# POLITICAL BARRIERS TO REFORM: ANALYSING AUSTRALIA'S LEGITIMATION OF ITS GUARDIANSHIP FRAMEWORK

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CONTENTS

# ABSTRACT

The guardianship of unaccompanied asylum-seeker children is a contentious aspect of Australian asylum-seeker law and policy. The current legislative framework for guardianship is curtailed by migration legislation and policy and is ineffective for realising the rights of these children under international law. This paper contributes to existing scholarship on guardianship by critically examining political discourse on child asylum-seekers. It combines the discourse-historical approach with doctrinal analysis to uncover the historical and political context and outcomes of the legislation. Critical discourse analysis examines statements made by politicians from both major Australian political parties and the parliamentary report rejecting the most recent attempt at reform. This paper reveals that, to reject reform and justify maintaining the status quo, the government has rationalised the detention of child asylum-seekers as essential to the success of deterrence measures, and moralised these measures by framing them as necessary to protect the lives of those attempting to reach Australia by boat.

# I INTRODUCTION

Unaccompanied asylum-seeker children are often lost in the broader asylum-seeker debate in Australia. Although children constitute only a small percentage of asylum-seekers entering or seeking entry into Australia, and those currently in immigration detention,[1] they are a particularly vulnerable class of asylum-seeker whose protection warrants greater government action. Those who come unaccompanied are further disenfranchised by their lack of legal guardian and assistance through the refugee status determination ('RSD') process, and by Australia's failure to adhere to its obligations to unaccompanied children under international law. The Committee on the Rights of the Child ('*CRC* Committee') has stressed the augmented risks that unaccompanied asylum-seeker children face, including abuse, detention and denial of access to basic human rights.[2]

The current Australian legislative framework of guardianship of unaccompanied asylum-seeker children neither addresses their particular vulnerabilities nor affords their particular rights and protections. Since its enactment in 1946, the *Immigration (Guardianship of Children) Act 1946 (Cth)* ('*IGOC Act*') has conferred the role of guardian and its concomitant duties on the Minister for Immigration ('Minister'). There is a direct conflict between the Minister's fiduciary guardianship duties, including to act in the best interests of the child,[3] and immigration powers, including the power to deport, detain, and grant or decline visas.[4] The Minister's immigration functions often prevail because the Government prioritises national interest and border security concerns over the wellbeing and rights of asylum-seeker children,[5] epitomised by the *IGOC Act* being legislatively subordinate to the *Migration Act*

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[1] As of September 2020, under five children are in immigration detention and 282 are in community detention in Australia. No children are on Nauru or Manus Island: 'Statistics' *Asylum Insight: Facts and Analysis* (Web Page, September 2020) <https://www.asyluminsight.com/statistics#.X3hg4C1h3MI>; 'How many people are on Nauru and PNG?' *Offshore processing statistics* (Web Page, October 2020) <https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/2/>.

[2] Committee on the Rights of the Child, *General Comment No 6: Treatment of Unaccompanied and Separated Children outside their Country of Origin*, 39th Session, UN Doc CRC/GC/2005/6 (1 September 2005) 5 (*CRC* Committee, 'GC 6').

[3] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 3 ('*CRC*').

[4] Maria O'Sullivan, 'The Best Interests of Asylum-Seeker Children: Who's Guarding the Guardian' (2013) 38(4) *Alternative Law Journal* 224, 226.

[5] Jordana Silverstein, 'I am Responsible: Histories of the Intersection of the Guardianship of Unaccompanied Child Refugees and the Australian Border' (2016) 22(2) *Cultural Studies Review* 65 ('Responsible').

*1958 (Cth)* ('*Migration Act*').[6] While the Government has attempted to rectify this conflict by enabling delegation of guardianship functions to departmental officers, this has not resolved it.[7] Consequently, unaccompanied asylum-seeker children who come within the ambit of the *IGOC Act* are denied both the protections afforded by guardianship and their rights under international law, like the right to independent legal assistance.[8]

Attempts have been made to reform the *IGOC Act* and ameliorate the detrimental impacts of Australia's harsh asylum-seeker law and policy on unaccompanied asylum-seeker children.[9] The most recent was the Guardian for Unaccompanied Children Bill 2014 ('Bill'), which sought to establish an independent guardian for unaccompanied children in Australia, for which many academics and advocates have argued.[10] This would have mitigated the conflict of interest and helped to ensure Australia's compliance with its international obligations to unaccompanied asylum-seeker children. That this Bill, like those preceding it, was rejected warrants examination.

Such examination is the aim of this paper. Of particular focus is the Government's consistent justification of the current framework, despite its deficiencies. This paper takes the novel approach of combining doctrinal analysis of the guardianship framework with critical discourse analysis ('CDA') of the Government's language around asylum-seeker children to assess the discursive strategies used to effect desired political outcomes. CDA acknowledges that discourse creation is an inherently political process. Therefore, it is a useful tool for investigating the ways discourses are created and propagated by political elites to maintain dominance, and for challenging dominant discourses that perpetuate social injustice.[11] Adopting the discourse-historical approach, this paper also surveys the historical context of Australian asylum-seeker law and policy to 'justify… certain interpretations… of discursive

[6] *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 (Cth)* sch 2 (8).
[7] Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Guardian for Unaccompanied Children Bill 2014* (5 November 2014) 2.
[8] *CRC* arts 22, 37(c).
[9] See, eg, National Commissioner for Children Bill 2008 (Cth); Commonwealth Commissioner for Children and Young People Bill 2010 (Cth).
[10] See especially Gillian Triggs, 'Never again use children for political gain', *Sydney Morning Herald* (online, 12 February 2015) <https://www.smh.com.au/opinion/never-again-use-children-for-political-gain-20150212-13cgfd.html>.
[11] Naomi C Whitbourn, 'Locked up in a liberal state: A critical discourse analysis of parliamentary debates on the detention of asylum-seeking children in the United Kingdom' (Working Paper No 2018/1, Canadian Association for Refugee and Forced Migration Studies, March 2018) 9.

events'.[12] Analysis of statements made by political actors to the media and in parliament, and of the parliamentary committee's report rejecting the Bill,[13] uncovers the strategies used to legitimise the draconian approach to guardianship. These serve not only to justify policies and their outcomes, but also to marginalise asylum-seeker children and opposing political voices from the discourse.[14] Unaccompanied asylum-seeker children, who are already displaced and subjugated by seeking asylum, are thus stripped of their agency, individuality, humanity, and rights.

Part II of this paper introduces the legislative history of and existing literature on the guardianship framework. Part III explores the evolution of political discourse on asylum-seekers and asylum-seeker children and outlines this paper's methodology. In Part IV, the operation and effects of the guardianship legislation and the Bill's proposed reforms are examined. Finally, Part V critically analyses the political discourse employed to legitimate the current model and how this discourse relates to the rejection of the Bill. This paper concludes that, by rhetorically linking the detention of asylum-seeker children to deterrence measures against boat arrivals, the Government is able to legitimise its marginalisation of asylum-seeker children's rights in favour of stringent immigration policy.

## II AUSTRALIAN ASYLUM-SEEKER AND GUARDIANSHIP LAW AND POLICY

### A *History*

Asylum-seekers, particularly boat arrivals, have become increasingly politicised in Australian discourse. The first wave of predominantly Vietnamese boat arrivals between 1976-1980 were met by a compassionate Fraser Government, who depoliticised their arrival and admission into Australia.[15] They were characterised in academic discourse, however, distinctly as refugees,

[12] Ruth Wodak, 'Critical Discourse Analysis, Discourse-Historical Approach' in Karen Tracey, Cornelia Ilie and Todd Sandel (eds), *The International Encyclopedia of Language and Social Interaction* (John Wiley & Sons, Inc, 2015) 1, 3.

[13] Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Guardian for Unaccompanied Children Bill 2014* (Final Report, February 2015) (Legislation Committee, 'Final Report').

[14] Helen J McLaren and Tejaswini Vishwanath Patil, 'Manipulative silences and the politics of representation of *boat children* in Australian print media' (2016) 30(16) *Continuum* 602.

[15] Michelle Peterie, '"These Few Small Boats": Representations of Asylum Seekers During Australia's 1977 and 2001 Elections' (2016) 40(4) *Journal of Australian Studies* 433, 446.

separate from the broader context of post-World War II migration.[16] The introduction of individual RSD processes in 1982 to discern the 'genuine' refugees perpetuated this distinction.[17] This initiated a shift in Australia's asylum narrative away from notions of international legal and humanitarian obligations and towards policies aimed at deterring and punishing asylum-seekers arriving by boat.[18]

The 1989-1998 wave of mostly South Chinese and Cambodian asylum-seekers sparked '[c]oncern over their uncontrolled influx'.[19] Australia participated in the Orderly Departure Program (1979-1997) and Comprehensive Plan of Action for Indochinese Refugees (1989-1997), which aimed to reach asylum-seekers before they arrived in Australia, determine their status, and either return or resettle them.[20] In 1992, the Government introduced mandatory detention of all unlawful non-citizens, further entrenching the 'conceptual distinction' between illegitimate and genuine asylum-seekers.[21] Australia's refugee programme was also separated from its general migration scheme in 1993.

