

# CHAPTER 1

## Introduction and Background

### Referral of the inquiry

1.1 On 28 August 2014, the Guardian for Unaccompanied Children Bill 2014 (Bill) was referred pursuant to a recommendation of the Selection of Bills Committee to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 5 February 2015.<sup>1</sup> On 5 February 2015, the reporting date was extended to 9 February 2015. The Bill is a private senator's bill that was introduced into the Senate by Senator Hanson-Young on 16 July 2014.<sup>2</sup>

### Conduct of the inquiry

1.2 In accordance with usual practice, the committee advertised the inquiry on its website and wrote to a number of organisations and individual stakeholders inviting submissions by 23 October 2014. Details of the inquiry were placed on the committee's website at [http://www.aph.gov.au/senate\\_legalcon](http://www.aph.gov.au/senate_legalcon).

1.3 The committee received 14 submissions to the inquiry. The submissions, published on the committee's website, are listed at Appendix 1. The committee did not hold a public hearing for this inquiry.

### Purpose of the bill

1.4 The Bill seeks to establish a position of Guardian for Unaccompanied Non-citizen Children (Guardian) to act as the head of a new statutory agency, the Office of the Guardian for Unaccompanied Non-citizen Children (Office).<sup>3</sup> The Bill sets out the functions and powers of the proposed Guardian and Office, and the general terms and conditions of the Guardian's appointment.<sup>4</sup> Finally, the Bill would make consequential amendments to the *Immigration (Guardianship of Children) Act 1946* (Cth) (IGOC Act) and the *Migration Act 1958* (Cth) (Migration Act) to reflect the role of the Guardian.<sup>5</sup>

1.5 In her second reading speech, Senator Hanson-Young stated that the Guardian would 'provide expert care and advocacy for asylum seeker children who arrive in Australia on their own', stating that:

Under current law, the Minister for Immigration has a responsibility to look after unaccompanied children's best interests as their appointed Guardian under the *Immigration (Guardianship of Children) Act 1946* as well as a

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1 *Journals of the Senate*, No. 48–28 August 2014, p. 1341.

2 *Journals of the Senate*, No. 44–16 July 2014, p. 1212.

3 Guardian for Unaccompanied Children Bill 2014, Part 3 Division 1 and Part 4.

4 Guardian for Unaccompanied Children Bill 2014, cl. 18.

5 Guardian for Unaccompanied Children Bill 2014, Sch. 1.

responsibility for deciding whether or not to detain them under the *Migration Act 1958*.<sup>6</sup>

1.6 The Senator explained that the Bill would aim to rectify this apparent conflict of interest as, if the Bill was passed, in relation to unaccompanied non-citizen children the new Guardian:

...will be responsible for ensuring that the best interests of the child are always the paramount consideration. The Guardian will be in a position to advocate that children should not be detained by reason of their immigration status, or, if detained, for the shortest possible period of time. The Guardian will also be mandated to oversee and ensure the provision of legal and other assistance such as care, accommodation, education, language and health support amongst other functions.<sup>7</sup>

### **Other inquiries examining guardianship of unaccompanied children**

1.7 Although no inquiry has been dedicated to the specific issue of guardianship of unaccompanied non-citizen children, several inquiries have touched on the issue, these include:

- the Human Rights and Equal Opportunity Commission National Inquiry into Children in Immigration Detention 2004 (2004 inquiry);
- the Australian Human Rights Commission (AHRC) 2014 inquiry into children held in immigration detention;
- the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010; and
- a Joint Select Committee on Australia's Immigration Detention Network inquiry into guardianship of unaccompanied non-citizen children in detention in 2012.

These are briefly summarised in the following sections.

#### ***The Human Rights and Equal Opportunity Commission Inquiry***

1.8 The report of the Human Rights and Equal Opportunity Commission 2004 inquiry stated that:

There is a fundamental conflict of interest between the Minister as guardian of unaccompanied children in detention centres and the Minister as the person who makes decisions about visas.<sup>8</sup>

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6 *Senate Hansard*, 16 July 2014, p. 68.

7 *Senate Hansard*, 16 July 2014, p. 69.

8 Human Rights and Equal Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention*, April 2004, p. 12, at [https://www.humanrights.gov.au/sites/default/files/document/publication/alr\\_complete.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/alr_complete.pdf) (accessed 7 January 2015).

1.9 The report recommended that 'an independent guardian should be appointed for unaccompanied children and they should receive appropriate support'.<sup>9</sup>

1.10 The AHRC stated that the reason for its decision to establish the National Inquiry into Children in Immigration Detention 2014 (2014 inquiry) was to investigate what has changed in 10 years since the 2004 inquiry and to give a voice to children and families directly affected by detention. The terms of reference of the 2014 inquiry involved an assessment of:

whether laws, policies and practices relating to children in immigration detention meet Australia's international human rights obligations, with particular attention to:

- the appropriateness of facilities in which children are detained;
- the impact of the length of detention on children;
- measures to ensure the safety of children;
- provision of education, recreation, maternal and infant health services;
- the separation of families across detention facilities in Australia;
- the guardianship of unaccompanied children in detention in Australia;
- assessments conducted prior to transferring children to be detained in 'regional processing countries'; and
- progress that has been made during the 10 years since the Commission's 2004 report: *A last resort? National Inquiry into Children in Immigration Detention*.

