
Submission on the proposed Joint General Comment on the human rights of children in the context of international migration

United Nations Committee on the Rights of the Child and Committee on Migrant Workers

29 January 2016

The Law Council of Australia represents state and territory law societies, bar associations and Law Firms Australia. Through this representation, it acts on behalf of over 60,000 lawyers. Its submission focuses on what it considers are the most pertinent rule of law issues in respect of the human rights of children in the context of international migration.

Introduction

1. The *Convention on the Rights of the Child (CRC)* requires States to recognise, protect and promote the rights of all children seeking protection, which includes the requirement that, in all actions concerning children, the best interests of the child be a primary consideration.¹
2. The Committee on the Rights of the Child (**CRC Committee**) has stated that in general, this principle requires that the assessment and determination of the best interests should be undertaken in each individual case, in the light of the specific circumstances of each child, group of children, or children in general.² The elements to be taken into account when assessing and determining the child's best interests include: the child's views and identity; preservation of the family environment and maintaining relations; care, protection and safety of the child; vulnerability; and the child's rights to health and education.³ Further, States Parties to the CRC must not exercise discretion as to whether children's best interests are to be assessed and ascribed proper weight as a primary consideration.⁴

Unaccompanied minors

The need for an independent guardian

3. The CRC Committee has also explained what the best interests principle means in respect of the treatment of unaccompanied minors seeking protection.⁵ The Committee's *General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin (General Comment 6)* addresses the appointment of a guardian and advisor or legal representative pursuant to Articles 18(2)⁶ and 20(1)⁷ of the CRC. It states:

Review mechanisms shall be introduced and implemented to monitor the quality of the exercise of guardianship in order to ensure the best interests of

¹ Article 3(1). See also arts 9(1) and (3), 18(1), 20(1), 21, 37(c) and 40(2)(iii).

² Committee on the Rights of the Child, *General Comment 14: (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC/C/GC/14, (29 May 2013), [48] ('General Comment 14').

³ Ibid [52]-[79].

⁴ Ibid [36]-[37].

⁵ Committee on the Rights of the Child, *General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin*, CRC/GC/2005/6, (1 September 2005), [12]-[30] ('General Comment 6').

⁶ '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.'

⁷ 'A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.'

*the child are being represented throughout the decision-making process and, in particular, to prevent abuse.*⁸

4. The Law Council also notes that the United Nations High Commissioner for Refugees (**UNHCR**) *Guidelines and Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* recommends that: ‘an independent and formally accredited organisation be identified/ established in each country, which will appoint a guardian or adviser as soon as the unaccompanied child is identified.’⁹
5. In Australia, the *Immigration (Guardianship of Children) Act 1946* (Cth)¹⁰ provides that the Minister for Immigration and Border Protection (**the Minister**) is considered to be the legal guardian of every unaccompanied child who arrives in Australia. Under this Act, the Minister may delegate his powers and functions as guardian to Commonwealth officers, or officers of a State or Territory government. A private individual or entity may be appointed as ‘custodian’ by the Minister or delegated guardian. The custodian provides for the care and welfare needs of the unaccompanied minors and can make decisions about routine, day-to-day matters. The delegated guardian retains legal responsibility for the unaccompanied minor. The care arrangements for unaccompanied minors in the community will generally be a relative or approved carer under the supervision of the relevant State or Territory child welfare agency, or a contracted service provider.
6. However, the Minister’s decision-making is necessarily political, and the Minister is also responsible for determining the visa status of non-citizens and for making a range of other decisions that affect their rights and liberties, pursuant to the *Migration Act 1958* (Cth). For some time, the Minister and his predecessors have adhered to a strong policy message aimed at deterring asylum seekers intending to travel to Australia by boat.¹¹ This policy message has necessarily extended to the migration treatment of children.¹²
7. The Law Council considers that the proposed General Comment should discuss the importance of an independent guardian for unaccompanied children. The appointment of an independent guardian would guard against any conflicts of duties or interest, and avoid the appearance of political motivation competing with considerations of the best interests of children. This would ensure that decisions are made in accordance with ordinary welfare requirements and/ or legislation, and ensure States’ international human rights obligations are properly and fairly met.