Over the 1990s and 2000s, Australia's 'crack down' on the 'refugee problem'[22] included introducing safe haven and temporary protection visas;[23] removing reference to the *Convention Relating to the Status of Refugees* ('*Refugee Convention*')[24] from the *Migration Act*; and expanding on- and offshore detention centres and offshore processing centres.[25] In 2001, the Howard government implemented the 'Pacific Solution' in response to the 'Tampa Affair', excising Australia's external territories from Australia's migration zone and turning boats back to Indonesia.[26]

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[16] Klaus Neumann, Sandra M Gifford, Annika Lems and Stefanie Scherr, 'Refugee Settlement in Australia: Policy, Scholarship and the Production of Knowledge, 1952 – 2013' (2014) 35(1) *Journal of Intercultural Studies* 1, 6.
[17] Janet Phillips and Harriet Spinks, 'Boat Arrivals in Australia since 1976' (Research Paper, Parliamentary Library, Department of Parliamentary Services, Parliament of Australia, 23 July 2013) 4 ('Boat Arrivals') 9.
[18] Anne Pedersen and Lisa Hartley, 'Can we make a difference? Prejudice towards asylum seekers in Australia and the effectiveness of antiprejudice interventions' (2015) 9(1) *Journal of Pacific Rim Psychology* 1, 2.
[19] Ben Doherty, 'Call me illegal: The semantic struggle over seeking asylum in Australia' (Reuters Institute Fellow's Paper, Trinity Term 2015, Reuters Institute for the Study of Journalism, The University of Oxford, 2015) 17.
[20] Phillips and Spinks, 'Boat Arrivals' (n 17) 10.
[21] Neumann et al. (n 16) 8, 9.
[22] Doherty (n 19) 18.
[23] Neumann et al. (n 16) 9.
[24] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('*Refugee Convention*').
[25] Pedersen and Hartley (n 18) 2.
[26] Peterie (n 15) 435.

While the 'Pacific Solution' formally ended in 2008, mandatory detention and offshore processing in regional processing centres ('RPCs') resumed in 2012.[27] The severity of asylum-seeker policies increased under both Labor and the Coalition in this period, including, notably, the introduction of the militarised program 'Operation Sovereign Borders' ('OSB') in 2013.[28]

Today, Australia maintains its parallel onshore protection and offshore resettlement programs. Asylum-seekers who arrive by boat or without a valid visa are still denied access to the former under OSB[29] and are turned back to their country of origin or departure.[30] Those who reach Australia can only apply for temporary protection.[31] The Government is currently attempting to resettle asylum-seekers still on Nauru and PNG in the US and other countries,[32] and continues to implement deterrence measures against 'illegal maritime arrivals'.[33] These policies directly contravene Australia's obligation not to penalise people for illegally entering Australia to seek asylum[34] and the principle of *non-refoulement*.[35]

### B *Development and criticisms of guardianship law and policy*

Despite some diachronic legal and policy change, scholars agree that the Government continues not to protect or adequately consider unaccompanied asylum-seeker children's rights. In 1946, the Government introduced the *IGOC Act* to provide protection for children who came to Australia from the United Kingdom during and after World War II through an assisted migration and re-settlement scheme.[36] It established the Minister as their guardian and enabled the national coordination of their guardianship.[37] Refugee children, previously cared for by community groups, legally came within the ambit of the legislation through a 1983 amendment

[27] Phillips and Spinks, 'Boat Arrivals' (n 17) 17.
[28] Pedersen and Hartley (n 18) 2.
[29] Refugee Council of Australia, 'Offshore processing', *Australia's asylum policies* (Web Page, 18 May 2020) <https://www.refugeecouncil.org.au/asylum-policies/5/>.
[30] 'Australia's refugee policy: An overview', *Andrew and Renata Kaldor Centre for International Refugee Law* (Web Page, 17 July 2020) <https://www.kaldorcentre.unsw.edu.au/publication/australias-refugee-policy-overview>.
[31] Refugee Council of Australia, 'Fast tracking', *Australia's asylum policies* (Web Page, 18 May 2020) <https://www.refugeecouncil.org.au/asylum-policies/7/>.
[32] Refugee Council of Australia, 'Intro', *Offshore processing statistics* (Web Page, 4 October 2020) <https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/>.
[33] 'Australia's refugee policy: An overview' (n 30).
[34] *Refugee Convention* art 31.
[35] Ibid art 33.
[36] Mary Crock and Mary Anne Kenny, 'Rethinking the Guardianship of Refugee Children after the Malaysian Solution' (2012) 34 *Sydney Law Review* 437, 447.
[37] Julie Taylor, 'Guardianship of Child Asylum-Seekers' (2006) 34(1) *Federal Law Review* 185, 186.

that replaced the term 'immigrant' with 'non-citizen'.[38] Although in practice guardianship was extended to unaccompanied asylum-seeker children as early as 1956, this was formalised by the *Immigration (Guardianship of Children) Amendment Act 1994 (Cth)* ('*1994 Amendment*').[39]

Initially, guardianship ceased when the child reached 21 or became a citizen.[40] The *1994 Amendment* changed the scope to children under 18 who enter Australia without a guardian and intend to become permanent residents, until they '[leave] Australia permanently'.[41] Notably, under the 'Pacific Solution', guardianship ceased when children were removed to RPCs,[42] as this came within the meaning of 'leaves Australia permanently'.

Unaccompanied asylum-seeker children would have been similarly denied a guardian under the failed 2011 'Malaysian Solution', which sought to transfer asylum-seekers to Malaysia for detention and processing. After the High Court found that the scheme violated the *IGOC Act* section 6A(1) requirement that children covered by the Act 'not leave Australia except with the consent in writing of the Minister',[43] the Government enacted the *Migration Legislation Amendment (Offshore Processing and other Measures) Act 2012* ('*2012 Amendment*'). This formally rendered the *IGOC Act* subordinate to the *Migration Act*.[44] Thus, the guardianship duty has been rendered nugatory, the Minister's role has become tokenistic,[45] and the conflict of interest remains.[46]

This is especially concerning since guardianship entails obtaining independent legal advice for a ward.[47] Without this, unaccompanied asylum-seeker children have restricted access to RSD processes and to recourse for decisions pertaining to their status, furthering their disempowerment.[48] The Australian Human Rights Commission's ('AHRC') 2014 report into

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[38] Silverstein, 'Responsible' (n 5) 70-72.
[39] Taylor (n 37) 185.
[40] Jordana Silverstein, '"The beneficent and legal godfather": a history of the guardianship of unaccompanied immigrant and refugee children in Australia, 1946-1975' (2017) 22(4) *The History of the Family* 446, 450 ('Legal godfather').
[41] *Immigration (Guardianship of Children) Act 1946 (Cth)* ss 4AAA, 6(1) ('*IGOC Act*').
[42] Mary Crock, 'Lonely refuge: Judicial responses to separated children seeking refugee protection in Australia' (2004) 22(2) *Law in Context: A Socio-Legal Journal* 120, 128 ('Lonely refuge').
[43] *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32.
[44] See Part IV.
[45] Crock and Kenny (n 36) 450-451.
[46] Mark Evenhuis, 'Child-Proofing Asylum: Separated Children and Refugee Decision Making in Australia' (2013) 25(3) *International Journal of Refugee Law* 535, 571.
[47] See Part IV.
[48] Natasha Naidu, 'Minister Dutton's Children / Guardianship of Unaccompanied Minors in Immigration Detention' (2016) 10 *UNSW Law Society Court of Conscience* 32, 34.

children in immigration detention ('*Forgotten Children* report') contended the framework ignores asylum-seeker children's particular vulnerabilities and denies them the special assistance and protection to which they are entitled.[49]

These developments have illuminated the 'complete disinterest in the children at the heart of… decision-making' and legislating.[50] This paper explores the failure of the legislation to set out the guardian's duties and the child's rights, leaving the content of the duty vulnerable to interpretations unfavourable to the child's interests, and to safeguard against conflicts of the guardian and child's interests.[51] The existence of such problematic laws, as well as the migration law and policies affecting unaccompanied asylum-seeker children, begs the question of how they originated and endure. To answer this, it is necessary to consider the political will for, and justifications of, these policies.

