



**Submission to the Australian Human Rights
Commission
National Inquiry into Children in Immigration
Detention
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Toward a holistic approach to guardianship in Australia¹

Introduction

This submission examines current Australian guardianship law, policy and practice in relation to unaccompanied minors (Part 1), identifies guiding principles for effective guardianship of unaccompanied minors from international human rights norms and comparative legal and policy analysis (Part 2), and considers how the guardianship of unaccompanied minors in Australia can be made more effective in law, policy and practice (Part 3).

At the outset, we note that international law, sound policy and humane practice require that children should only be detained as a last resort, for the shortest possible period of time, and that asylum seekers should not be processed or detained offshore. However, as these matters have been dealt with extensively elsewhere, we do not reproduce these arguments in this submission.

Summary of recommendations

Recommendation 1: Establish an explicit and integrated national policy framework for the guardianship and custodianship of UMAS' and UHMs (National Unaccompanied Minor Guardianship Framework), drawing on the accumulated experience and sharing of best practice between current service providers.

Recommendation 2: The National Unaccompanied Minor Guardianship Framework should stipulate guidelines for guardians and custodians discharging their duties and establish a transparent monitoring and accountability system.

Recommendation 3: Amend the IGOC Act to resolve the conflict which arises from the Minister for Immigration being the designated guardian of all unaccompanied minors in Australia.

Recommendation 4: Conduct costing and consultation with stakeholders regarding the operational viability of either creating an independent statutory office of Guardian for Unaccompanied Children or transferring Guardianship of Unaccompanied Minors to a Minister independent of the Immigration portfolio.

Recommendation 5: In the interim, the Minister for Immigration should adopt a policy of delegating guardianship of UMAS' to government officers outside of the DIBP who do not discharge immigration statutory functions in relation to the child.

Recommendation 6: Amend the IGOC Act to require the immediate appointment of an independent guardian after an unaccompanied minor is identified or identifies himself or herself as a minor.

Recommendation 7: In the interim, a policy change should be effected to ensure all unaccompanied minors are appointed, and have time to consult with an independent guardian before any proceedings in relation to the child occur.

Recommendation 8: Unaccompanied minors on Christmas Island should urgently be provided with an independent advocate upon reception.

Recommendation 9: Consultation with unaccompanied minors and service providers regarding the need for the provision of transitional services to support unaccompanied minors until they turn 21 and subsequent resourcing of those identified services.

Recommendation 10: Amend the IGOC Act to regulate minimum qualifications for guardians and delegated guardians.

Recommendation 11: Mandatory training regarding child protection obligations and guardianship responsibilities must be provided to all guardians, delegated guardians and custodians.

Recommendation 12: Amend the IGOC Act to include a description of the role of the guardian in similar terms to that proposed in the UK guardianship proposal.

Recommendation 13: Establish an independent committee within the National Guardianship Framework to oversee guardians' and delegated guardians' compliance with their duties and to provide a complaint mechanism for unaccompanied minors who are dissatisfied that their guardian is discharging their obligations effectively.

Recommendation 14: Provide for annual evaluations of UHMS/UMAS services within the National Unaccompanied Minor Guardianship Framework to ensure accountability and transparency.

Part 1: Australian guardianship law and policy

International law recognises the particular vulnerability of children who have arrived in a State as a refugee, or seeking asylum, without a natural parent, or relative 21 years or older and who are not being cared for by an adult who by law or custom has responsibility to care for them. In this section we examine current Australian guardianship law, policy and practice in relation to unaccompanied minor refugees and asylum seekers.

Unaccompanied children: the legal categories

Persons under the age of eighteen who have arrived in Australia without a natural parent, or relative 21 years or older and who are not being cared for by an adult who by law or custom has responsibility to do so fall broadly into two legal categories: Unaccompanied Humanitarian Minors (UHMs) and Unaccompanied Minor Asylum Seekers (UMAS). Essentially, UHMs have been accepted as refugees under Australia's Offshore Humanitarian Program or have arrived as UMAS and have been granted a protection visa in Australia.² UMAS, on the other hand, are in the process of having their refugee claim determined.

UMAS who arrive in Australia by boat have different legal rights depending on the date of their arrival:

- Those arriving before 13 August 2012 have their asylum claim processed in Australia and can be resettled in Australia if found to be a refugee;
- Those arriving after 13 August 2012, but before 19 July 2013, might have their asylum claim processed in a third country but may be resettled in Australia;
- Those arriving after 19 July 2013 have their asylum claim processed in a third country (Nauru or Papua New Guinea) and cannot be resettled in Australia.³

The last group 'transit' in Australia (on Christmas Island) prior to being sent to Nauru or Manus Island for processing of their asylum claim and potential resettlement in those countries. As the terms of reference of this Inquiry do not extend to UMAS in Nauru or Papua New Guinea, this

submission does not consider those particular situations although they raise urgent significant human rights concerns.⁴

The IGOC Act

Minister as guardian

Under section 6 of the *Immigration (Guardianship of Children) Act 1946 (IGOC Act)*, the Minister for Immigration and Border Protection (the Minister) is automatically appointed the legal guardian of both UHMs and UMAS arriving in Australia until they become 18, or, as in the case of those sent to Nauru or Manus Island, leave Australia permanently.⁵

Delegation

The Minister is empowered to delegate their role to a 'delegated guardian' who can also make decisions regarding the child's welfare.⁶ These delegated guardians then assume the role of the 'legally recognized parent.'⁷ In practice, the Minister delegates guardianship to officers either within the Department of Immigration and Border Protection (DIBP) or state or territory child welfare agencies.⁸ A private individual or entity may also be appointed as a custodian of a UHM under the IGOC Act by the Minister or a delegated guardian. In practice, the provision of basic welfare is usually undertaken by either a carer (an approved relative) or third party organisation that provide everyday care (custodians), who make decisions about day-to-day matters. However, the legal guardian retains responsibility for matters that are not of a routine nature and in particular custodians must obtain consent from the legal guardian in relation to healthcare and residency decisions, travel plans,⁹ placing an unaccompanied minor in the care of another person or allowing them to leave the State in which they reside.¹⁰

Care arrangements for UHMs

The possible care arrangements for UHMs include:

- being cared for by a relative or other approved carer under the supervision of the relevant state or territory child welfare agency;
- being cared for by a contracted service provider (currently Life Without Barriers in QLD, WA and SA, and potentially additional locations in future); and
- being cared for by contracted service providers as part of the Refugee Youth Support Pilot Program (QLD, SA, VIC).¹¹

These children typically live in the community with a custodian or carer or in group housing. The approved individual custodian or carer is overseen by the relevant state or territory child welfare agency. UHMs being cared for in group housing with a live-in carer usually have a non-government service provider appointed as their custodian.

The Immigration Department states that its Unaccompanied Humanitarian Minors Program 'provides assistance, support and advocacy in relation to the minor's welfare, settlement and transition to adulthood; and connecting the minor to appropriate services, including formal and informal community networks, to assist in their settlement process'.¹² UHMs typically have access to health care, schooling, and other activities such as sports, art and music classes.

UHMs may also be eligible for services under Humanitarian Settlement Services (HSS), and other settlement programs, if they meet the relevant conditions.¹³ The HSS service provider is responsible for particular aspects of their initial settlement needs, while the state government or contracted service provider is responsible for their supervision and welfare. In many cases, UHMs may exit the HSS program before leaving care under a UHM program. Under the Refugee Youth Support Pilot Program all initial settlement needs are provided through the scheme and clients are referred to a HSS provider shortly before they turn 18 and exit the scheme.

Care arrangements for UMAS

It is currently Australian Government policy that all UMAS are initially detained in immigration detention facilities while health and security checks are conducted but subsequently 'UMAS are accommodated in community-based accommodation wherever possible until their immigration status is resolved.'¹⁴ As at 30 April 2014, 677 children are housed in Alternative Places of Detention on Christmas Island and the mainland, 156 are in transit facilities, 1490 are in community detention, and 1827 are in the community under Bridging Visa E.¹⁵ The Department does not disclose what proportion of these children are unaccompanied. Although Senate Estimates disclosed that there are currently 30 unaccompanied male minors and 2 unaccompanied female minors detained on Christmas Island;¹⁶ no equivalent figures are available for those on the mainland.