Access to free legal advice and representation

8. The Law Council notes the importance of ensuring that migrants, especially children, are aware of how to contact a lawyer, and how they may use the services of a lawyer

⁸ General Comment 6, [35].

⁹ Office of the United Nations High Commissioner for Refugees, ‘Guidelines and Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum’ (February 1997) [5.7], available at: <http://www.refworld.org/docid/3ae6b3360.html>.

¹⁰ Section 6(1).

¹¹ See, for example, The Hon Peter Dutton MP, ‘Australia’s border protection measures remain in force’, (Media Release, 4 February 2016), available at: <http://www.minister.border.gov.au/peterdutton/2016/Pages/border-protection-measures.aspx>.

¹² See, for example: Law Council of Australia, ‘Baby Asha’s release into community detention a positive step, but further action required’ (Media Release, 22 February 2016), available at: http://www.lawcouncil.asn.au/lawcouncil/images/1607_--_Baby_Ashas_release_into_community_detention_a_positive_step_but_further_action_required.pdf.

in order to protect their legal rights. In Australia, unaccompanied children require legal advice about various issues including:

- (a) visa issues, including their own applications for protection in Australia, age-determination processes, entry and screening interviews, and visa-related appeals;
- (b) migration advice in relation to bringing family members to Australia; and
- (c) alleged criminal conduct, and whether this will have an impact on migration status.

9. Australia's new Primary Application Information Service (**PAIS**) scheme, provides assistance to unaccompanied minors at the primary application stage of their visa application, but not during any merits or judicial review proceedings. However, many minors who arrived in Australia are ineligible for PAIS due to long delays in processing their visa applications.

10. The Law Council considers that rule of law and procedural fairness principles, as well as international human rights law, require that States provide legal advice and assistance in order to ensure:

- equality before the law;
- equal protection of the law; and
- access to an effective remedy by a competent court or tribunal, for any violations of the law, including human rights.

11. The *International Covenant on Civil and Political Rights (ICCPR)* requires that States provide an effective remedy to all people within its jurisdiction;¹³ equality of men and women in respect of all rights in the ICCPR;¹⁴ the right to legal aid in criminal matters¹⁵ and equal protection of the law.¹⁶

12. To complement these rights, and those in the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and *Universal Declaration of Human Rights*, that together with the ICCPR, comprise the International Bill of Rights, the CRC and *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)* also set out specific legal rights:

- the CRC sets out the rights of children who have infringed a penal law, including equality before the law, which includes appropriate assistance to parents and legal guardians,¹⁷ and special protection and assistance for children separated from their parents;¹⁸ and
- the CMW sets out that migrant workers and their families are equal with nationals of the State concerned before the courts and tribunals¹⁹ and are entitled to an effective remedy.²⁰

¹³ Art 2(3)(a).

¹⁴ Art 3.

¹⁵ Art 14.

¹⁶ Art 26.

¹⁷ Art 40. See specifically art 40(2)(b)(iv).

¹⁸ Art 20(1)

¹⁹ Art 18.

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13. The CRC Committee's General Comment 6 provides that, where children are involved in processing of their protection claims or administrative or judicial proceedings, these children should be provided with both a guardian and legal representation.²¹ Further, taking the children's interests into account, children should be informed, at all times, of arrangements with respect to guardianship and legal representation.²²
 14. The CRC Committee's *General Comment 14: on the right of the child to have his or her best interests taken as a primary consideration (General Comment 14)* also provides that legal representation is required when a child's best interests are to be formally assessed and determined by courts and equivalent bodies.²³
 15. The Law Council considers that the proposed General Comment should discuss the need for all people seeking protection to be treated with humanity and dignity, and to be provided with the services necessary to ensure that their basic needs are met, including publicly funded legal and migration advice. This should include – in a Federal State like Australia – access to legal advice and representation for unaccompanied children regardless of the State or Territory in which they reside. Advice and representation should cover assistance in respect of all interactions with the legal system. For instance in Australia, children should be assisted with protection visa applications and any review stage, during all interviews including screening interviews, entry interviews and age assessments, and in respect of criminal proceedings.