## III EXAMINING POLITICAL DISCOURSE IN ASYLUM-SEEKER LAW AND POLICY

The literature analysing the Government's discourse on asylum-seekers suggests that the Government has legitimised its stringent law and policy through manipulative constructions of asylum-seekers and persuasive rhetoric that resonates with underlying nationalist sentiment and xenophobia. The Government's presumed authority and credibility and its significant influence have enabled it to dominate public debate on asylum-seekers,[52] and to 'rationalise… [their] dehumanisation and marginalisation'.[53] The political discourse on asylum-seekers over the past few decades has been so integral to Australia's asylum-seeker policy that it has been argued that language itself is the policy.[54]

The use of discursive practices to validate policies and their outcomes is 'deep rooted, historical and socio-political'.[55] Scholars have identified a clear correlation between

[49] Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention 2014* (Report, November 2014) 29 (AHRC, '*Forgotten Children*').
[50] Jordana Silverstein, '"Best interests of the child", Australia refugee policy, and the (im)possibilities of international solidarity' (2020) *Human Rights Review* 1, 10 ('Best interests').
[51] Crock and Kenny (n 36) 448.
[52] Doherty (n 19) 12.
[53] Danielle Every and Martha Augoustinos, 'Constructions of racism in the Australian parliamentary debates on asylum seekers' (2007) 18(4) *Discourse & Society* 411, 412.
[54] Doherty (n 19) 80.
[55] Helen J McLaren and Tejaswini Vishwanath Patil, 'Australian Media and Islamophobia: Representations of Asylum Seeker Children' (2019) *Religions* 10, 501, 11.

integration and settlement concerns and humane, sympathetic policies in the 1970s, and between the notion of an 'ethno-specific', 'eligible' refugee and concerns of 'legitimacy, social inclusion, identity and citizenship' and the more 'hardline' policies Australia has now.[56] Thus, legitimation must be studied in context;[57] it is crucial that the historical context of current asylum-seeker law and policy, explored in Part II, is considered alongside the rhetoric legitimising it to understand the Government's use of language to achieve its political aims.

The Government's perpetuation of the dichotomy of illegitimate and genuine asylum-seekers and its 'rhetorical insistence' on the illegality of those who arrive by boat has been a 'fundamental keystone' to its desired, and achieved, policy outcomes.[58] Conflation of asylum-seekers with terrorists and use of terms like 'crisis' and 'threatening' 'enlivened' the constructed threat, giving the Government the 'imprimatur… to respond' with exclusionary measures under OSB.[59] Similarly, Islamophobic rhetoric and constructions of people smugglers and asylum-seeking adults as deviant 'Others' justified and necessitated draconian detention and deterrence policies.[60] Capitalising on 9/11, the 'Children Overboard Affair' and the 'Tampa Affair', the Government reinforced the 'interconnected narratives' of asylum-seekers as 'an affront to what it means to be Australian' and a national security threat.[61] This contributed to a discourse that dehumanised asylum-seekers, disconnected them from their reasons for seeking asylum, and 'anaesthetised' the Australian public's goodwill.[62]

Importantly, these 'rhetorical constructions' have created a 'discursive environment' in which 'genuine debate is not possible'.[63] Through its perpetuation of rhetoric that demonises and dehumanises asylum-seekers, the Government has erected linguistic barriers to the debate that opposing discourses must overcome before being able to focus on substantive legal and political issues. The Australian Greens and Independents, for example, have attempted to challenge this rhetoric by denying the illegality of those labelled 'illegal maritime arrivals' and the concept of jumping a 'queue'.[64] Scholars have also argued that the construct of the 'illegal'

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[56] Neumann et al. (n 16) 2.
[57] Theo van Leeuwen, 'Legitimation in discourse and communication' (2007) 1(1) *Discourse and Communication* 91, 92.
[58] Doherty (n 19) 33.
[59] Ibid 48-49.
[60] Peterie (n 15) 439, citing Edward W. Said, *Orientalism* (Penguin Books, 2003 [1978]).
[61] Ibid 438.
[62] Doherty (n 19) 39-40.
[63] Ibid 63.
[64] Elizabeth Rowe and Erin O'Brien, '"Genuine" refugees or illegitimate "boat people": Political constructions of asylum seekers and refugees in the Malaysia Deal debate' (2014) 49(2) *Australian Journal of Social Issues* 11-12.

asylum-seeker has no legal foundation, being so different from the *Refugee Convention* definition.[65] This shows that the Government's discursive strategies curtail the political agenda so that while opposing discourses can be articulated, they are limited to the semantics of the debate (i.e. the illegal/legal dichotomy) rather than having any impact on reform. In this way, the Government's legitimation of policy deflects from and masks the actual effects of the policies, and marginalises alternative perspectives.

### A *Political discourse in guardianship law and policy*

It is within this broader context that the Government has sought to legitimise its guardianship framework. Political constructions of asylum-seeker children have rendered them voice- and faceless within the broader asylum-seeker discourse. Thus, the Government has been able to construct the 'putative child' to regressively deny their status as legal persons and to avoid acknowledging the need for, and enacting, reform.[66] It has propagated notions of the child as requiring saving and protection,[67] as incompetent[68] and without agency, and as dependent on the Minister.[69] During the 2001 'Children Overboard Affair', for instance, images of asylum-seeker children being rescued at sea were used to perpetuate these constructions. In emptying the images of their 'essential contextual information' – the children had been on a sinking boat – the Government could impose a particular interpretation on them (and the asylum-seekers therein) that suited its political agenda, and control both the event and the broader discourse.[70]

The Government has consistently used children as 'emotional currency' in political discourse to achieve desirable policy outcomes.[71] The child's best interests have become 'a political bargaining chip' which is weighed against, and trumped by, national interests.[72] Further, the rhetoric of 'best interests' has been used to frame and manage asylum-seeker children, deprioritising their rights and continuing the 'Australian settler-colonial project'.[73]

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[65] Rowe and O'Brien (n 64) 12.
[66] Mary Crock, 'Of Relative Rights and Putative Children: Rethinking the Critical Framework for the Protection of Refugee Children and Youth' (2013) 20 *Australian International Law Journal* 33, 34.
[67] Jordana Silverstein, '"Because we all love our country": Refugee and asylum-seeking children, Australian policy-makers, and the building of national sentiment' (2019) 65(4) *Australian Journal of Politics and History* 532, 538 ('Our country').
[68] Silverstein, 'Best interests' (n 50) 6.
[69] Silverstein, 'Legal godfather' (n 40).
[70] Mary Macken-Horarik, 'Working the borders in racist discourse: the challenge of the 'Children Overboard Affair' in news media texts' (2003) 13(3) *Social Semiotics* 283.
[71] Silverstein, 'Our country' (n 67) 539.
[72] Silverstein, 'Best interests' (n 50) 7.
[73] Ibid.

This was evident in the Government's 2010-11 'Overseas Public Information Campaign' '*Don't be fooled*', which used emotive images and words to frame irregular migration as harmful to the family and the child.[74]

Current guardianship law and policy are undoubtedly influenced by the broader political context and discourse regarding asylum-seekers. The framework has been condemned by scholars and human rights and refugee advocates, and yet, the Government has resisted multiple reform attempts. The role of political discourse in this resistance, particularly to the most recent reform attempt, the Bill, has not been scrutinised. Investigation into political discourse on asylum-seeker children at the time of the Bill, and political responses to its proposed reforms, provides insight into the continuing political barriers to reform of the guardianship framework. This will assist in developing future strategies to address the denial of unaccompanied asylum-seeker children's rights.

### B *Methodological framework*

To examine the political barriers to reform, this paper adopts the discourse-historical approach ('DHA') in combination with doctrinal analysis. The DHA focuses not only on the political issue, but also the 'historical dimension of that issue'[75] to study the political environment in which discursive 'events' occur.[76] Having introduced the historical and political context of Australian asylum-seeker law and policy in Part II, the examination proceeds below with a doctrinal analysis of the *IGOC Act*, its amending legislation, and its compliance with Australia's international obligations. This is informed by case law and existing scholarship and reveals the legislation's problematic operation. It concludes with an analysis of the Bill's proposed reforms, aided by its explanatory memorandum.

Subsequently, this paper undertakes a CDA of statements made by politicians about asylum-seeker children, guardianship and the Bill. Since 'language is not power on its own', DHA seeks to 'demystify the hegemony of specific discourses by deciphering the underlying ideologies' of those creating them.[77] In critically analysing these texts, this paper uncovers the legitimation strategies used by the Government and compares and contrasts the ways in which the law and reform proposals have been represented in political discourse. This unique

[74] Josh Watkins, 'Australia's irregular migration information campaigns: border externalization, spatial imaginaries, and extraterritorial subjugation' (2017) *Territory, Politics, Governance* 1, 8-9.
[75] Theo Van Leeuwen and Ruth Wodak, 'Legitimizing immigration control', (1999) 1(1) *Discourse Studies* 83, 91.
[76] Wodak (n 12).
[77] Ibid 4.

combination of methodologies allows for a more integrated examination of the political discourse on asylum-seeker children, as the way the law is framed by political actors can be directly contrasted with, and challenged in light of, the actual law and the problems therein.

CDA examines 'what is included or excluded' in the discourse 'to understand and address social issues'.[78] Discourse is power, and those in power legitimate law and policy by using discursive strategies to gain them 'normative approval'.[79] CDA enables a political critique of these strategies and reveals how they are used to 'enact, sustain, legitimate, condone or ignore social inequality and injustice'.[80] This aligns with the aim of this paper: to identify the barriers to reform of Australia's guardianship law and policy by investigating the influence and power of political elites in creating and perpetuating discourses to 'validate preferred solutions'.[81] The framing of asylum-seeker children through selective language and manipulated representations has informed our understanding of their experiences and their needs,[82] enabling their disenfranchisement.[83] CDA is therefore an appropriate method for challenging this discourse and the social injustice it perpetuates.