Community Detention

UMAS are given priority over other groups to enter community detention. In community detention, these children receive a higher level of support, including a full-time qualified carer in any group housing, access to Immigration Department case managers, and care specific to the needs of unaccompanied minors. They attend schools, have access to health care and are supported to take part in after school activities. They may also receive a small weekly allowance to pay for things such as transport or personal items. Care in community detention is provided in partnership with contracted service providers such as the Red Cross, Life without Barriers, and Mercy Community Services. It has been found that the needs of UMAS in community detention are, on the whole, being met.¹⁷ However some problems persist, for example many UMAS still require approval from their legal guardian to participate in activities.¹⁸ The fact that the legal guardians of UMAS (being either the Minister or his delegates) are not easily accessible means that the process of approving activities can be inefficient and inconsistent.¹⁹ One of the key strengths observed in European jurisdictions was the ability of the UMAS to access their guardian and establish a genuine relationship with them. In Australia there is a disjoint between UMAS and their legal guardian. Most UMAS report that their relationship with their carers is therapeutic,²⁰ but the imposition of curfews in the community detention program may be seen as an unnecessarily intrusive restriction.²¹

Alternative Places of Detention (APODs)

Where an unaccompanied minor is held in detention facilities, including in Alternative Places of Detention (APODs) on Christmas Island or the mainland, services are provided by departmental case managers, mental health support teams, medical staff and education staff.²² However, the secure nature of APODs, the limited opportunities to participate in social and recreational activities and the institutionalised nature of the accommodation and dining arrangements all have a significant effect on the health and wellbeing of children. The APODs have been described as unsatisfactory in meeting the needs of children for reasons including the conditions of play areas, inappropriate

medical services (including limited access to child-appropriate mental health services). The stress and anxiety of indefinite detention in the absence of purposeful activity has also been highlighted.²³

Living with relatives

Unaccompanied minors are not eligible for bridging visas and generally stay in community detention, where they are afforded a greater level of support, until they are 18 years of age.²⁴ However, the DIBP indicates that while their visa application is being processed, the Minister for Immigration and Border Protection can allow them to live with relatives if they have any in Australia. Those relatives become responsible for the care and welfare of the unaccompanied minors in their care.²⁵

Part 2: Guiding principles for guardianship of unaccompanied minors

In this section we draw on international law, guidelines and comparative practice to identify the underlying principles that define guardianship and recommend guiding principles for legal guardianship of unaccompanied minors in law and policy in Australia.

Guardianship refers to the legislative and functional responsibility to protect and provide for the rights and well-being of a child in the absence of the child's parents. In domestic law, a guardian owes a fiduciary duty to a ward, has a duty to protect the child from harm, to provide for their maintenance and education of the child and to make decisions to facilitate their welfare, upbringing and development.²⁶

International law concerning the rights of unaccompanied children and the obligations of States to protect and assist them and act in their interests is clear.²⁷ Relevant international guidelines and standards for guardianship of unaccompanied minors can also be clearly ascertained from the reports of the [Separated Children in Europe Programme](#), the affiliated project to develop [core standards for guardianship](#), the [Inter-Agency Guiding Principles on Unaccompanied and Separated Children](#), and the [European Network of Guardianship Institutions' minimum standards](#). Recent legislative amendments proposed in the UK Parliament regarding guardians for victims of child trafficking are also instructive.²⁸ Additionally, a large body of academic literature has established the need for greater protection and assistance of refugee and asylum seeking children, due to their particular vulnerabilities including separation from family and histories of trauma.²⁹

The key guiding principles for guardianship of unaccompanied minors address the independence, duration, qualifications, powers, capacity, responsibilities and accountability of guardians.

The need for an independent guardian

For unaccompanied asylum seeking and refugee children, the appointment of an independent guardian is imperative to help ensure that they are not subject to any legal disadvantage in their claims for asylum, and that their support and care needs are met by all responsible agencies. International law and guidelines all emphasise the need for an independent guardian:

- The [UN Committee on the Rights of the Child's General Comment No 6](#): Agencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship;
- UNHCR's [Guidelines and Policies on Unaccompanied and Separated Children](#): an independent and formally accredited organization should be identified/established in each country, which will appoint a guardian or adviser as soon as the unaccompanied child is identified;

- The Separated Children in Europe Programme’s [Statement of Good Practice](#): Immediately after a separated child is identified, or where an individual claims to be a separated child... an independent guardian must be appointed to advise and protect them; and
- The [EU’s Reception Directive \(recast\)](#) and [Procedures Directive \(recast\)](#): Organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor shall not be eligible to become representatives.

European countries appoint different types of guardians, but in general there is a clear distinction between the immigration authorities and the role of the guardian. The principal types of guardians appointed in Europe include:

- Child protection or youth services government agencies: Austria, Germany, Lithuania, Spain
- Non-government bodies: France, Netherlands, Poland
- Hybrid models: Belgium (professional non-government employees, and volunteers); Czech Republic (child protection departments and NGOs)
- Citizens of good standing: Sweden.³⁰

In Europe the method of appointment recognises the need for independence. For example, the following principal methods are used:

- Appointment by a court: the Netherlands, Austria, Germany, Italy
- Appointment by an independent body: Belgium (the Guardianship Service), Sweden (the Chief Guardian).³¹

Duration of guardianship

Under international law and according to best practice, a guardian should be appointed at an early stage, preferably as soon as they are identified or claim to be unaccompanied children. For example, the UN Committee on the Rights of the Child recommends:

States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified ...³²

Similarly, UNHCR guidance, EU law, and international soft law recommend appointment of a guardian when an unaccompanied child is identified, or a person claims to be an unaccompanied child, immediately or as soon as possible.³³ In practice, it appears that while guardians in Italy and France were appointed immediately upon arrival, in most other countries delays remain common.³⁴

As a minimum, guardianship should continue until the age of majority or until the child leaves the jurisdiction (as is currently the case under the IGOC Act). However, an emerging issue is to support children during the difficult transitional phase after they turn 18, as a recent European report has examined in detail.³⁵ The Statement of Good Practice, for example, recommends that the appointment of a guardian should continue until a durable solution has been identified and implemented, and this may extend beyond the child’s 18th birthday. In the Netherlands, some UMAS are provided with transitional assistance leading up to the termination of guardianship, such as to find independent accommodation.³⁶ The UK guardianship proposal recommended that guardianship should continue until the age of 21.³⁷

Continuity of guardianship is also important. EU Directives, for example, require that the guardian only be changed when necessary. Continuity of guardianship is necessary in order to establish a relationship of trust, and facilitates the protection of the individual child's best interests.

Qualifications of guardian

International law and practice highlight the need for guardians to have appropriate qualifications. For example, the UN Committee on the Rights of the Child states:

The 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, 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.³⁸

Similarly, the European Network of Guardianship Institutions recommends:

[Guardians should] have the means to enforce a suitable environment, should have general knowledge about the asylum system, and know when to refer and who to refer to when other legal issues arise. They should furthermore have some financial training and be able to act as a person of trust when necessary. Especially in a system reliant on volunteers there may be a risk of a lack of professionalism and therefore ongoing training is crucial. Guardians may range in terms of education, age and commitment. Without denying the added value of individual volunteers or the exemplary dedication and commitment of some, a system of professional guardianship is in this regard preferred over a voluntary system. Should this be impossible, volunteers may well be a second best option or a back-up.³⁹

Recently, the European Parliament called for the guardian to:

[H]ave specific training in the challenges faced by unaccompanied minors, child protection and children's rights, and asylum and migration law ...; these persons should receive continued and adequate training and undergo regular and independent monitoring; [and] calls on the Commission to include in the strategic guidelines common standards, based on best practices, concerning the mandate, functions, qualifications, skills and training of these persons.⁴⁰

The European Fundamental Rights Agency has noted concerns about the lack of qualifications and training of guardians in various countries. However, the Netherlands appears to offer a promising model in this respect, as its Youth Care Act mandates that certain quality requirements must be met by guardianship organisations, including in the recruitment of professionals.⁴¹ The European Fundamental Rights Agency's empirical research found that most children in the Netherlands were satisfied with their guardians.⁴² In Sweden, children are also satisfied with their guardians as although they do not employ professional guardians or have particular requirements, basic training courses are offered.