Other unaccompanied minors

16. One of the Law Council's Constituent Bodies, the Law Society of South Australia (**LSSA**), has identified the inability of teenage migrants in Australia to apply for an appropriate visa where they have become separated from their parents. This particularly affects children who are either citizens of New Zealand or holders of temporary visas who are not eligible to apply for visas in their own right.
17. Consideration should therefore be given, in preparing the General Comment, to:
 - (a) the establishment of a specific visa category for child migrants who are no longer in the care of their parents but who do not meet eligibility criteria for other visas in their own right; and
 - (b) the availability of social security to such groups of people.

Migration consequences

Arbitrary detention and deportation of children

18. The Law Council notes that the requirement that States take measures to ensure the best interests of the child appears in the CRC at Articles 3(1), 9(1) and (3), 18(1), 20(1), 21, 37(c) and 40(2)(iii). There are other articles that are applicable to the best interests of the child in the context of a child's mental health, such as Article 37(b) of the CRC, which provides that children should only be detained as a measure of last resort, and for the shortest appropriate period of time.

²⁰ Art 83.

²¹ General Comment 6, [36].

²² Ibid [37].

²³ General Comment 14, [96].

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19. Although international human rights law and its interpretive instruments provide for minimum standards of detention, the Law Council opposes any form of immigration detention of children except as a matter of last resort and queries whether such detention could ever satisfy the best interests principle, due to the long-term effects of detention on children's mental and physical health and wellbeing.²⁴ Consideration should be given to a strong statement against the detention of children. And any exceptions (if there are to be any) should be narrowly confined.
 20. The Law Council has long advocated that legislated limits be placed on detention, and that immigration detention be subject to judicial oversight and regular review. The General Comment should include such requirements.

Security concerns

21. Procedural fairness requires the opportunity for asylum seekers or refugees who are subject to adverse security assessments (for example, because they are considered to be a threat to national security) to be heard as meaningfully as possible in the course of that assessment. It also requires the right to seek effective merits review and judicial review of the adverse security assessment, and any decision based on the assessment.
22. Meaningful review requires that such a person must be given sufficient information to know the basis for their assessment. Further, where national security concerns preclude full disclosure of the reasons for the assessment and the evidence allegedly substantiating it, mechanisms must be available to allow for partial disclosure and independent review. The Law Council also considers that adverse security assessments should be subject to periodic internal review.
23. Where people must be detained because of an adverse security assessment, alternatives to detention that are appropriate in light of the specific security risk posed if an adverse security assessment is upheld should be identified. The principle of proportionality requires the balancing of the rights to liberty and security of the person and freedom of movement on the one hand with the public policy purpose of detention on the other, and that a person (and especially any dependent child) should be detained only where that is strictly necessary to achieve the purpose said to justify detention in that person's individual case.²⁵
24. The proposed General Comment should include a specific mention of the wellbeing of children who, or whose parents, are the subject of an adverse security assessment.

Visa refusals and cancellations

25. In Australia, the Minister has the power to cancel or refuse a visa and deport a person on various grounds under the Migration Act. In exercising the power to cancel or refuse visas, the Law Council considers that it is important to ensure that Australia does not unnecessarily refuse or deny visas to non-citizens who pose no real threat to Australia, as visa refusal or cancellation may involve significant long-term consequences for the individual, including detention and deportation. In Australia, some parents have had their visas revoked, leaving children in Australia without care.

²⁴ See, for example: Australian Human Rights Commission, *The Forgotten Children* (2014), available at: https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf.

²⁵ Office of the United Nations High Commissioner for Refugees, 'Detention Guidelines: guidelines on the Applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention' (2012), Guideline 4.2.