A similar approach has been taken successfully in a CDA of parliamentary debates regarding the detention of asylum-seeker children in the United Kingdom. In that study, Whitbourn analysed politicians' language over two time periods, uncovering the framing of asylum-seeker children 'as both a threat and a "moral touchstone"' and the government's disingenuous rhetoric of care.[84] In Australia, Silverstein has examined the notions of fatherhood and the child in the context of the *IGOC Act* guardianship relationship, and explored the legal and discursive interlinking of the Government and asylum-seeker children.[85] CDA is an effective methodology by which the current framework can be examined and constructions of asylum-seeker children can be scrutinised. In undertaking this analysis, this paper contributes to the existing literature, taking up where Silverstein has left off.

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[78] Samantha Cooper, Erin Olejniczak, Caroline Lenette and Charlotte Smedley, 'Media coverage of refugees and asylum seekers in regional Australia: a critical discourse analysis' (2016) *Media International Australia (Sage)* 1, 3.

[79] Markus Rheindorf and Ruth Wodak, 'Building 'Fortress Europe': Legitimizing Exclusion from Basic Human Rights' in Markus Rheindorf and Ruth Wodak (eds) *Sociolinguistic perspectives on migration control: language policy, identity and belonging* (Walter de Gruyter & Co., 2020) 116, 121.

[80] Teun A van Dijk, 'Principles of critical discourse analysis' (1993) 4(2) *Discourse & Society* 249, 252-255.

[81] Georgia van Toome and Leanne Dowse, 'Policy claims and problem frames: a cross-case comparison of evidence-based policy in an Australian context' (2016) 12(1) *Evidence & Policy* 9, 15.

[82] Jane McAdam, 'Are they illegals? No, and Scott Morrison should know better' (23 October 2013) *UNSW Newsroom*.

[83] Doherty (n 19) 9.

[84] Whitbourn (n 11) 21-22.

[85] Silverstein, 'Legal godfather' (n 40); Silverstein, 'Best interests' (n 50) 12.

CDA involves quantitative and/or qualitative analysis of texts and necessitates a systematic approach to data collection and analysis. This paper analyses the Senate Legal and Constitutional Affairs Legislation Committee's ('Committee') final report following the Parliamentary Inquiry into the Bill[86] and statements made by politicians in Parliament and to the media concerning guardianship, the Bill and asylum-seeker children. The selection of texts was limited to a one-year period around the introduction of the Bill, from July 2014 to, and including, July 2015. This period encompasses the AHRC's November 2014 *Forgotten Children* report and the Committee's report in February 2015.

Government discourse significantly influences, indeed dominates, public discourse,[87] therefore this study focused on direct quotations from politicians representing different political positions. Since the *Forgotten Children* report garnered much criticism from politicians, the perspective of then-AHRC Commissioner Gillian Triggs has also been included in this analysis. While she was not a politician, her role and expertise allowed her to contribute important commentary on child asylum-seekers to the political discourse. Texts related to asylum-seeker children or that explicitly mentioned guardianship or the Bill were sought. Key word searches were used to find relevant statements in the Hansard archives within the relevant timeframe. The terms included: 'asylum', 'bill', 'child', 'guardian', 'minor' and 'unaccompanied'. This resulted in ten relevant texts.

Media searches were conducted to assist in locating interviews and other public statements made during this period. These used the same temporal limitation and search terms, plus 'interview', 'press conference', 'press release' and 'public statement'. They were conducted through Google and the six Australian news sites with the highest unique audience as at April 2020.[88] These sites were used because they are representative of mainstream audiences and ensure a cross-section of the political views of the Australian public, capturing how the political discourse is assimilated into public discourse. This resulted in 14 texts, including radio and television interviews and public statements. A detailed list of the texts is contained in the appendix.

This small dataset allowed for a more in-depth qualitative analysis, which identified legitimation strategies and topoi (rhetorical themes or topics) across the texts. Since discourses

[86] Legislation Committee, 'Final Report' (n 13).
[87] Doherty (n 19) 12.
[88] Vivienne Kelly, 'News.com.au tumbles to sixth in ranking of Australia's most popular websites, as ABC maintains lead' *Mumbrella* (Web Page, 4 June 2020) < https://mumbrella.com.au/news-com-au-tumbles-to-sixth-in-ranking-of-australias-most-popular-websites-as-abc-maintains-lead-630211>.

'shape… and are shaped by'[89] law and policy, the results of this analysis are situated within the broader context of Australian asylum-seeker law and policy and discourse, and considered in light of the operation and outcomes of the legislative framework, analysed below.

## IV CURRENT LEGISLATIVE FRAMEWORK

### A *The IGOC Act*

Section 6(1) of the *IGOC Act* confers upon the Minister the 'same rights, powers, duties, obligations and liabilities as a natural guardian' regarding 'every non-citizen child who arrives in Australia'. A 'non-citizen child' is defined in section 4AAA(1) as a person who 'has not turned 18', 'enters Australia as a non-citizen', and 'intends, or is intended, to become a permanent resident of Australia'. The Full Court in *Odhiambo v Minister for Immigration and Multicultural Affairs* confirmed that this definition extends to child asylum-seekers.[90] Guardianship continues 'until the child reaches the age of 18 years or leaves Australia permanently, or until the provisions of this Act cease to apply to and in relation to the child'.[91] To the detriment of asylum-seeker children, the words 'leaves Australia permanently' include when 'the child is removed from Australia under section 198 or 199 of the Migration Act 1958' or 'is taken from Australia to a regional processing country under section 198AD of that Act'.[92]

The content of the guardianship duty, while not explicit in the *IGOC Act*, is derived from both common and international law. It is a fiduciary duty that, as a matter of common law, connotes a power and responsibility to ensure the 'provision of the basic needs of the child', including protecting the child's welfare, health, property and other non-economic interests.[93] It may also include legal advice and assistance[94] or bringing legal proceedings on the child's behalf.[95] Guardianship also denotes the 'responsibilities concerned with according fundamental human rights to children' under the *CRC*,[96] explained in the following section.

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[89] Wodak (n 12) 1.
[90] *Odhiambo v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 194, [87] (Black CJ, Wilcox and Moore JJ) ('*Odhiambo*').
[91] *IGOC Act* s 6(1).
[92] Ibid s 6(2)(a)-(b).
[93] Crock and Kenny (n 36) 449.
[94] *Odhiambo* (n 90).
[95] Taylor (n 37) 190.
[96] *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524, [43] (North J).

Guardianship responsibilities can be delegated to State and Territory authorities under section 5. This is only effective, however, if States and Territories enact complementary guardianship legislation enabling performance of *IGOC Act* functions by officials.[97] While States and Territories have established guardians and commissioners for children and young people, there is currently no legislation that implements the role and responsibilities of the *IGOC Act* guardian. Even if such legislation did exist, ultimate legal responsibility remains with the Minister.[98]

Further, delegation does not negate the conflict of interest that makes this arrangement fundamentally problematic; rather, it inheres in the delegate.[99] This conflict is ever-present in the interactions between child and State. When unaccompanied children arrive unlawfully in Australia so as to be covered by the *IGOC Act*, the Minister's *Migration Act* powers require he place them in detention until they are granted a visa or removed.[100] Similarly, when a child engages in the RSD process, or seeks review of a visa refusal decision, the Minister acts as both guardian and 'prosecutor, judge and gaoler'.[101] The Government's failure to rectify this conflict renders the guardian relationship of no practical significance for the child.[102]

This has only been exacerbated by the curtailment of the *IGOC Act* by the *Migration Act*. The *2012 Amendment* inserted provisions into section 8 of the *IGOC Act* that no part of the Act would impinge upon the operation of migration law or any performance or exercise of functions therein.[103] This legally 'allowed the government to assert the primacy' of the *Migration Act* over the *IGOC Act*.[104] An amendment to the *Migration Act* also 'removed the condition [of consent in writing] that had prevented' the Malaysian Solution's implementation.[105] The combined, continuing result of these amendments is the complete subordination of the guardianship duty and rights of the child to immigration concerns. Unaccompanied children are not exempt from, and are still held in, detention. Until the conflict of interest is resolved, these children are denied a guardian to protect their rights and promote their best interests.

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[97] Taylor (n 37) 187.
[98] Ibid.
[99] Crock and Kenny (n 36) 451.
[100] Crock, 'Lonely refuge' (n 42), 128-9.
[101] Crock and Kenny (n 36) 448.
[102] Ibid 451.
[103] *IGOC Act* s 8(2)-(3).
[104] Silverstein, 'Responsible' (n 5) 72.
[105] Refugee Council of Australia, 'Current policies and concerns', *Australia's asylum policies* (Web Page, 18 May 2020) <https://www.refugeecouncil.org.au/asylum-policies/4/>.

Case law on guardianship is scarce, and claimants who have sought to challenge the Minister's performance of the guardianship duty have been largely unsuccessful due to section 8. In June 2020, the court in *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)*[106] had to consider firstly whether the Minister had breached his section 6 guardianship obligations, and consequently whether this alleged breach 'influenced the nature and scope of the Minister's decision-making power under s 501CA(4)' of the *Migration Act*.[107] Justice Anderson held that even if a breach was assumed, it did 'not influence the nature or scope' of the Minister's *Migration Act* power.[108] The court highlighted that although a section 6 breach may be relevant to other causes of action, it 'does not, by itself, give rise to a free-standing cause of action'.[109] The operation of the *IGOC Act* has been so impeded by migration law that it is now practically ineffective.