Powers of guardians

International law and good practice require that the guardian should:

- Be consulted and informed regarding all actions taken in relation to the child;⁴³

- have the authority to be present in all planning and decision-making processes, including immigration and appeal hearings, care arrangements and all efforts to search for a durable solution.⁴⁴

Capacity of guardians

Comparative practice shows that one difficulty is ensuring that guardians have sufficient capacity to engage with their children. The report on the core standards of guardianship recommended, for example, that '[t]he caseload of guardians should be reasonable and maximum levels of caseloads should be set.' One example of good practice is in the Netherlands, where a full time 'Juvenile Protector' accompanies 24 minors, ensuring that each UMAS is seen once a month on average.⁴⁵

Responsibilities of guardians

The '[Statement of Good Practice](#)' identifies that the responsibilities of an appointed guardian are to:

1. Ensure that all decisions have the child's best interests as a primary consideration;
2. Ensure the child's views and opinions are considered in all decisions that affect them;
3. Ensure that the child has suitable care, accommodation, education, language support and health care provision and that they are able to practice their religion;
4. Ensure the child has suitable legal representation to assist in procedures that will address protection claims and durable solutions;
5. Explore, together with the child, the possibility of family tracing and reunification and assist the child to keep in touch with his or her family where appropriate;
6. Contribute to a durable solution in the child's best interests;
7. Provide a link, and ensure transparency and cooperation between the child and the various organisations who may provide them with services;
8. Engage with the child's informal network of friends and peers;
9. Consult with and advise the child, and to
10. Advocate on the child's behalf.⁴⁶

Additionally, the Separated Children in Europe Programme has recently endorsed the following standards:

1. The guardian advocates for all decisions to be taken in the best interests of the child, aimed at the protection and development of the child;
2. The guardian ensures the child's participation in every decision which affects the child;
3. The guardian protects the safety of the child;
4. The guardian acts as an advocate for the rights of the child;
5. The guardian is a bridge between and focal point for the child and other actors involved;
6. The guardian ensures the timely identification and implementation of a durable solution;
7. The guardian treats the child with respect and dignity;
8. The guardian forms a relationship with the child built on mutual trust, openness and confidentiality;
9. The guardian is accessible; and
10. The guardian is equipped with relevant professional knowledge and competencies.⁴⁷

The UK guardianship proposal sets out these responsibilities in legislative language, and expands particularly on the legal aspects of the role:

- (d) assist the child to access legal and other representation where necessary, including, where appropriate, to appoint and instruct legal representatives on all matters relevant to the interests of the child;
- (e) consult with, advise and keep the child informed of legal rights;
- (f) keep the child informed of all relevant immigration, criminal, compensation, community care, public law or other proceedings; ...
- (j) where appropriate liaise with the immigration officer handling the child's case in conjunction with the child's legal representative;
- (k) accompany the child to all interviews with the police, the immigration authorities and care proceedings;
- (l) accompany the child to any court proceedings; and
- (m) accompany the child whenever the child moves to new accommodation.

In the Australian context, Margaret Piper and Graham Thom have identified the responsibilities of guardians to 'ensure that all relevant information is presented and considered in the context of refugee status determination; determine appropriate care arrangements; monitor such arrangements to ensure that the child is being well care for and that their rights are being respected; prevent the minor from being detained; protect the minor from abuse, exploitation, trafficking, recruitment or any other rights violation and to support the minor in any legal manner.'⁴⁸

Accountability of guardians

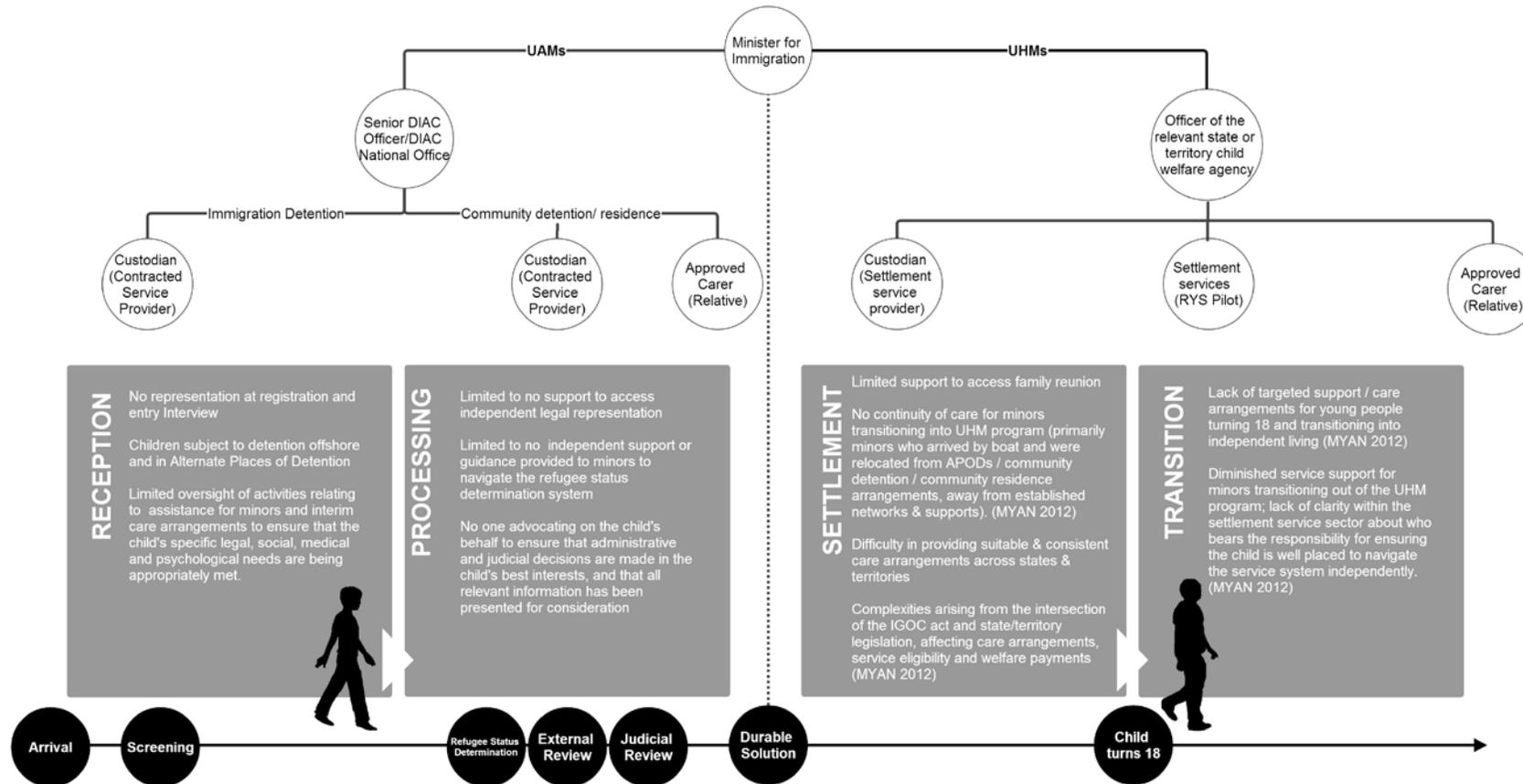
International law and practice demonstrates the need for guardians to be accountable for the performance of their obligations. An effective monitoring and enforcement mechanism is crucial to implement and ensure oversight of, and accountability for, standards of guardianship. One example of good practice is in the Netherlands, where a government body – the Inspection of Youth Protection - monitors and supervises this process.⁴⁹

Part 3: Reforming Australian guardianship law and policy

Guardianship and care arrangements in Australia for unaccompanied minors are fragmented, with different groups enjoying varying degrees of support and services. These artificial distinctions could be removed, particularly in a context where the unavailability of processing in Australia will diminish the numbers of UMAS within Australia. These distinctions cannot be justified as a matter of policy. In our view, the care arrangements, services and infrastructure available in community detention are far better suited to the needs of UMAS than those available in secure detention facilities, and issues currently preventing UMAS from being admitted into community detention should be resolved as a matter of priority.

The artificial distinction between UMAS and UHMs fails to recognise that at least some UHMs are former UMAS. As such it may be more appropriate to think of the UMAS processes and the UHM program as two phases along a single continuum. Continuity of care throughout this continuum is clearly preferable from a child protection perspective.

The diagram below depicts the fragmented nature of the current approach. Although the Minister remains the legal guardian throughout the process, in practice the delegate guardian is responsible for the UMAS, but only for part of the child's journey through the process. The separation and lack of collaboration between the detention process and the UHM program compounds the fragmented services provided to unaccompanied minors.