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26. In Australia, any person (including a child) who receives a sentence of 12 months or more faces automatic cancellation of their visa. Although it is possible to apply to have the cancellation revoked, legal aid is not currently available to persons in this situation. This may result in the deportation of a person to their home country, without the support of family members who all may have a right to stay in Australia.
 27. It is imperative that all visa cancellations are subject to effective procedural safeguards, and that the visa-holder or their legal representative is appraised of the reasons for their visa cancellation.
 28. The proposed General Comment should discuss the need for States to ensure children are not arbitrarily detained in circumstances relating to adverse security assessments of the child or the child's parents, and that children are afforded procedural fairness in respect of visa cancellation and prior to any deportation.

Risk of deportation on other grounds

29. The Law Council's Migration Law Committee has observed that, while a number of children have completed a majority of their education in Australia, they are faced with deportation, or alternatively are required to leave Australia to avoid being deported.
30. This usually arises due to the status of the children's parents. In such circumstances, discretion rests with the Minister to grant a further temporary or permanent visa using his discretionary powers under sections 417 or 351 of the Migration Act. In considering exercise of such discretionary powers, the Minister may consider 'unique and exceptional circumstances' including, amongst other things, Australia's international obligations, including the CRC. However, it is the experience of the Migration Law Committee that, in practice, it is exceedingly rare for non-Australian children's rights to be accorded any weight in this discretionary consideration, leading to the family's removal from Australia.
31. The Migration Law Committee also observes that the requirements of applying for a new visa offshore can be difficult to meet. The General Comment should require or recommend that in such circumstances, States adopt special visas or other measures so that children aged 16 or over can apply for a temporary visa to enable them to finish their education.

Custody of children

32. The LSSA has also raised concerns for the welfare of Australian children who have one Australian parent and one migrant parent on a visa, in circumstances where the relationship between the parents breaks down and the migrant parent is unable to legitimately remain in Australia.
33. The LSSA considers that there should be a pathway whereby a migrant parent who finds themselves in such a situation would be able to remain in the State in which their child is a citizen.
34. The proposed General Comment should discuss that decision-makers be empowered to make a discretionary decision on family reunion, if this is not provided for in legislation.

Temporary Protection

35. The Law Council acknowledges the significant impact of temporary protection laws on children. Children who are not provided with a durable solution, under the principle of

non-refoulement in the *Convention Relating to the Status of Refugees (Refugee Convention)*,²⁶ face a life of deprivation and permanent uncertainty.

36. In Australia, the Government reintroduced Temporary Protection Visas (TPVs) as a substitute for permanent protection in December 2014. Following these amendments to the Migration Act, no asylum seeker who has arrived or will arrive by boat or by air without a valid visa will ever be eligible for a permanent protection visa.
37. The Law Council expressed its opposition to these changes on the basis that TPVs do not provide durable protection outcomes; potentially contribute to mental health issues as a result of associated uncertainty and family separation; result in an administrative burden on government; and may not have the desired deterrent effect.²⁷ The Law Council considers that TPVs will only be consistent with international obligations to the extent that they constitute a form of 'bridging visa' while people await the determination of their claim. They should not be supported as the final outcome once an individual has been found to engage the protection obligations.
38. The deleterious effect of temporary protection is exemplified by Australia's reintroduction of TPVs:
- unaccompanied minors granted TPVs are unable to apply to bring their parents to Australia, as a result of their temporary status;
 - similarly, families with one parent in Australia on a TPV cannot apply to bring the other parent to Australia. Often the single parent is left in a vulnerable situation of trying to support the child, get access to childcare, and meet their visa requirements;
 - although some children on TPVs are eligible for primary and secondary education, depending on the State or Territory in which they reside, all children face fees as foreign students at tertiary level; and
 - children with disabilities are denied access to certain services, such as social services and housing assistance.
39. The proposed General Comment should discuss the need for durable solutions, including family reunion and equal access to education and other services for all children, regardless of their visa status.

Refusal of visas for children with disabilities

40. In Australia, the Migration Act is exempt from the application of the *Disability Discrimination Act 1992* (Cth) (**DDA**). This has the effect of excluding the Migration Act, including decisions made under that Act, from Australia's obligations under the United Nations *Convention on the Rights of Persons with Disabilities*.
41. In Australia, children are impacted severely by the health rules that operate to exclude families who have a child with a disability. The applicant must be free from a disease or condition in relation to which the provision of the health care or community services,

²⁶ Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007), 343.