### B *Compliance with international obligations*

While the provisions of the *CRC* have not been directly implemented into Australian law and are therefore not legally enforceable here, Australia must still carry out its international obligations in good faith.[110] The *CRC* obliges States to provide legal support for children, mandates their special protection, and assumes their rights to be independent from the rights of adults.[111] Central to the guardianship of unaccompanied asylum-seeker children is the obligation to consider as a (or, arguably, *the*)[112] 'primary consideration', and to have as a 'basic concern', their best interests.[113] This is reflected in the common law understanding of the guardianship duty, the *IGOC Act* and the Immigration (Guardianship of Children) Regulations 2018 ('IGOC Regulations').

The *CRC* Committee notes that the 'best interests' principle is at once a 'substantive right', a 'fundamental, interpretative legal principle', and a 'rule of procedure'.[114] This conception aids in ensuring a holistic approach is taken to realising children's rights. Not only

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[106] [2020] FCA 843 ('*McHugh*').
[107] Ibid, [60] (Anderson J).
[108] Ibid, [61] (Anderson J).
[109] Ibid, [92] (Anderson J).
[110] Pursuant to the international law maxim *pacta sunt servanda*.
[111] *CRC* arts 22, 37(c); *CRC* Committee, 'GC 6' (n 2).
[112] Crock and Kenny (n 36) 449-450, citing Human Rights and Equal Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention* (HREOC, 2004) [14.1].
[113] *CRC* arts 3(1), 18(1).
[114] *CRC* Committee, *General Comment No 14: on the right of the child to have his or her best interests taken as a primary consideration (art; 3, para. 1),* UN Doc CRC/C/GC/14 (29 May 2013) 2.

must guardians prioritise the child's best interests, but governments are also required to 'take appropriate measures' to ensure they 'receive appropriate protection and humanitarian assistance in the enjoyment' of their rights under international law.[115] Unaccompanied children in particular are 'entitled to special protection and assistance' and 'alternative care' arrangements.[116] Moreover, the Committee requires that guardians of unaccompanied children 'have the necessary expertise in the field of childcare… to ensure that the child's legal, social, health, psychological, material and educational needs are appropriate covered'; and, significantly, are not an agency or individual 'whose interests could potentially be in conflict with those of the child'.[117] Crucially for Australia, children should not be unlawfully or arbitrarily detained, detention should be 'a last resort and for the shortest appropriate period of time', and those who are detained have the right to legal assistance, to 'challenge the legality' of their detention, and to 'a prompt decision'.[118]

The *IGOC Act prima facie* complies with the obligations under the *CRC*. Considered in a vacuum, it provides unaccompanied or separated children in Australia with a legal guardian, or a custodian under section 7, with all the powers and responsibilities of a parent; and it prevents the child's unlawful removal from Australia.[119] Further, the IGOC Regulations require custodians to accept responsibility and provide for 'the welfare and care of the child', not to place the child in the care of another person, and not to take or let the child out of its home state without the Minister's consent.[120] These provisions suggest care and concern for the welfare and protection of the child but, in practice, they do not ensure this, and do not fully reflect or give effect to the treaty.[121] They are, in fact, redundant given the Minister's inherent conflict of interest and the *2012 Amendment*, and considering Australia's continuing human rights abuses through deterrence and mandatory detention policies. The interests of the child are thus deprioritised, and the term 'best interests' used to describe policies that serve interests entirely contrary to the child's.[122]

The *CRC* Committee has stated that the exercise of guardianship should be reviewed 'to ensure the best interests of the child are being represented throughout the decision-making

[115] *CRC* art 22(1).
[116] Ibid art 20(1)-(2).
[117] *CRC* Committee, 'GC 6' (n 2) [33].
[118] *CRC* art 37(b), (d).
[119] *IGOC Act* ss 6A, 9.
[120] Immigration (Guardianship of Children) Regulations 2018 regs 8-11.
[121] *CRC* Committee, 'GC 6' (n 2) [14].
[122] Silverstein, 'Best interests' (n 50) 3, 5.

process'.[123] It has consistently advocated for unaccompanied asylum-seeker children to have independent guardians who can protect and promote, particularly during RSD, the child's best interests and needs.[124] Specifically, the *CRC* Committee has urged Australia to ensure its migration legislation complies with the *CRC* and to appoint an independent guardian.[125] The *Forgotten Children* report echoes this, concluding that the 'Minister cannot be an effective guardian' as he does not fit the *CRC* Committee's requirements,[126] and 'has failed to act in the best interests of unaccompanied children'.[127]

### C *Guardian for Unaccompanied Children Bill 2014 reforms*

In light of the evident deficiencies of the current guardianship framework, the Bill proposed several recommendations for reform. Authored by Greens Senator Sarah Hanson-Young, the primary object of the Bill was the establishment of an independent statutory office of Guardian for Unaccompanied Non-citizen Children to ensure Australia's compliance with its *CRC* obligations.[128] This guardian would promote the best interests of unaccompanied non-citizen children who sought humanitarian protection in Australia or Australia's external territories.[129]

While the Bill retained much of the *IGOC Act*'s wording, it modified the definition of 'unaccompanied non-citizen child' by removing the requirement that the child 'intends, or is intended, to become a permanent resident of Australia'[130] and including 'does not have the appropriate visa or other authority for entry into Australia'.[131] The guardianship duty was extended to 'all unaccompanied non-citizen children in Australia, including in every external Territory… and in immigration detention,'[132] which would have been significant for the unaccompanied children then held on Christmas Island.[133] The Bill also allowed for delegation of guardianship functions and powers to a Senior Executive Service employee or acting

[123] *CRC* Committee, 'GC 6' (n 2) [35].
[124] Office of the United National High Commissioner for Refugees, *Guidelines and Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (February 1997) 7.
[125] Evenhuis (n 46) 541, 571.
[126] *CRC* Committee, 'GC 6' (n 2) [33].
[127] AHRC, '*Forgotten Children*' (n 49) 169.
[128] Guardian for Unaccompanied Children Bill 2014 (Cth) cl 3 (2) ('Bill').
[129] Explanatory Memorandum, Guardian for Unaccompanied Children Bill 2014 2 ('Explanatory Memorandum, Bill').
[130] *IGOC Act* s 4AAA(1)(c).
[131] Bill cl 6(1)(d).
[132] Ibid cl 18(3)(a)-(b).
[133] Explanatory Memorandum, Bill 3.

employee,[134] and kept the *IGOC Act*'s provision that the duty ceases when the child reaches 18, 'leaves Australia permanently', or the 'provisions… cease to apply'.[135]

The requirements for the guardian were comprehensive and addressed many of the humanitarian and human rights concerns detailed earlier.[136] The guardian was to be appointed by the Governor-General and was required to be a person with 'appropriate qualifications, knowledge or experience,' 'of good character', and who 'demonstrated commitment to, and capacity to promote, the rights, interests and well-being of non-citizen children',[137] mirroring the *CRC* Committee's requirements. As a result, the Bill was more explicit than the *IGOC Act* or IGOC Regulations in ensuring Australia's adherence to its international obligations.

Similarly, the Bill listed the guardian's functions and powers extensively and addressed the rights of children and duties of guardians under international law, unlike the *IGOC Act*. They included, *inter alia*, 'to protect the rights of unaccompanied non-citizen children and intervene… in court cases involving [their] rights'; 'to act as an advocate, and in [their] best interests'; and 'to ensure that [they] have access to suitable legal representation and other assistance in respect of their claim for asylum'.[138] These aligned with the *CRC* requirements to afford children care and protection; to make their best interests a primary consideration; and to hear and consider their views and encourage their participation in decision-making about their life.[139] In carrying out these functions, the guardian had to consult with and listen to 'the concerns, views and wishes' of the children and encourage their participation in the Office of the Guardian,[140] and consult with 'other agencies and organisations whose work relates to unaccompanied children in Australia'.[141] Importantly, the Bill stipulated that the guardian 'is not under the control or direction of the Minister',[142] ensuring their independence.

Parts 4 and 5 of the Bill established the Office of the Guardian and required the guardian to submit annual reports to Parliament. Importantly, it expressly provided for review of the Act's operation in clause 34, guaranteeing the Office and Guardian's accountability and transparency, and facilitating any necessary improvements that were identified over time. Finally, it proposed amendments to the *IGOC Act* and *Migration Act* to cease their application

[134] Bill cl 20.
[135] Ibid cl 11(2).
[136] Ibid Part 3.
[137] Ibid cls 17(1)-(2)(a)-(b).
[138] Ibid cls 18(1)(c), (e), (g).
[139] Explanatory Memorandum, Bill 9-10; *CRC* arts 2, 3, 12.
[140] Bill cl 18(4).
[141] Ibid cl 19(1).
[142] Ibid cl 18(5)(b).

to unaccompanied non-citizen children who would have been covered by the Guardian for Unaccompanied Children Act, insofar as their provisions related to guardianship.[143] Thus, the Bill created a comprehensive legal framework under which, it appeared, all the deficiencies of the current framework would be resolved.