The inconsistency in service provision, which arises from the fact that care arrangements are contracted through different organizations, gives rise to a number of issues. UMAS are uncertain about what the 'community detention' program offers,⁵⁰ and in situations where their needs are unmet they may be required to relocate.⁵¹ The fragmented nature of care provision has meant that evaluating 'community detention' holistically has been difficult.⁵² Importantly, there is no clear complaint mechanism that UMAS can access to hold custodians or delegated guardians accountable.⁵³

Evaluations of the UHM programs have identified a number of similar issues, particularly for UMAS that have progressed to the UHM program through immigration detention.⁵⁴ These issues include but are not limited to a lack of uniformity in care arrangements,⁵⁵ inadequate provision of appropriate care in some states,⁵⁶ and shortcomings in transitional arrangements.⁵⁷

In our view, a national policy framework for the guardianship of unaccompanied minors is needed to ensure consistency and equality of care across and between state and territory child welfare agencies. This framework could be developed as part of the existing work on a national child protection framework.

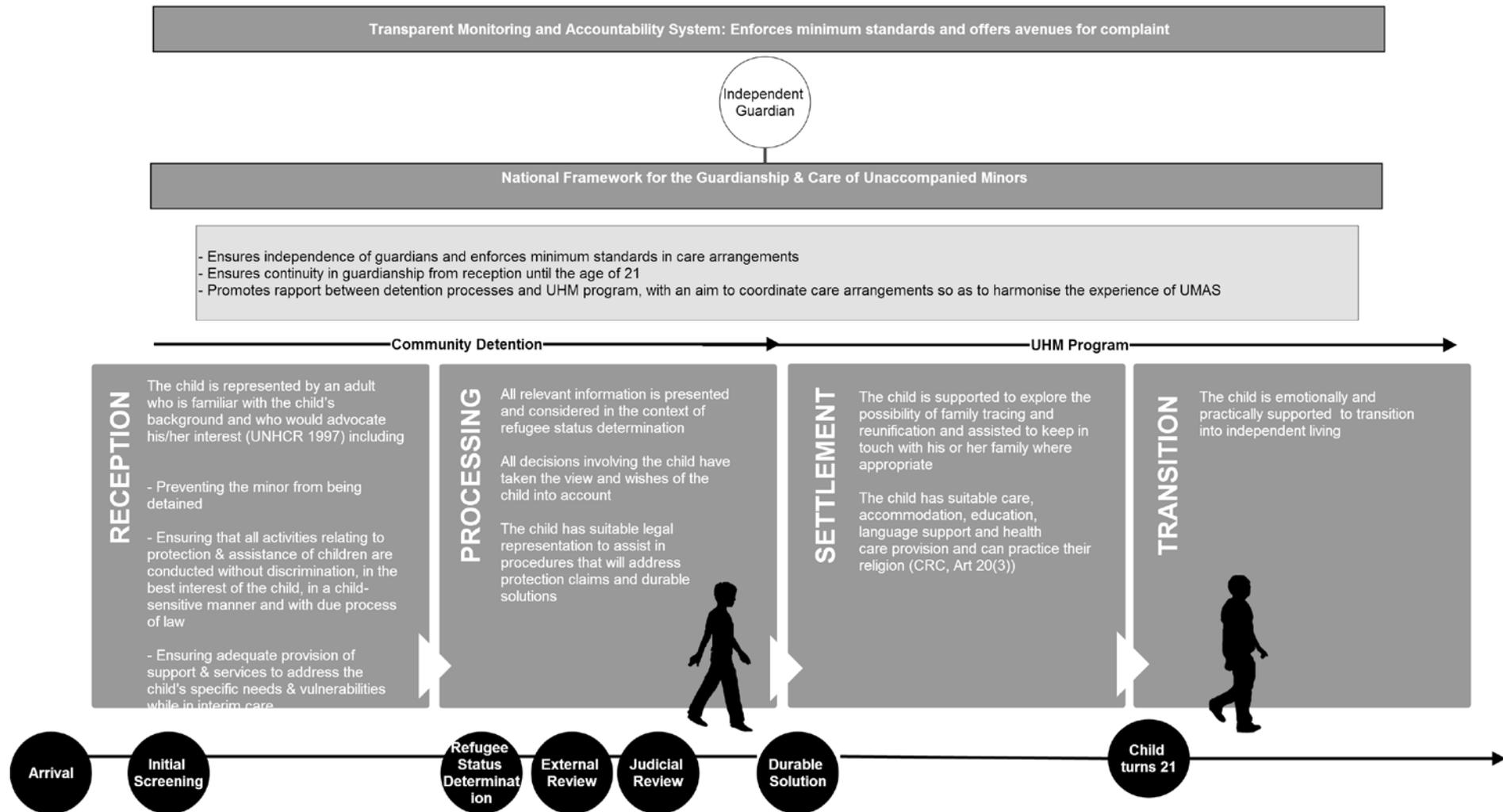
This framework should clearly articulate the roles and duties of guardians and custodians. In Scotland, clarity regarding the role of the Guardian is believed to be one of the most successful features of their Refugee Pilot Programme.⁵⁸

The framework should also identify ways of developing cross sectoral collaboration between government and non-government agencies, for example through a review of existing services and the development of a coordinating mechanism. The framework should also establish minimum standards for services available to unaccompanied minors, and a transparent monitoring and accountability system to underpin the framework.

Recommendation 1: Establish an explicit and integrated national policy framework for the guardianship and custodianship of UMAS' and UHMs (National Unaccompanied Minor Guardianship Framework), drawing on the accumulated experience and sharing of best practice between current service providers.

Recommendation 2: The National Unaccompanied Minor Guardianship Framework should stipulate guidelines for guardians and custodians discharging their duties and establish a transparent monitoring and accountability system.

The diagram below illustrates a possible approach to guardianship and care arrangements, but any final proposal will need to be informed by the detailed knowledge of current service providers and close consultation with key stakeholders.



Removal of conflict of interest

The Minister's dual roles of guardian and administrator of the *Migration Act* gives rise to an unambiguous conflict of interest. This conflict of interest has been well documented in the previous National Inquiry into Children in Detention conducted by the Human Rights and Equal Opportunity Commission in 2004 and in subsequent research.⁵⁹ In 2012, the Parliamentary Joint Select Committee on Australia's Immigration Detention Network recommended that the Minister for Immigration should not be the legal guardian of unaccompanied minors in immigration detention,⁶⁰ a recommendation we support.⁶¹ As these issues have been examined extensively, we do not reproduce them in this submission. However, one recent amendment to the IGOC Act requires comment as does the issue of conflicts of interest regarding UHMs.

There is a potential for conflict between the IGOC Act and the *Migration Act*. The specific provisions of the *Migration Act* have been held to override general guardianship duties⁶² but the courts also found in the *Malaysian Solution*⁶³ case that a specific provision of the IGOC Act (in that case, the need for the Minister's written consent for the removal of a guardian from Australia) can render actions taken under the *Migration Act* unlawful.

As a result of that case, however, the IGOC Act was amended. Section 8 currently provides that the Act did not affect the operation of, or performance or exercise of functions, duties or powers under the *Migration Act* and associated legislation. Further, the IGOC Act does not impose any obligation on the Minister to exercise or consider exercising ministerial powers under the *Migration Act* (such as the power to enable a valid protection visa application) and associated legislation. In particular, the IGOC Act does not affect removals or deportations, including under regional processing arrangements under the Act. These amendments, therefore, mean that the guardianship duties of the Minister have been emptied of real meaning in relation to the administration of migration law.

While the conflict of interest is less obvious for UHMs, the Minister may still be the subject of legal actions arising from his failure to fulfil his fiduciary duties as guardian.⁶⁴ For example, issues that could be litigated include the inconsistent levels of support to UHMs across Australia,⁶⁵ and a lack of capacity in existing service systems to manage caseloads and operate across sectors.⁶⁶ UHMs also lack advocates who can represent their interests to government departments in relation to, for example, access to social security or citizenship applications,⁶⁷ and issues after they turn 18 and are no longer eligible for UHM services.⁶⁸

Alternatives to the Minister as guardian are discussed in the following section.

Recommendation 3: Amend the IGOC Act to resolve the conflict which arises from the Minister for Immigration being the designated guardian of all unaccompanied minors in Australia.

Independent guardian

A person discharging duties as a guardian should not discharge any other statutory duties in relation to a child for whom they are providing assistance.⁶⁹

The need for the independence of the appointed guardian is widely accepted in several European countries as good practise. There are many possible models for ensuring the independence of the guardian including court appointed approved guardians,⁷⁰ independent guardians appointed by a Chief Guardian,⁷¹ the simultaneous appointment of both a guardian and a legal representative⁷² and guardians appointed by government departments. Germany has a mixed appointment system but the majority of guardians are independent.⁷³

The models of the Netherlands, in which a non-governmental organisation is appointed by courts, or Sweden, in which independent citizens are appointed by a chief guardian, appear preferable to models that rely on government departments to appoint or discharge guardianship duties, as these models ensure greater independence.