²⁷ Department of Parliamentary Services, Parliament of Australia, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (Bills Digest No 40, 2014-15) 14 citing Senate Legal and Constitutional Affairs Committee, Answers to Questions on Notice, Immigration and Citizenship Portfolio, Budget Estimates 2012-13, 21-22 May 2012, Question BE12/0265.

regardless of whether the health care or community services will actually be used in connection with the applicant, would be likely to: (a) result in a significant cost to the Australian community in the areas of health care and community services; or (b) prejudice the access of an Australian citizen or permanent resident to health care or community services.²⁸

42. The Law Council notes that these provisions apply regardless of whether the child is migrating to Australia or not, and that the entire family's visas will be refused if one child fails the health criteria.
43. The proposed General Comment should discuss the need for migration to be a non-discriminatory practice, including in respect of families who have children with disabilities.

Access to services

Victims of trafficking

44. The Special Rapporteur on trafficking in persons, especially women and children (**Special Rapporteur**), has consistently identified that the United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* as a Protocol to the United Nations *Convention against Transnational Organized Crime* requires States to protect victims, and prosecute trafficking in persons by private individuals, including by providing the possibility for victims to access compensation.²⁹
45. In respect of Australia, the lack of consistency of victims' compensation schemes across jurisdictions and the failure of these schemes to adequately cover some forms of human trafficking has led the Special Rapporteur to support the establishment of a harmonised, national compensation scheme in Australia.³⁰
46. The Law Council supports this approach. It considers that, in accordance with the United Nation's *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, any physical and psychological care should not be conditional on the provision of assistance by the victim to law enforcement agencies.³¹ This is underscored by the primacy of human rights, such that human rights of trafficked persons shall be at the centre of all efforts to prevent and combat human trafficking, and to protect, assist and provide redress to victims.³²
47. The proposed General Comment should discuss the need for States to adopt a national compensation scheme for victims of human trafficking.

²⁸ Migration Regulations 1994 (Cth), Schedule 4, reg 4005(c)(ii).

²⁹ *Report of the Special Rapporteur on trafficking in persons, especially women and children*, 3 August 2015, UN GAOR 70th sess, Item 73(b) of the provisional agenda, UN Doc A/70/260, [14].

³⁰ *Report of the Special Rapporteur on trafficking in persons, especially women and children*, 28 July 2014, UN GAOR 69th sess, Item 69(b) of the provisional agenda, UN Doc A/69/33797, Recommendation 82(g).

³¹ Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, UN Doc E/2002/68/Add.1, 1 [8].

³² *Ibid*, 1 [4] and Guideline 1.

Disability support services

48. The Law Council considers that all migrant children, including those with a disability, must be treated equally.³³ This includes their ability to access appropriate services.
49. In Australia, migrants with a higher likelihood of needing income support payments, such as parents and potential spouses of Australian residents, are prevented from accessing social security funding for a period of between two and ten years, and require the commitment by an 'assurer', who meets certain requirements, to assume financial responsibility for supporting this dependant during that period.
50. In respect of the Disability Support Pension, migrants with disability granted visa status (except for those immigrating on humanitarian grounds), must wait ten years before being eligible for this pension. Eligibility for this pension has flow-on effects, such as eligibility for essential disability services and equipment. Consequently, unlike other Australians with a disability, migrants with disability are unable to access appropriate financial support, or a range of services and support.
51. The Law Council also notes that Australia's new National Disability Insurance Scheme is only available to Australian citizens and permanent residents. This precludes children with a disability who are born in Australia, but whose parents are not citizens or permanent residents, from accessing the scheme prior to turning 10,³⁴ despite the fact that their parents may have lived in Australia for a long period.
52. The proposed General Comment should discuss the need for social services and disability services to be accessible to all migrants, in the same way as they are to citizens and permanent residents.

³³ Art 2 of the CRC, art 7 of the CMW.

³⁴ When they will be eligible for Australian citizenship.