# V POLITICAL DISCOURSE ON UNACCOMPANIED ASYLUM-SEEKER CHILDREN AND GUARDIANSHIP REFORM

This part explores the political discourse that existed in the period surrounding the Bill and its rejection. Analysis reveals the Government's use of topoi and legitimation strategies to frame asylum-seeker children and the law affecting them in ways that achieved its political aims. Examination of the Committee's justifications for rejecting the Bill reveals the connections between its report and the broader discourse, as the justifications reflect the Government's discursive practices. Therefore, although this analysis focuses on texts from 2014 and 2015, it is useful for understanding the continuing semantic struggle over the guardianship of unaccompanied asylum-seeker children.

It is important to note that while the majority of the texts contain representations by Coalition politicians, in power at the time, politicians from both major parties have legitimised the detention of asylum-seeker children and the de-prioritisation of their welfare and rights. Just as Australia's asylum-seeker law and policy has essentially been bipartisan, both parties have engaged in a shared political discourse on asylum-seekers. The discursive acts of both have been 'socially constitutive': they have played 'a decisive role in the genesis, production and construction of certain social conditions' and 'in perpetuating and reproducing the status quo'.[144] Those in power have control of the discourse and, thereby, the political outcomes, and Labor and the Coalition have been able to maintain political power through the perpetuation of their political discourse.

## A *Dominant discourse*

A key element of this discourse is the linking of child asylum-seeker detention and boat arrivals. Through the strategy of instrumental rationalisation, the Coalition legitimated deterrence

[143] Bill sch 1 cls 1-9.
[144] Van Leeuwen and Wodak (n 75) 92.

measures by reference to their utility and positive outcomes,[145] using the decrease in the number of children in detention as an indicator for their success. This was especially prevalent following the publication of the *Forgotten Children* report, when the Government sought to legitimate its continuation of child detention. Deterrence is also represented as means-oriented in these texts: it is a practice that enabled the Government to achieve another objective, seen in statements like, 'you can get children out of detention… because every time you get a child out, you don't have another one turning up on the next boat,'[146] and, 'That number [of children] is now under 200… Because this government has stopped the boats.'[147]

The 'objective strategy' and 'result' kinds of instrumental rationalisation[148] in particular were used to propagate this artificial cause-and-effect. Through the former, deterrence measures were framed as necessary to decrease child detention numbers, despite violating the principle of *non-refoulement*:[149] 'successful border protection policies have [meant] no more children are detained on Christmas Island'.[150] This fallacy allowed the Government to continue implementing tough policies under OSB. The 'result' strategy legitimates practices by making them the subject of an 'effect process'.[151] Here, an equally fallacious causal link was made between deterrence measures and lowering child detention numbers. Statements like, 'We are taking children out of detention because the boats have stopped,'[152] and, 'release children from the detention centres now and… the boats start up again,'[153] achieved this, masking the reality that government policy requires children to be detained.

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[145] Van Leeuwen and Wodak (n 75) 105.

[146] 'Refugee resettlement is safe haven not economic upgrade says Immigration Minister', *7.30 Report* (Australian Broadcasting Corporation, 2014) <https://www.abc.net.au/7.30/refugee-resettlement-is-safe-haven-not-economic/5682472>.

[147] Charis Chang, Debra Killalea and Wires, 'Tony Abbott on The Forgotten Children: Scott Morrison deserves a congratulation note', *News.com.au* (online, 12 February 2015) <https://www.news.com.au/national/tony-abbott-on-the-forgotten-children-scott-morrison-deserves-a-congratulation-note/news-story/569d225d1e111fd9574ef53a9d400ee0> ('Abbott 3AW').

[148] Van Leeuwen and Wodak (n 75) 106.

[149] *Refugee Convention* art 33.

[150] Jennifer Rajca, 'Last children released from Christmas Island detention centre bound for mainland Australia', *News.com.au* (online, 21 December 2014) <https://www.news.com.au/national/last-children-released-from-christmas-island-detention-centre-bound-for-mainland-australia/news-story/e634396d4a8936168dc954aa9ab3589f >.

[151] Van Leeuwen and Wodak (n 75) 106.

[152] Commonwealth, *Parliamentary Debates,* House of Representatives, 16 March 2015, 2362 (Tony Abbott, Prime Minister).

[153] 'Peter Dutton', *RN Breakfast* (ABC Radio National, 12 February 2015) <https://www.abc.net.au/radionational/programs/breakfast/peter-dutton/6087398>.

Aiding rationalisation is the occurrence of the topoi of numbers and pressure.[154] The Coalition cited statistics of child detention and boat arrivals under the previous Labor Government to emphasise their policies' success to the Australia public: 'more than 50,000 people illegally entered Australia on more than 800 boats,'[155] and, '1,392 [detained children] when Labor lost office. Though, 8,469 children had arrived on boats during their [two terms].'[156] It also emphasised having to reverse the effects of Labor's policy: 'Labor ran a building detention centre revolution that could never keep pace with demand… we are closing the detention centres Labor opened.'[157] This enabled the Government to legitimate draconian deterrence measures as successful and necessary, and to distract from the continued suffering of the children still in detention.

These figures were also used to assert the Government's authority in immigration matters and undermine the authority of others speaking on asylum-seeker policy and the welfare of asylum-seeker children. The *Forgotten Children* report, for example, condemned child detention and made recommendations for policy change. In response, the Government attempted to invalidate its findings: 'Where was the Human Rights Commission when hundreds of people were drowning at sea? Where was the Human Rights Commission when there were almost 2,000 children in detention?',[158] and, 'Other recommendations would mean undermining the very policies that mean children don't get on boats in the first place.'[159] This shifted the debate from the report's focus, child asylum-seeker wellbeing, to the political motives of the AHRC, in particular Commissioner Gillian Triggs, and resulted in the findings and recommendations becoming lost in the discourse.

Similarly, this rhetoric subsumed asylum-seeker children into the larger asylum-seeker policy discourse. This is a common semantic tactic,[160] used here to obfuscate the greater concerns of welfare and rights, the requirements of the guardianship duty, and Australia's international obligations. It also enabled the Government to defend against criticisms and

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[154] Rheindorf and Wodak (n 79) 136, 140.

[155] Scott Morrison, 'Cost, chaos and tragedy now under control', *The Daily Telegraph* (online, 17 September 2014) <https://www.dailytelegraph.com.au/news/opinion/cost-chaos-and-tragedy-now-under-control/news-story/aee6fc2181a650f66d4ff024b1be8626> ('Morrison Daily Telegraph').

[156] Commonwealth, *Parliamentary Debates*, Senate, 27 August 2014, 5737 (Michaelia Cash, Assistant Minister for Immigration and Border Protection).

[157] Morrison Daily Telegraph (n 155).

[158] Abbott 3AW (n 147).

[159] AAP, 'Commission says detention of children breaches human rights', *Nine.com.au* (online, 11 February 2015) <https://www.9news.com.au/national/royal-commission-into-child-detention/0320addb-713e-4dd4-9e79-5948853c0843> ('Detention breaches rights').

[160] See Part III.

marginalise opposing discourses, despite the known impacts of detention on children, particularly the unaccompanied.[161]

Rationalisation also involves representing the utility of practices as embodying moral concepts,[162] so some overlap occurs between the Government's rationalisation and moralisation of its policies. Moralisation is 'based on moral values'[163] and was predominantly used to perpetuate the construction of asylum-seeker children as needing saving.[164] It is also linked with the topos of humanitarianism[165] in this context, as the safety and rights of asylum-seeker children were foregrounded to justify stringent policies. The Government primarily invoked the value of human rights and made 'straightforwardly evaluative claims',[166] for example: 'the HRC ought to be sending a note of congratulations to Scott Morrison… [his] actions have been very good for the human rights and the human flourishing of thousands of people';[167] 'the most compassionate thing you can do is stop the boats',[168] and, 'Offshore processing is playing a vital role in seeing an end to the deaths at sea, and that is obviously a good thing'.[169] Further, imagery like 'scooping the corpses of children out of the water'[170] appealed to the public's sense of morality and empathy for the putative, over the actual, child. The Government exploited this to legitimise measures it argued save lives: 'the Australian people decided that enough people had died at sea by electing the Coalition'.[171] By drawing on 'the Australian people', it also legitimated deterrence measures by giving democratic authority to their implementation. The Government purported to be concerned with fulfilling its obligations under international law to afford children their rights but, as Part IV illuminated, the current framework does not achieve this. Thus, the constructed link between deterrence and detention enabled the Government to deprioritise children's rights while co-opting the language of rights to justify these policies as part of a moral project of saving lives.