Independent Guardian models in Australia

The DIBP appears to have been considering how to resolve the Minister's inherent conflict of interest since at least 2009.⁷⁴ This was confirmed by the Department in the Senate Legal and Constitutional Affairs' *Inquiry into the Commonwealth Commissioner for Children and Young People Bill* in 2010.⁷⁵ However, nothing has so far publicly emerged from this work.

Proposals to address this issue in Australia so far include that the guardianship role of the Minister be transferred either to the national Children's Commissioner, the Department of Families, Housing, Community Services and Indigenous Affairs (now the Department of Social Services) or a newly created independent statutory office of Guardian for Unaccompanied Children.⁷⁶

In our view, any of these proposals would be better than the existing conflict of interest, although the proposals would need to be legislatively entrenched so as not to set up a dual guardianship regime. We make some initial comments on these proposals below.

In relation to the national Children's Commissioner, we note that previously stakeholders have expressed concern⁷⁷ that there would be a conflict of interest between the Commissioner's duty to act independently and to monitor laws and policies affecting children and young people, and any potential guardianship function.⁷⁸ The subsequent establishment of the Children's Commissioner has not included a guardianship function.⁷⁹ Further, it is unlikely the Commissioner would be adequately resourced to perform this function.⁸⁰

In relation to transfer of guardianship to the Department of Social Services, this would have the advantage of aligning department responsibilities for settlement services and the Community Assistance Support (CAS) program⁸¹ together with those of responsibility for unaccompanied minors. If this proposal were recommended, we would suggest that the guardianship functions would best be delegated by the Minister to an expert advisory panel comprised of representatives from community organisations and/or state government agencies with relevant knowledge and qualifications. However, any such transfer would need to be adequately resourced.

In relation to the Greens' proposal of an independent statutory office of guardian for unaccompanied children in 2013,⁸² we note that this would provide the greatest degree of independence from government policy. However, there would be difficulties not only in ensuring adequate resourcing but also in integration with existing services provided to unaccompanied minors.

Determining which model is preferable is beyond the scope of the submission, as this would require considering matters such as implications for existing services and providers, costs of services and the breath of the guardianship role (for example, whether it should encompass individual case management or instead advocacy and systemic oversight). Further work would therefore need to be done in consultation with the sector and with possible alternative bodies.

However, we recommend that in the interim, the Minister of Immigration should delegate the function to ‘an officer or authority of the Commonwealth of any State or Territory’ outside of the DIBP — ideally, as already noted, an officer or authority that does not have any other statutory role in relation to the guardian. This would not require any legislative amendment and would immediately reduce the scope of conflict of interest, although any such delegation could still be revoked by the Minister at will.⁸³

One possibility would be to delegate guardianship to an officer of the Department of Human Services, as is currently already done in the case of UHMs.⁸⁴

Recommendation 4: Conduct costing and consultation with stakeholders regarding the operational viability of either creating an independent statutory office of Guardian for Unaccompanied Children or transferring Guardianship of Unaccompanied Minors to a Minister independent of the Immigration portfolio.

Recommendation 5: In the interim, the Minister for Immigration should adopt a policy of delegating guardianship of UMAS’ to government officers outside of the DIBP who do not discharge immigration statutory functions in relation to the child.

Duration of guardianship

Currently, a fundamental flaw in the Australian system is that there is no person to safeguard the best interests of the child when they arrive in Australia and are first detained and interviewed. Although provision may be made for an independent observer, this falls far short of the minimum standard required by international law.

Ideally, the IGOC Act should be amended to provide that arrangements should be made to appoint a guardian immediately after a child is identified as an unaccompanied minor.⁸⁵ However, in the interim, the same outcome may be achieved by a suitable policy change, in which after a minor is identified, an officer of the DIBP is required to schedule the request for an appointment of a guardian with the Minister, and all immigration proceedings be suspended until a guardian is appointed and has time to consult with the child.

Children on Christmas Island

Under current law and policy, UMAS on Christmas Island are intended to transit to a regional processing centre (in 48 hours or less).⁸⁶ However, under the IGOC Act the Minister continues to have fiduciary duties in respect of these UMAS, at least until they are removed.

A pressing issue during this ‘transit’ is their entitlement to the assistance of an independent adult to assist them with their legal claim for asylum. These UMAS should be provided with urgent access to an independent advocate who can meet and represent their best interests in any interactions or interviews with the DIBP. The independent advocate must be able to petition the Minister to exercise his discretion to allow the child to make a valid protection visa application.⁸⁷

We note, however, that for a number of practical reasons children on Christmas Island are likely to remain longer than 48 hours on Christmas Island. These children are particularly vulnerable as they do not know when detention will end and have no prospect of being processed within Australia.⁸⁸ It is imperative that the interests and rights of these children are protected by providing them with a guardian outside the DIBP, preferably stationed on Christmas Island. Failing this, they should be

automatically provided with access to an independent advocate upon reception, who will be able to represent their interests and petition the Minister to exercise his discretion to allow the child to make a valid protection visa application.

Recommendation 6: Amend the IGO Act to require the immediate appointment of an independent guardian after an unaccompanied minor is identified or identifies himself or herself as a minor.

Recommendation 7: In the interim, a policy change should be effected to ensure all unaccompanied minors are appointed, and have time to consult with an independent guardian before any proceedings in relation to the child occur.

Recommendation 8: Unaccompanied minors on Christmas Island should urgently be provided with an independent advocate upon reception.

As already noted, the abrupt cessation of services to children at the age of 18 causes difficulty in transitioning into adulthood. We recommend, therefore, that at 18, children should be given the legal capability of making independent decisions but still be able to access the necessary services, if needed, until the age of 21.

Recommendation 9: Consultation with unaccompanied minors and service providers regarding the need for the provision of transitional services to support unaccompanied minors until they turn 21 and subsequent resourcing of those identified services.

Qualifications of the Guardian

The Minister, as guardian, is not required to meet any standards or possess any qualifications in respect of working with children, nor are the Minister's delegates required to fulfil any standards.

Given the complexity and importance of the role of the guardian, including its legal aspects, minimum standards should be required here as elsewhere in the provision of services to children. These should be entrenched by requiring a responsible body to set out training standards. For example, the UK guardianship proposal required the Secretary of State to set out requirements for training courses that must be completed before exercising functions as a guardian. In developing minimum standards, regard should be had to the guidance on the ten core standards of guardianship developed in Europe, namely that the guardian 'is accountable, works according to a set methodology, knows personal and professional limits, seeks support and counselling whenever necessary and is open to supervision and monitoring.'⁸⁹

Our recommendation is that professional guardians should be appointed. The standard set by the Scottish Pilot Program suggests that hiring professionals enhances productivity and accountability as they are able to develop a reliable working relationship with children and are able to identify the scope and limits of their role.⁹⁰

Alternatively, if citizen guardians are appointed, all guardians should be required to undertake basic training courses unless exempted for good reasons. In the interim, training courses should be designed and undertaken by those officers currently delegated roles by the Minister. As custodians take on a role similar to that of guardians in various European jurisdictions, training should be extended to them as well.

Recommendation 10: Amend the IGO Act to regulate minimum qualifications for guardians and delegated guardians.

Role and powers of the guardian

Currently, the Minister as guardian effectively plays no role in relation to the majority of guardianship functions expected under domestic or international law. In particular, the Minister plays no role as an advocate. This lack of an advocate leaves the child vulnerable to procedural injustice during screening, age determination and interview, the harmful effects of delays in decision making and at worst, the risk of refoulement.⁹¹

Ideally, the role and powers of the guardian should include those set out in the UK guardianship proposal, which are based on the Statement of Good Practice and other international best practice. Setting these responsibilities out in legislation would clarify the roles and duties, especially in relation to the particular aspects of the role that are particular to unaccompanied minors.

In the interim, however, officers delegated as guardians should be required to undertake, as part of their training, a review of the functions of guardianship.

Recommendation 11: Mandatory training regarding child protection obligations and guardianship responsibilities must be provided to all guardians, delegated guardians and custodians.

Recommendation 12: Amend the IGOC Act to include a description of the role of the guardian in similar terms to that proposed in the UK guardianship proposal.

