

21 October 2014

Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

**By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)**

To the Committee Secretary

## **Submission to the Inquiry into the Guardian for Unaccompanied Children Bill 2014**

The Refugee Advice & Casework Service (**RACS**) is a community legal centre that provides free legal advice and assistance to people seeking refugee status in Australia.

RACS has specialist expertise in working with unaccompanied children and young people seeking asylum. RACS currently provides a specialist legal service for unaccompanied children and young people seeking asylum in NSW, Christmas Island and other locations around Australia. RACS is an industry partner of the cross-institutional research project “Small Mercies, Big Futures: enhancing law, policy and practice in the selection, protection and settlement of refugee children and youth”. As part of this project, RACS has contributed to the development of guidelines for legal representatives working with children and young people seeking asylum.

RACS welcomes the opportunity to make this submission to the Committee about the *Guardianship for Unaccompanied Children Bill 2014* (**the Bill**), which is informed by our experience in this area.

### **Support for the Bill**

RACS supports the underlying principles and objectives of the Bill to establish an independent statutory office to act as the legal guardian and to advocate for the best interests of unaccompanied non-citizen children.

RACS believes that the current system of guardianship established by the *Immigration (Guardianship of Children) Act 1946* (Cth), whereby the Minister for Immigration and Border Protection (**the Minister**) is the legal guardian of all non-citizen children in Australia without

a relative over 21,<sup>1</sup> is inappropriate and inadequate for protecting the rights and interests of unaccompanied children.

### **Independence of the legal guardian**

Under the current system of guardianship the Minister has ‘the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have’.<sup>2</sup> At the same time, under the *Migration Act 1958* (Cth) (**the Migration Act**), the Minister is responsible for administering a wide range of powers and functions, including determining visa applications, making decisions about whether to detain children or release them from detention, whether to transfer children to regional processing countries, and whether to remove children from Australia.

RACS is concerned that the Minister for Immigration’s responsibilities as the legal guardian of unaccompanied non-citizen children at times may conflict with the Minister’s responsibilities in administering the Migration Act. In such instances, 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>3</sup>

RACS believes that 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.

### **Best interests of the child**

Article 3 of the *Convention on the Rights of the Child*, to which Australia is a signatory, requires that legal guardian(s) of a child have as their basic concern the best interests of the child.<sup>4</sup> Under the current guardianship arrangements, the Minister for Immigration is not required to act in the best interests of children under the Minister’s guardianship.

The Migration Act and associated departmental policies do not require the Minister to act in the best interests of unaccompanied non-citizen children. For example, when conducting Best Interests Assessments for the purpose of deciding whether a child is to be transferred to a regional processing country, departmental policy states that the best interests of a child may be outweighed by other factors.<sup>5</sup> In such circumstances, unaccompanied children do not have any adult who is responsible for advocating on their behalf and representing their best interests as part of the decision making process.

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<sup>1</sup> Subject to additional provisions and qualifications: *Immigration (Guardianship of Children) Act 1946* (Cth), s 4AAA.

<sup>2</sup> *Immigration (Guardianship of Children) Act 1946* (Cth), s 6(1).

<sup>3</sup> Australian Churches Refugee Taskforce (author Jennifer Basham), *Protecting the Lonely Children: Recommendations to the Australian Government and the UN Committee on the Rights of the Child with respect to unaccompanied children who seek asylum and refuge in Australia* (July 2014) 20; Crock, Mary and Kenny, Mary Anne, ‘Rethinking the Guardianship of Refugee Children after the Malaysian Solution’ (2012) 34(3) *Sydney Law Review* 437, 453; *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365; *Odhiambo* (2002) 122 FCR 29; *Plaintiff M168 litigation* (2011) 279 ALR 1; *WACA v Minister for Immigration and Multicultural Affairs* (2002) 121 FCR 463.

<sup>4</sup> *Convention on the Rights of the Child*, article 18.

<sup>5</sup> See, for example, Department of Immigration and Border Protection, Pre-Transfer Assessment, Best Interests Assessment for transferring minors to a regional processing country, 13 February 2014 – Version 1.4, 1.

RACS believes that it is necessary for unaccompanied non-citizen children, who lack any parent or other guardian to represent their interests in Australia, to have an independent legal guardian who is responsible for promoting their best interests.

**Conclusion**

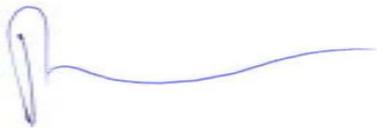
For these reasons, RACS supports the objective of the current Bill to establish an independent statutory office of the Guardian, and requiring the Guardian to act in a way which promotes the best interests of children under guardianship.<sup>6</sup>

To discuss the contents of this submission, please contact us on (02) 9114 1600.

Yours sincerely

REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC.

Per:



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<sup>6</sup> Guardian for Unaccompanied Children Bill 2014, cl 18(5).