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[161] See especially AHRC, '*Forgotten Children'* (n 49) 151.
[162] Van Leewen and Wodak (n 75) 105.
[163] Van Leeuwen (n 57) 97.
[164] See, eg, Macken-Horarik (n 70).
[165] Rheindorf and Wodak (n 79) 138.
[166] Ibid 122.
[167] Abbott 3AW (n 147).
[168] Ibid.
[169] Emma Griffiths and Naomi Woodley, 'Tony Abbott labels Human Rights Commission report into children in detention "blatantly partisan politicised exercise"', *ABC News* (online, 14 February 2015) <https://www.abc.net.au/news/2015-02-12/human-rights-immigration-report-blatantly-partisan-abbott/6087148?nw=0>.
[170] Morrison Daily Telegraph (n 155).
[171] Ibid.

The Government also employed the discursive strategy of argumentation, using fallacies of the behaviour of asylum-seeking adults, to justify its representations.[172] It contended that asylum-seeker adults 'jeopardise [children's] lives by risking that troubling and dangerous voyage across the ocean',[173] drawing on the constructions of adult asylum-seekers, people smugglers and asylum-seeker children from the 2001 'Children Overboard Affair'. The topoi of nature and culture occur here, as the Government perpetuated the enduring myth that asylum-seekers are deviant.[174] Morrison's metaphor of people smugglers as immoral, '[they] have crawled back under the rocks they came from',[175] contributed to this fallacy. Hence, the Government could frame itself as concerned for the wellbeing of asylum-seeker children and frame its policies as enacted to promote this.

### B *Opposing discourse*

While opposing discourse similarly demonstrates concern for child asylum-seekers' welfare and rights, it does so by asserting their importance over, and using rhetoric to distinguish, the policies of detention and deterrence. During this period, non-Coalition politicians sought to draw attention to the negative effects of policy on actual children and the deficiencies of the guardianship legislation; however, only Senator Hanson-Young and Commissioner Gillian Triggs explicitly mentioned the Bill or guardianship in the media.

The Greens attempted to delegitimise the Government's policies through moralisation, invoking the same moral concerns but using them to condemn rather than justify the policies: 'what price are we prepared to pay for [stopping the boats]?…Are we prepared to justify young children self-harming?'[176] They also labelled detention as 'immoral' and highlighted that the rhetoric of 'queue jumpers', 'illegals' and border protection began 'long before' asylum-seeker deaths at sea 'entered the public consciousness', suggesting government action is motivated by 'political self-interest' rather than concern for human life.[177] Appealing to the moral value of human rights, Hanson-Young emphasised the 'abuse that… indefinite detention… inflict[s] on children'[178] and the disadvantages and 'risk of being overlooked' that unaccompanied minors

[172] Wodak (n 12) 8.
[173] Melinda Hayter, 'Riverina MP says children in detention centres "well looked after"', *ABC News* (online, 9 December 2014) <https://www.abc.net.au/news/2014-12-09/mccormack-cage/5953326>.
[174] See, eg, Peterie (n 15).
[175] Morrison Daily Telegraph (n 155).
[176] Commonwealth, *Parliamentary Debates,* Senate, 25 June 2015, 4572-4573 (Richard di Natale).
[177] Ibid.
[178] Detention breaches rights (n 159).

face during RSD.[179] In her Second Reading Speech, she argued the Bill was 'critical in removing… guardianship… from the government of the day' and 'crucial' for safeguarding children's rights and wellbeing.[180] The scarcity of politicians' statements explicitly mentioning the Bill or guardianship suggests the difficulty of politicising these key legal and political issues within a discursive environment that the political elite has deliberately saturated with obfuscating rhetoric and constructions.

While some of the political elite, namely Labor members, attempted to combat government policy, they were nevertheless still constrained by the Government-controlled terms of the debate. Thus, even in arguing, 'The best thing we can do for children in detention is to have refugee claims processed quickly so nobody has to languish in detention',[181] they adopted the Government's moralising rhetoric.[182] Others explicitly identified and condemned the Government's legitimation strategies, 'They're still refugees needing protection… I don't think it's any answer to say, "We've stopped these boats, therefore we saved X number of lives"',[183] and likened asylum-seeker children to 'hostages' being held to 'ransom' and used to justify tough legislation and policy in 'the most crass form of blackmail'.[184] Identifying and attempting to devalue the Government's discursive practices in this way is an important step in challenging them; here, however, it was not able to effect any legal or policy change.

Gillian Triggs presented another opposing perspective. She stressed the Government's 'duty of care to [detained] children' and that 'paediatricians and child specialists [were] deeply concerned' about their physical and psychological welfare in detention.[185] Further, she uncovered the Government's legitimation tactics, revealing that it was inventing stories of child transfers to Nauru as a deterrence measure[186] and that both former Immigration Minister Chris Bowen and then-Minister Morrison had agreed 'asylum seeker children are not detained to

[179] Legal and Constitutional Affairs Legislation Committee*,* Parliament of Australia, Canberra, 5 September 2014, 7 (Sarah Hanson-Young).
[180] Commonwealth, *Parliamentary Debates,* Senate, 16 July 2014, 5161 (Sarah Hanson-Young).
[181] Detention breaches rights (n 159).
[182] See, eg, Abbott 3AW (n 147).
[183] 'Labor open to turning back asylum seeker boats?', *7.30 Report* (Australian Broadcasting Corporation, 2014) <https://www.abc.net.au/7.30/labor-open-to-turning-back-asylum-seeker-boats/5845672>.
[184] Commonwealth, *Parliamentary Debates*, Senate, 4 December 2014, 10260 (Kim Carr), 10263 (Susan Lines). See also Commonwealth, *Parliamentary Debates,* House of Representatives, 17 June 2015, 6583 (David Feeney).
[185] 'Immigration Minister 'needs to be better advised' on harm to children in detention says Human Rights', *7.30 Report* (Australian Broadcasting Corporation, 2014) <https://www.abc.net.au/7.30/immigration-minister-needs-to-be-better-advised-on/5639578>.
[186] Ibid.

deter people smuggling'.[187] Triggs also condemned the use of discourse to link child detention to deterrence measures, and emphasised the harm that the exclusion of asylum-seeker children's rights from political discourse has on the actual child.

Control of discourse affords 'preferential access to its production…, to its contents… and finally to the public mind'; thereby, the political elite can control 'maybe not exactly what people will think, but at least what they will think *about*.'[188] Through rationalisation and moralisation, the Government has been able to define the parameters of the discourse on asylum-seeker children and relevant policy. It has forced the debate to become one of semantics, hyper-politicising broader asylum-seeker law and policy, and downplaying both the effects of policy on asylum-seeker children and the need for guardianship reform. As a result, discussion of the Bill in Parliament was limited to referring it to the Committee, and the only available political commentary on the Bill is what is contained in the report.

### C *Rejection of the Bill*

In this discursive context, it is not surprising that the Bill failed. The lack of political will to address the issue of guardianship implicitly relates to the Committee's lack of will to engage seriously with reform of the guardianship framework. It is worth noting that the Committee comprised of three Coalition politicians, two from Labor, and just one, Senator Hanson-Young, from the Greens. With this majority, the Committee was able to use the same legitimation strategies identified in the dominant discourse above to defend the current framework and oppose reform.

The Committee rejected the Bill on the basis that its lack of specificity 'could seriously undermine the principle of 'best interests of the child'.[189] Regarding submissions that the Minister cannot fulfil the obligation to consider, primarily, the child's best interests given his conflicting roles and lack of expertise in childcare, the Committee doubted whether the proposed guardian would do much better. It highlighted several areas in which the Bill failed to provide sufficient detail of the requirements, qualifications and duties of the proposed guardian and Office, like those outlined by the *CRC* Committee, finding that this could impede

[187] Gillian Triggs, 'Human Rights Commission: Keeping asylum seeker children in detention doesn't stop people smugglers - so why do it?', *The Sydney Morning Herald* (online, 7 October 2014) <https://www.smh.com.au/opinion/human-rights-commission-keeping-asylum-seeker-children-in-detention-doesnt-stop-people-smugglers-so-why-do-it-20141007-10rcz3>.
[188] Teun A. van Dijk, *Discourse and Power* (Basingstoke: Palgrave Macmillan, 2008) viii.
[189] Legislation Committee, 'Final Report' (n 13) 17.

its effectiveness in assisting unaccompanied children.[190] The Committee also agreed with other concerns raised in submissions to the inquiry, like a lack of accountability mechanisms or legislative duty to provide services to the child.[191] This is ironic given the existing lack of specificity in the *IGOC Act* and IGOC Regulations and the deficiencies of the framework to provide assistance and protection; but it echoes the moralisation and topos of humanitarianism common in the broader asylum-seeker discourse. Thus the Committee framed its recommendation to maintain the existing framework as necessary for safeguarding children's rights, and disregarded submissions made to the inquiry that outlined its failures.