Accountability of the guardian

There is no clear avenue of complaint if minors believe their interests are not adequately protected by their guardian or delegated guardian. Recent reports have documented the negative impacts on minors of not being able to raise issues that they had with their appointed Guardian.⁹²

For example, one of Europe's Core Standards for Guardians includes a requirement to allow the child to participate in decisions that affect him. An indicator for a guardian assessment in this respect is that the guardian 'informs the child about complaint procedures concerning the guardianship and is open to feedback from the child.'⁹³

Further, there is no systematic or comprehensive oversight of guardianship arrangements in Australia. The fragmented nature of this system has limited the ability to co-ordinate efforts, evaluate and monitor guardianship models is limited.⁹⁴ Similarly, in several European jurisdictions it has been acknowledged that a lack of uniformity in practice hinders the process of information exchange and learnings from practice,⁹⁵ with efforts to address this including a comparative analysis of guardianship.⁹⁶

In our view, much could be learnt from jurisdictions that regularly evaluate the effectiveness of their guardianship systems.⁹⁷ For example, the Netherlands⁹⁸ and Scotland⁹⁹ guardianship regimes require annual reporting, advice about available complaint mechanisms and assessments of compliance with complaint mechanisms.¹⁰⁰ In the Netherlands, there is an independent complaints committee¹⁰¹ and children are required to be informed of this.

Recommendation 13: Establish an independent committee within the National Guardianship Framework to oversee guardians and delegated guardians' compliance with their duties and to provide a complaint mechanism for unaccompanied minors who are dissatisfied that their guardian is discharging their obligations effectively.

Recommendation 14: Provide for annual evaluations of UHMS/UMAS services within the National Unaccompanied Minor Guardianship Framework to ensure accountability and transparency.

Conclusion

It is now indisputable that mandatory immigration detention has a lasting and sometimes permanent impact on children's health, well-being and development. All children, unaccompanied or not, should be immediately removed from immigration detention centres (including APOD's) and placed in community detention in the Australian community with access to acceptable standards of healthcare, education and financial support. Unaccompanied minors must be provided with consistent, high quality care from an independent guardian who is able to genuinely represent their interests.

Adoption of the 14 recommendations in this submission would create a guardianship model which addresses the Minister of Immigration's existing conflict of interest, enhances the accountability and uniformity of guardianship standards and arrangements, and better uses the expertise and positive elements in existing service frameworks.

We are happy to provide any further assistance to the Inquiry that may be useful.

Thank you for considering our submission.

¹ The UNSW Human Rights Law Clinic (Jenni Whelan, Niru Sureshkumar, and Amina Youssef), the Andrew & Renata Kaldor Centre for International Refugee Law (Dr Joyce Chia) and the UNSW Faculty of Arts and Social Sciences (Renee Chan, Dr Karen Soldatic) have collaborated to produce this submission. It builds on an existing report, 'Improving guardianship arrangements for unaccompanied minor asylum seekers (UMAS) in South East Asia and Australia: Towards a Holistic approach,' that was prepared by the Human Rights Clinic in 2013.

² The term UHM includes minors who fall under the Minister's guardianship under the *Immigration (Guardianship of Children) Act 1946 (IGOC Act)* as well as minors living with relatives or private carers. See Department of Immigration and Border Protection, Australian Government, *Who is an unaccompanied humanitarian minor?* <<https://www.immi.gov.au/FAQs/Pages/who-is-an-unaccompanied-humanitarian-minor.aspx>>.

³ See *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*, *Migration Legislation Amendment (Offshore Processing and Other Measures) Act 2012* and *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013*.

⁴ UNHCR, *UNHCR Mission to Manus Island, Papua New Guinea: 15-17 January 2013* (2013) available at <<http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Manus%20Island%20PNG%2023-25%20October%202013.pdf>> and UNHCR (2013), *UNHCR monitoring visit to the Republic of Nauru: 7 to 9 October 2013* (2013) available at <<http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf>>.

⁵ It appears that Save the Children has been delegated as a guardian in Nauru by the Minister for Immigration, although the legal position of that delegation is unclear. See Nicholas Procter, Suresh Sundram, Gillian Singleton, Georgia Paxton, Andrew Block, *Physical and Mental Health Subcommittee of the Joint Advisory Committee for Nauru Regional Processing Arrangements: Nauru Site Visit Report* (Nauru Site Visit Report, 30 May 2014), available at <<http://www.theguardian.com/world/interactive/2014/may/29/nauru-family-health-risks-report-in-full>>.

⁶ *Immigration (Guardianship of Children) Act 1946* (Cth), s 5.

⁷ Department of Immigration and Border Protection, *IGOC Factsheet* (2012) 2, viewed on 28 May 2014 and available at <www.ag.gov.au/FamiliesAndMarriage/IntercountryAdoption/Documents/MICAB-IGOCFactSheet-FINAL-6January2012-DOCversion.doc>.

⁸ The delegated guardian for a UHM who has been placed with a contracted service provider is a senior DIBP officer located in the DIBP National Office. The delegated guardian for a UHM residing with an approved carer is an officer of the relevant state or territory child welfare agency.

⁹ Department of Immigration and Border Protection, above n 7.

¹⁰ Multicultural Youth Advocacy Network, *Unaccompanied Humanitarian Minors in Australia - An Overview of National Support Arrangements and Key Emerging Issues* (Policy Paper, Multicultural Youth Advocacy Network, 2012) 8, available at <<http://www.myan.org.au/file/file/MYAN%20UHM%20Policy%20Paper%20Sept%202012.pdf>>.

¹¹ See <<http://www.mdainc.org.au/?q=refugee-youth-support-pilot>> for further information on the RYS Pilot scheme.

¹² Department of Immigration and Border Protection, Australian Government, *What is the Unaccompanied Humanitarian Minors Program?*, viewed on 28 May 2014 and available at <<https://www.immi.gov.au/FAQs/Pages/what-is-the-unaccompanied-humanitarian-minors-program.aspx>>.

¹³ Department of Immigration and Border Protection, above n 12.

¹⁴ Department of Immigration and Border Protection, Australian Government, *FAQ's: How do we care for unaccompanied minors until their immigration status is resolved?*, viewed on 28 May 2014 and available at <<https://www.immi.gov.au/FAQs/Pages/how-do-we-care-for-unaccompanied-minors-until-their-immigration-status-is-resolved.aspx>>.

¹⁵ ChilOut, *Stats + Reports*, viewed on 28 May 2014 and available at <<http://www.chilout.org/statsreports>>.

¹⁶ Legal and Constitutional Affairs Legislation Committee, Australian Customs and Border Protection Service, *Senate Estimates: Immigration And Border Protection Portfolio* (2014) available at <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Festimate%2F2F246c0cd-c536-4f01-bd8b-df3cdbf8f806%2F0006;query=id%3A%22committees%2Festimate%2F2F246c0cd-c536-4f01-bd8b-df3cdbf8f806%2F0000%22>>.

¹⁷ Ilan Katz, Geraldine Doney, Effie Mitchell, *Evaluation of the Expansion of the Community Detention Program: Client and Service Provider Perspectives*, Social Policy Research Centre, SPRC Report 12/13 (2013), available at <<https://www.sprc.unsw.edu.au/media/SPRCFile/evaluationexpansioncommunitydetentionprogramFinal.pdf>> .129-130.

¹⁸ *Ibid*, 80.

¹⁹ *Ibid*, 80.

²⁰ *Ibid*, 122.

²¹ *Ibid*, 99.

²² Department of Immigration and Border Protection, above n 14.

²³ Sophie Peer, Caroline deCosta, Emma Adams, *Visit to Darwin Alternative Places of Detention December 6th-8th, 2013: Darwin Detention: Damaging Children* (Research Findings Report, ChilOut, December 2013) available at <<http://media.virbcdn.com/files/11/7ab4e1dd0c5ca616-DarwinReportF.pdf>>.

²⁴ Katz, Doney and Mitchell, above n 17.

²⁵ Multicultural Youth Advocacy Network, above n 10, 8.

²⁶ *Bennett V. Minister of Community Welfare* [1992] HCA 27 (25 June 1992); *Trevorrow v State of South Australia* (No 5) [2007] SASC 285 (1 August 2007).

²⁷ See 'International Law and Guardianship of Unaccompanied and Separated Children' which sets out excerpts related to guardianship in relevant international law instruments and guidelines at <<http://www.law.unsw.edu.au/sites/law.unsw.edu.au/files/docs/international-law-and-guardianship-of-unaccompanied-and-separated-children.pdf>>

²⁸ See <<http://www.publications.parliament.uk/pa/bills/lbill/2013-2014/0096/amend/ml096-III.htm>> See in particular Amendment 55A moved by Baroness Butler-Sloss <<http://www.theyworkforyou.com/lords/?id=2014-04-07a.1138.4>>.

