylum in Australia.<sup>36</sup>

## **7.2 – Transfer guardianship to the Department of Families, Housing, Community Services and Indigenous Affairs**

Another alternative that has been suggested by organisations such as ChilOut (Children Out of Immigration Detention) is that legal guardianship of unaccompanied minors could be transferred to the Minister for Families, Housing, Community Services and Indigenous Affairs.<sup>37</sup> The care of unaccompanied minors seeking asylum would then be the responsibility of FaHCSIA which already maintains the portfolio for child protection generally in Australia. FaHCSIA could then delegate guardianship responsibilities to appropriately qualified and experienced community organisations and/or state government agencies while maintaining oversight and overall responsibility.

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<sup>36</sup> Mary Crock & Mary Anne Kenny, *Rethinking the Guardianship of Refugee Children after the Malaysian Solution* (2012) 34 *Sydney Law Review* 437 at 465.

<sup>37</sup> ChilOut, *Submission 63*, pp 5-6.

Significantly, FaHCSIA's legal guardianship of unaccompanied minors seeking asylum in Australia should not terminate where an unaccompanied minor is transferred to Christmas Island, Nauru or Manus Island, and the Department would be required to have appropriately qualified guardians and necessary facilities in each regional processing centre to ensure that the rights of unaccompanied minors are upheld and to ensure that the appointed legal guardians are in a position to carry out their obligations in favour of the unaccompanied minor asylum-seeker.

It must be noted, however, that FaHCSIA already has a large portfolio and would need to be further resourced to provide a role in relation to unaccompanied minors.<sup>38</sup> Furthermore, it may be argued that this option is not suitable as no Minister in the Australian Government or Government Department is sufficiently independent from the whole of government policy to independently protect the rights of vulnerable unaccompanied minors.<sup>39</sup>

### **7.3 - Establish a National Legal Guardianship Commission**

Finally, an alternative to the options presented above may be to establish a **National Legal Guardianship Commission** which would be responsible for monitoring and providing legal advice to unaccompanied minors seeking asylum. This option provides for the observation of the welfare and rights of unaccompanied minors and also gives the Minister for Immigration recourse to a service which may then provide independent legal advice to unaccompanied minors where a cause of action has arisen or may arise in the future. This arrangement must also be maintained even where an unaccompanied minor is sent to Christmas Island, Nauru or Manus Island.

However, it is clear that this is not a preferable option as it arguably creates a dual guardianship arrangement, whereby the responsibility for monitoring and advocating for unaccompanied minors is shared between the Minister for Immigration and DIAC and the Commission.

It is our submission that adopting any of the reform options outlined above would represent a vast improvement on the current guardianship framework for unaccompanied minors seeking asylum, and would contribute greatly to an immigration system that has respect for and regard to the rights and dignity of vulnerable children.

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<sup>38</sup> Ms Rosemary Budavari, Co-director, Criminal Law and Human Rights Unit, Law Council of Australia, *Committee Hansard*, 29 March 2011, p. 21.

<sup>39</sup> Senate Standing Committee on Legal and Constitutional Affairs, *Report on Commonwealth Commissioner for Children and Young People Bill 2010*, Chapter 4.