Additionally, the Committee noted that the *CRC* only obliges States to make the child's best interests '*a* primary consideration when legislating, not *the* primary consideration'.[192] This is incorrect, as the *CRC* requires it to be a primary consideration 'in all actions concerning the child'. However, the Committee contended that 'other factors [could] occasionally outweigh' the principle, reflecting the Government's 'result' rationalisation of subordinating children's rights through detention as necessary for the purpose of achieving other policy objectives. Further, it erroneously held that 'the existing legislation sufficiently incorporates the principle… as *a* primary consideration',[193] contradicting the effect of section 8 of the *IGOC Act*. The Committee's disregard for the operation and problems of the guardianship framework mirrors the Government's disregard for its effects on asylum-seeker children, as immigration concerns outweigh their best interests not 'occasionally' but, arguably, always.[194]

Regarding the conflict of interest between the Minister's guardianship and immigration functions, the Committee found that the current framework only presents a 'perceived' conflict,[195] despite conflict being inherent in the operation of section 8 of the *IGOC Act* and unanimously acknowledged by commentators. Paradoxically, it held that the Bill's 'proposed functions of the Minister could impinge on the independence of the proposed office',[196] as the conferral on the Minister of the powers to 'have an input in the appointment of the Guardian' and to 'appoint an acting Guardian during a vacancy' in clauses 17 and 22 creates a conflict of interest. This subverts the real effect of the current legislation and ignores the lack of independence of the existing guardian. Maintaining the Minister's position as guardian is

[190] Legislation Committee, 'Final Report' (n 13) 15-16.
[191] Ibid 16.
[192] Ibid 17.
[193] Ibid.
[194] See especially Silverstein, 'Best interests' (n 50).
[195] Legislation Committee, 'Final Report' (n 13) 16-17.
[196] Ibid 13.

legitimated in this way and presented as not only having a utility and positive effect, but also to be moral, as it ensures the independence of the Guardian and, thereby, the protection of unaccompanied children. Further, the Committee noted that guardianship could currently be delegated, and commended the Department of Immigration and Border Protection for enabling delegation to ensure it avoided conflicts of interest.[197] This overlooks the practical reality that delegation does not resolve this conflict.

Finally, the Committee rationalised the maintenance of the current framework by contending that it would achieve better outcomes than reform. It cast doubt on the reform's effectiveness, questioning 'whether replacing the Minister… would have any practical effect on the best interests of non-citizen unaccompanied minors' and 'whether the Bill would result in any substantive change to the existing framework'.[198] By failing to be definitive in its conclusion, the Committee evaded its duty to make recommendations, rather, it promoted uncertainty around whether change is necessary or valuable. In this way, it marginalised the key issues at hand, just as the Government's control of the discourse inhibits genuine debate of asylum-seeker law and policy, and minimised public debate of guardianship reform. While doctrinal analysis and existing scholarship have uncovered the weakness of the existing framework, this CDA has shown that the Government's discursive strategies contribute to preventing reform.

## VI CONCLUSION

This paper has investigated the political discourse used to legitimate guardianship law and policy and hinder meaningful reform. Doctrinal analysis has uncovered the ways in which the legislative framework works to deny unaccompanied asylum-seeker children their rights. CDA has revealed a dominant discourse overrun by the politics of language and values, in which key legal and political issues are overlooked and the guardianship framework and its outcomes are legitimated in pursuit of competing political aims. The rationalisation and moralisation underpinning the rhetoric used in legitimation masks and deflects not only the real issues, but also the real people subject to these laws and policies. The historical background and development of both the legislation and political discourse have been analysed to demonstrate

[197] Legislation Committee, 'Final Report' (n 13) 14, 16.
[198] Ibid 17.

that law and discourse are inherently linked – political discourse shapes, and is shaped by, policy.

In this way, this paper makes a significant methodological contribution to existing scholarship. Its approach of combining doctrinal analysis and CDA and adopting DHA has not yet been applied to this area of law or to the issue of guardianship. It has enabled an exploration of the ways in which government discourse can justify problematic policy, and challenged this discourse by analysing the reasons for which that policy is so problematic. Moreover, by undertaking a high level of doctrinal analysis within the framework of DHA, this combination of methodologies contributes to existing DHA-based work. This approach could be applied to other contentious areas of the law, particularly those in which the Government evades its international obligations or sidesteps reform.

Constructions of asylum-seekers and asylum-seeker children in Australian political discourse have endured and evolved over time, enabling the continuing legitimation of laws and policies that affect them detrimentally. This paper has shown that the Government has no intention of addressing the lacuna it has created in the guardianship framework. In studying the dominant and opposing discourses, we must remember that the voices of unaccompanied asylum-seeker children have been silenced. The implications of this are that children covered by the guardianship framework are left without an independent legal guardian who will prioritise their welfare and rights under international law, and remain stripped of their agency by Australia's punitive immigration system. The challenge remains for academics and asylum-seeker and human rights advocates to continue campaigning for the rights of the children, and for legislative overhaul, including by challenging harmful political discourse that perpetuates existing legal frameworks.

# APPENDIX

*Corpus of texts*

| Date | Text | Speaker |
|---|---|---|
| ***Parliamentary debates and speeches*** | | |
| 16 July 2014 | Guardian for Unaccompanied Children Bill 2014 – Second Reading Speech (Senate) | Greens Senator Sarah Hanson-Young |
| 26 August 2014 | Questions without Notice: Refugees (Senate) | Greens Senator Sarah Hanson-Young |
| 27 August 2014 | Questions without Notice: Asylum-Seekers (Senate) | Liberal Senator Michaelia Cash, Assistant Minister for Immigration and Border Protection |
| 5 September 2014 | Senate Legal and Constitutional Affairs Legislation Committee: Migration Amendment (Protection and Other Measures) Bill 2014 | Liberal Senator Michaelia Cash, Assistant Minister for Immigration and Border Protection |
| 4 December 2014 | Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 – Second Reading (Senate) | Labor Senators Kim Carr and Susan Lines |
| 16 March 2015 | Questions without Notice: Asylum-Seekers (House of Representatives) | Prime Minister Tony Abbott |
| 16 April 2015 | Senate Legal and Constitutional Affairs Legislation Committee: Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 | Australian Human Rights Commissioner Gillian Triggs |
| 25 May 2015 | Petitions: Asylum-Seekers: Children (House of Representatives) | Minister for Immigration and Border Protection Peter Dutton (December 2014-August 2018) |
| 17 June 2015 | Asylum-Seekers Speech (House of Representatives) | Labor MP David Feeney |
| 25 June 2015 | Migration Amendments (Regional Processing Arrangements) Bill 2015 – Second Reading Speech (Senate) | Greens Leader Senator Richard di Natale |
| ***Media interviews and statements*** | | |
| 30 July 2014 | 'Immigration Minister reserves right to exercise 'any and every option' on asylum seekers', *7.30 Report*, ABC | Minister for Immigration and Border Protection Scott Morrison (September 2013-December 2014) |
| 30 July 2014 | 'Greens Senator Sarah Hanson-Young denied access to Curtin Detention Centre to visit asylum seekers', Karen Barlow, *ABC News* | Greens Senator Hanson-Young |

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| 31 July 2014 | ‘Immigration Minister 'needs to be better advised' on harm to children in detention says Human Rights’, *7.30 Report*, ABC | Australian Human Rights Commissioner Gillian Triggs |
| 19 August 2014 | ‘Refugee resettlement is safe haven not economic upgrade says Immigration Minister’, *7.30 Report*, ABC | Minister for Immigration and Border Protection Scott Morrison |
| 9 September 2014 | ‘Bowen fronts inquiry into detained minors’, *Nine.com* | Minister for Immigration and Border Protection Chris Bowen (September 2010-February 2013) |
| 17 September 2014 | ‘Cost, chaos and tragedy now under control’, *The Daily Telegraph* | Minister for Immigration and Border Protection Scott Morrison |
| 7 October 2014 | ‘Human Rights Commission: Keeping asylum seeker children in detention doesn’t stop people smugglers – so why do it?’, Gillian Triggs, *Smh.com.au* | Australian Human Rights Commissioner Gillian Triggs |
| 27 October 2014 | ‘Labor open to turning back asylum seeker boats?’, *7.30 Report*, ABC | Labor MP Melissa Parkes |
| 9 December 2014 | ‘Riverina MP says children in detention centres ‘well looked after’, Melinda, Hayter, *ABC News* | Nationals MP Michael McCormack |
| 21 December 2014 | ‘Last children released from Christmas Island detention centre bound for mainland Australia’, Jennifer Rajca, *News.com.au* | Minister for Immigration and Border Protection Scott Morrison |
| 11 February 2015 | ‘Commission says detention of children breaches human rights’, AAP, *Nine.com* | AHRC, Attorney-General George Brandis, Minister for Immigration and Border Protection Peter Dutton, Labor immigration spokesperson Richard Marles, Greens Senator Sarah Hanson-Young |
| 12 February 2015 | ‘Tony Abbott on The Forgotten Children: Scott Morrison deserves a congratulation note’, 3AW radio | Prime Minister Tony Abbott |
| 12 February 2015 | ‘Peter Dutton’, *RN Breakfast*, ABC Radio National | Immigration and Border Protection Peter Dutton |
| 14 February 2015 | ‘Tony Abbott labels Human Rights Commission report into children in detention 'blatantly partisan politicised exercise', Emma Griffiths and Naomi Woodley, *ABC News* | Australian Human Rights Commissioner Gillian Triggs, Labor immigration spokesperson Richard Marles, Ministers for Immigration and Border Protection Peter Dutton and Scott Morrison |

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