²⁹ See for example, Mary Crock, Mary-Anne Kenny, Rethinking the Guardianship of Refugee Children after the Malaysian Solution (2012) 34 (3) *Sydney Law Review* 437, p 5; Martine Goeman, Katja Fournier, Thomas Gittrich, Carla van Os, Gabriella Gallizia, Inger Neufeld, Eva Bellander, Samatha Arnold, Marina Uzelac, *Core Standards for guardians of separated children in Europe: Goals for guardians and authorities* (Leiden: Defence for Children – ECPAT The Netherlands, 2011) available at <www.corestandardsforguardians.com/images/22/335.pdf>.

³⁰ European Migration Network, 'Policies on Reception, Return and Integration arrangements for, and numbers of, Unaccompanied Minors – an EU comparative study' (May 2010), <http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/unaccompanied-minors/0_emn_synthesis_report_unaccompanied_minors_publication_sept10_en.pdf>.

³¹ NIDOS Foundation and Refugium, *Towards a European Network of Guardianship Institutions*, ENGI-Project Report (2011), available at <<http://www.epim.info/wp-content/uploads/2011/02/ENGI-Report-Towards-a-European-Network-of-Guardianship-Institutions.pdf>>.

³² United Nations: Committee on the Rights of the Child, General Assembly, Report of the Committee on the Rights of the Child (25 July 2006) UN Doc A/61/41, available at <http://www.crin.org/docs/Report_CRC_GA61_Eng.pdf>.

³³ See 'International Law and Guardianship of Unaccompanied and Separated Children' which sets out excerpts related to guardianship in relevant international law instruments and guidelines at <<http://www.law.unsw.edu.au/sites/law.unsw.edu.au/files/docs/international-law-and-guardianship-of-unaccompanied-and-separated-children.pdf>>

³⁴ European Union Agency for Fundamental Rights (2011), *Separated, asylum-seeking children in European Union Member States Comparative report*, viewed on 28 May 2014 and available at <http://fra.europa.eu/sites/default/files/fra_uploads/1692-SEPAC-comparative-report_EN.pdf>, pp 51-52.

³⁵ Ibid.

³⁶ NIDOS Foundation and Refugium, above n 31.

³⁷ See the UK guardianship proposal – <<http://www.publications.parliament.uk/pa/bills/lbill/2013-2014/0096/amend/ml096-III.htm>>.

³⁸ United Nations: Committee on the Rights of the Child, General Assembly, above n 32.

³⁹ NIDOS Foundation and Refugium, above n 31.

⁴⁰ *Report on the Situation of Unaccompanied Minors to the European Parliament on 26 August 2013*, available at <<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0251&language=EN>>.

⁴¹ In countries like Germany and Belgium we see a hybrid approach with a mix of both professional and volunteer guardians. While the value of volunteers in support systems and the UAM care infrastructure cannot be overstated, ideally guardianship should be restricted to professional workers to ensure uniformity, quality and accountability.

⁴² European Union Agency for Fundamental Rights, above n 34.

⁴³ UN Committee on the Rights of the Child, Separated Children D3.1.

⁴⁴ UN Committee on the Rights of the Child, Separated Children D3.1.

⁴⁵ However we see the limits of such an approach in Germany where the theoretical caseload for guardians is 40 children but has ranged from between 20 and 80 as a result of unexpected influxes in UAMs.

⁴⁶ The guardian should be consulted and informed regarding all actions taken in relation to the child. Where the child, subject to their age and maturity, gives consent, the guardian should have the authority to represent the child in all planning and decision making processes. (Separated Children in Europe Programme 2010, p.22).

⁴⁷ Martine Goeman, Katja Fournier, Thomas Gittrich, Carla van Os, Gabriella Gallizia, Inger Neufeld, Eva Bellander, Samatha Arnold, Marina Uzelac, *Core Standards for guardians of separated children in Europe: Goals for guardians and authorities* (Leiden: Defence for Children – ECPAT The Netherlands, 2011) available at <<http://www.corestandardsforguardians.com/images/22/335.pdf>>.

⁴⁸ Piper, M & Thom, G (2014), *Removing The Stumbling Blocks: Ways To Use Resettlement More Effectively To Protect Vulnerable Refugee Minors*, The University of Sydney in partnership with Amnesty International Australia, viewed on 28 May 2014 and available at <http://www.resettlement.eu/sites/icmc.ttp.eu/files/Removing_the_Stumbling_Blocks_Refugees_2014.pdf>.

⁴⁹ Difficulties arise in countries such as Germany and Belgium where there are different guardianship arrangements exist at the federal and local levels, and across municipalities.

⁵⁰ Katz, Doney and Mitchell, above n 17, 115.

⁵¹ Ibid, 120.

⁵² Ibid, 129-130.

⁵³ Ibid, 123.

⁵⁴ Multicultural Youth Advocacy Network, above n 10.

⁵⁵ Ibid, 12-13.

⁵⁶ Ibid.

⁵⁷ Ibid, 14.

⁵⁸ Heaven Crawley, Ravi KS Kohli, *She endures with me: An evaluation of the Scottish Guardianship Service Pilot*, accessed on 1 June 2014 and available at <http://www.aberlour.org.uk/assets/0000/9979/Summary_-_Evaluation_report_of_the_Scottish_Guardianship_Service.pdf>, p 3.

⁵⁹ See, for example, Australian Churches Refugee Taskforce (2013) *'All the Lonely Children: Questions for Policy makers regarding guardianship for unaccompanied minors'*; Crock & Kenny 2012; Parliamentary Joint Select Committee on Australia's Immigration Detention Network 2012; AHRC 2011; Martin & Curran 2007; Joint Select Committee on Australia's Immigration Detention Network 2012; Crock 2006.

⁶⁰ Joint Select Committee on Australia's Immigration Detention Network, Parliament of Australia, *Final Report* (2012), paras 5.95-5.96. Available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/immigrationdetention/report/index>(viewed 1 October 2013).

⁶¹ *Immigration (Guardianship of Children) Act 1946* (Cth), s 6.

⁶² *WACB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 79 ALJR 94 at 114 [106]; 210 ALR 190 at 217; [2004] HCA 50.

⁶³ *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (2011) 244 CLR 18.

⁶⁴ It should be noted that this conflict of interest also applies to the delegated guardian: Australian Churches Refugee Taskforce (2013), *All the Lonely Children: Questions for Policy Makers Regarding Guardianship of Unaccompanied Minors*, p 6.

⁶⁵ Australian Churches Refugee Taskforce (2013), *All the Lonely Children: Questions for Policy Makers Regarding Guardianship of Unaccompanied Minors*, p 9.

⁶⁶ Multicultural Youth Advocacy Network, above n 10.

⁶⁷ For further discussion on the specific legal and practical issues arising from guardianship arrangements for the UHM program, please see the MYAN (2012), *Unaccompanied Humanitarian Minors in Australia: an overview of national support arrangements and key emerging issues*, p 16.

⁶⁸ Multicultural Youth Advocacy Network, above n 10, p14.

⁶⁹ See for example, the UK guardianship proposal See <<http://www.publications.parliament.uk/pa/bills/lbill/2013-2014/0096/amend/ml096-III.htm>>.

⁷⁰ In the Netherlands, the Courts appoint individuals from NIDOS, an independent NGO, as guardians of all UMAS. Other jurisdictions where a guardianship judge appoints guardians include Finland, France, Germany and Italy.

⁷¹ In Sweden, a Chief Guardian is appointed by the municipalities who can then appoint independent guardians under his responsibility. The Chief Guardian can be a board or an individual person.

NIDOS Foundation and Refugium, above n 31, pp 68-69.

⁷² As in Canada, Finland, Norway, France and Switzerland.

Scottish Refugee Council, *First Annual Evaluation Report: Dec 2011*, p5. Available at <http://www.scottishrefugeecouncil.org.uk/assets/3643/First_Annual_Evaluation_report_guardianship_Dec_2011.pdf>.

⁷³ A Guardianship court appoints a guardian who can be an individual from Youth Services, a lawyer or an NGO. NIDOS Foundation and Refugium, above n 31, pp 30 – 31.

⁷⁴ Mary Crock, Mary-Anne Kenny, *Rethinking the Guardianship of Refugee Children after the Malaysian Solution* (2012) 34 (3) *Sydney Law Review* 437, p 463.

⁷⁵ See Australian Government, *Chapter 4: Main issues regarding the functions and powers of the Commonwealth Commissioner*, viewed on 28 May 2014 and available at <http://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/commissionerforchildrenandyoungpeople/report/c04#anc7>, para 4.62.

⁷⁶ See ChilOut (2010), *Submission No 63 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia: Commonwealth Commissioner for Children and Young People Bill 2010*, 5.

⁷⁷ See Australian Human Rights Commission (2010); COAG 's *National Framework for Protecting Australian Children* (2009); *Non-Government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* (2005). (*MYAN Briefing Paper*, August 2010).

⁷⁸ See Law Council of Australia (2011), *Senate Legal and Constitutional Affairs Committee: Commonwealth Commissioner for Children and Young People Bill 2010*, viewed on 28 May 2014 and available at <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2300-2399/2341%20Commonwealth%20Commissioner%20for%20Children%20and%20Young%20People%20Bill%202010.pdf>>, p 5.

⁷⁹ *Australian Human Rights Commission Act 1986*(Cth), s 46MB.

⁸⁰ When questioned about the allocation of \$3.5 million for the establishment of the Commonwealth Children's Commissioner in a Senate Estimates hearing in May 2012, President of the AHRC, Catherine Branson QC stated that: '... the funding of itself is not adequate if we choose to give those staff, which we regard as essentially the minimum with which a commissioner can effectively work, adequate resources for what we would expect to be a rise in complaints made under the Convention on the Rights of the Child. It will also not have the capacity to support the additional demands on support services of the commission, such as the legal office if demands are referred to the legal office. It will not enable us to provide further lawyers and there will

be further demands on our finance and human resources people. It is not adequate to provide additional funding there either.'

⁸¹ Australian Government: Department of Social Services, *Fact Sheet 98 – Settlement Services for Refugees*, viewed on 28 May 2013 and available at <<http://www.dss.gov.au/our-responsibilities/settlement-and-multicultural-affairs> and <www.dss.gov.au/our-responsibilities/settlement-and-multicultural-affairs/publications/fact-sheet-98-settlement-services-for-refugees#i>.

⁸² Australian Government, Guardian for Unaccompanied Children Bill 2013, viewed on 28 May 2014 and available at <<http://www.comlaw.gov.au/Details/C2013B00176>>.

⁸³ Section 8 of the IGOC act subordinates the provisions of the act to those of the Migration Act, section 11 allows the minister to determine that the provisions of the Act shall not apply in respect of a child specified by him, or a child included in a class of children specified and section 5(3) stipulates that 'A delegation under this section shall be revocable at will, and no delegation shall prevent the exercise of any power or function by the Minister'.

⁸⁴ Multicultural Youth Advocacy Network, above n 10.

⁸⁵ See <<http://www.publications.parliament.uk/pa/bills/lbill/2013-2014/0096/amend/ml096-III.htm>>.

⁸⁶ Previously they would have been subject to proper health and security checks in Australia, taking weeks.

The Australian Medical Association, amongst others, has expressed serious concerns about this practice: Australian Churches Refugee Taskforce (2013) '*All the Lonely Children: Questions for Policy makers regarding guardianship for unaccompanied minors*', viewed on 28 May 2014 and available at <<http://www.australianchurchesrefugeetaskforce.com.au/wp-content/uploads/2013/10/AllTheLonelyChildren-Draft1.pdf>>; SBS (2013), *Concerns over rapid asylum-seeker transfers*, viewed on 28 May 2014 and available at <<http://www.sbs.com.au/news/article/2013/09/25/concerns-over-rapid-asylum-seeker-transfers/>>.

⁸⁷ *Migration Act 1958* (Cth) s 48B.

⁸⁸ It is likely that the new policy of offshore detention and resettlement violates Australia's obligations under CROC, but amendments to the IGOC Act ensure that the Minister's guardianship duties cease when the UAM is removed from Australia. For those children who remain for any period of time on Christmas Island, even under the amendments – the Minister is still the legal Guardian. For these children there is no prospect of settlement in Australia, and yet they will be detained for an indeterminate period of time, violations of CROC may arise in respect of Art37(b),(c),(d); Art22, Art39 etc. Any children in this situation should be regarded as highly vulnerable and yet it is clear that their interests are not represented under the current framework.

⁸⁹ Crawley and Kohli, above n 58.

⁹⁰ Martine Goeman, Katja Fournier, Thomas Gittrich, Carla van Os, Gabriella Gallizia, Inger Neufeld, Eva Bellander, Samatha Arnold, Marina Uzelac, *Core Standards for guardians of separated children in Europe: Goals for guardians and authorities* (Leiden: Defence for Children – ECPAT The Netherlands, 2011) cited in Crawley, H & Kohli, R (2011), *She endures with me: An evaluation of the Scottish Guardianship Service Pilot*, accessed on 1 June 2014 and available at <http://www.aberlour.org.uk/assets/0000/9979/Summary_-_Evaluation_report_of_the_Scottish_Guardianship_Service.pdf>.

⁹¹ See the Australian Churches Refugee Taskforce 'All the Lonely Children' report, findings from the last National Inquiry into Children in Detention and findings from the recent Inquiry into the Immigration Detention Network for in depth discussion.

⁹² Katz, Doney and Mitchell, above n 17.

⁹³ Goeman, Fournier, Gittrich, Carla van Os, Gallizia, Neufeld, Bellander, Arnold and Uzelac, above n 47.

⁹⁴ Australian Churches Refugee Taskforce (2013) '*All the Lonely Children: Questions for Policy makers regarding guardianship for unaccompanied minors*', viewed on 28 May 2014 and available at <<http://www.australianchurchesrefugeetaskforce.com.au/wp-content/uploads/2013/10/AllTheLonelyChildren-Draft1.pdf>>; Faculty of Arts and Social Sciences: Social Policy Research Centre (2013), *Evaluation of the expansion of the community detention program: Client and Service*

Provider Perspectives, viewed on 28 May 2014 and available at <<https://www.sprc.unsw.edu.au/media/SPRCFile/evaluationexpansioncommunitydetentionprogramFinal.pdf>> ; Crock, M & Kenny, M, Rethinking the Guardianship of Refugee Children after the Malaysian Solution, 34 (3) *Sydney Law Review* 437; Multicultural Youth Advocacy Network, *Unaccompanied Humanitarian Minors in Australia: An Overview of National Support Arrangements and Key Emerging Issues* (2012) <<http://www.myan.org.au/file/file/MYAN%20UHM%20Policy%20Paper%20Sept%202012.pdf>>.

⁹⁵ NIDOS Foundation and Refugium, above n 31.

⁹⁶ Ibid.

⁹⁷ NIDOS (2007), *Annual Report*, viewed on 28 May 2014 and available at <<http://www.nidos.nl/~media/annual%20report%202007.ashx>>; *She endures with me: An evaluation of the Scottish Guardianship Service Pilot*, accessed on 1 June 2014 and available at <http://www.aberlour.org.uk/assets/0000/9979/Summary_-_Evaluation_report_of_the_Scottish_Guardianship_Service.pdf>.

⁹⁸ See NIDOS (2014), viewed on 28 May 2014 and available at <<http://www.nidos.nl/>>.

⁹⁹ An essential aspect of the Scottish Refugee Pilot Programme was the Project Advisory Group, Operation Steering Group and Service where issues could be raised about internal procedures. See *She endures with me: An evaluation of the Scottish Guardianship Service Pilot*, accessed on 1 June 2014 and available at <http://www.aberlour.org.uk/assets/0000/9979/Summary_-_Evaluation_report_of_the_Scottish_Guardianship_Service.pdf>; Crawley, H & Kohli, R (2011), *First Annual Evaluation Report of the Work of the Scottish Guardianship Service Pilot*, accessed on 1 June 2014 and available at <[www.scottishrefugeecouncil.org.uk/assets/3643/First Annual Evaluation report guardianship Dec 2011.pdf](http://www.scottishrefugeecouncil.org.uk/assets/3643/First%20Annual%20Evaluation%20report%20guardianship%20Dec%202011.pdf)>.

¹⁰⁰ Closing a Protection Gap co-ordinated by Defence for Children Netherlands (2014), *Core Standards for guardians of separated children in Europe: Goals for guardians and authorities*, viewed on 3 June 2014 and available at <<http://www.corestandardsforguardians.com/images/22/335.pdf>>.

¹⁰¹ The committee was established in compliance with Law for Youth care.