1.11 The report of the 2014 inquiry was sent to the office of the Australian Attorney-General on 11 November 2014, but at the time of drafting this report it had not been tabled.<sup>10</sup>

### ***Commonwealth Commissioner for Children and Young People Bill 2010 inquiry***

1.12 On 12 May 2011, the Senate Legal and Constitutional Affairs Legislation Committee (committee) tabled a report on the inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010.<sup>11</sup> The report noted that the then Department of Immigration and Citizenship (DIAC):

...submitted that it is aware of the potential perception of a conflict of interest under the current arrangements. Consequently, 'DIAC has been exploring alternative ways in which the IGOC Act [Immigration

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9 Human Rights and Equal Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention*, April 2004, p. 7, at [https://www.humanrights.gov.au/sites/default/files/document/publication/alr\\_complete.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/alr_complete.pdf) (accessed 7 January 2015).

10 Australian Human Rights Commission, *National Inquiry into Children in Detention 2014: Discussion Paper*, at <https://www.humanrights.gov.au/publications/national-inquiry-children-immigration-detention-2014-discussion-paper> (accessed 7 January 2015); see also <https://www.humanrights.gov.au/national-inquiry-children-immigration-detention-index> (accessed 7 January 2015).

11 *Journals of the Senate*, No. 30–12 May 2011, p. 918.

(Guardianship of Children) Act 1946] could better meet the objective of providing for the care and welfare of unaccompanied minors'.<sup>12</sup>

1.13 The inquiry examined the possibility of whether a proposed Commonwealth Commissioner for Children and Young People could take the place of the Minister, by acting as the legal guardian for non-citizen unaccompanied minors as submitted by the UNHCR. However, the committee took the view that it would not be appropriate for the proposed Commissioner to act as the legal guardian of unaccompanied non-citizen minors, but the proposed 'Commissioner should have oversight of the entity acting as guardian, to ensure the rights and wellbeing of children and young people are upheld'.<sup>13</sup>

1.14 The call for the appointment of an independent children's guardian for unaccompanied minors seeking asylum in Australia was repeated by submitters to the committee's inquiry into the Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012 [Provisions].<sup>14</sup>

### ***Joint Select Committee on Australia's Immigration Detention Network***

1.15 On 30 March 2012, the President of the Senate received the Final Report of the Joint Select Committee on Australia's Immigration Detention Network, tabled in the Senate on 10 May 2012.<sup>15</sup> In its report, the Joint Select Committee stated:

The Committee notes community concern regarding the guardianship of unaccompanied minors, and recognises the potential for a conflict of interest to arise where the Minister is simultaneously responsible for detaining asylum seekers for the purposes of processing their claims and acting in the best interest of unaccompanied minors seeking asylum. The Committee is of the view that the legal guardianship of unaccompanied

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12 Senate Legal and Constitutional Affairs Legislation Committee, *Commonwealth Commissioner for Children and Young People Bill 2010: Report*, May 2011, p. 55, at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2010-13/commissionerforchildrenandyoungpeople/report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/commissionerforchildrenandyoungpeople/report/index) (accessed 7 January 2015).

13 Senate Legal and Constitutional Affairs Legislation Committee, *Commonwealth Commissioner for Children and Young People Bill 2010: Report*, May 2011, pp 55 and 66, at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2010-13/commissionerforchildrenandyoungpeople/report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/commissionerforchildrenandyoungpeople/report/index) (accessed 7 January 2015).

14 Senate Legal and Constitutional Affairs Legislation Committee, *Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012 [Provisions]*, June 2012, p. 14, at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed%20inquiries/2010-13/nationalchildrenscommissioner/report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/2010-13/nationalchildrenscommissioner/report/index) (accessed 7 January 2015).

15 *Journals of the Senate*, No. 90–10 May 2012, p. 2445.

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minors in immigration detention should be transferred from the Minister for Immigration as soon as practicable.<sup>16</sup>

1.16 The Joint Select Committee recommended that:

...relevant legislation be amended to replace the Minister for Immigration as the legal guardian of unaccompanied minors in the immigration detention system.<sup>17</sup>

### **Immigration (Guardianship of Children) Act 1946**

1.17 Under the IGO Act, a child who intends, or is intended, to become a permanent resident of Australia is considered to be a 'non-citizen child' (IGOC minor) if he or she arrives in Australia without a parent or a carer and without a valid visa.<sup>18</sup> Under the current law, the Minister administering the IGO Act, the Minister for Immigration and Border Protection, is the legal guardian of an IGO minor to the exclusion of the parents and every other guardian of the child.<sup>19</sup> The Minister is empowered to delegate his or her powers and duties of guardianship to any officer or authority of the Commonwealth or of any state or territory<sup>20</sup> and he or she may place the IGO minor into the custody of a person who is willing to act in that capacity and is deemed to be a suitable custodian of the child.<sup>21</sup>

#### ***Current policy***

1.18 In practice, the Minister delegates guardianship of an IGO minor to 'delegated guardians', officers employed by either the Department of Immigration and Border Protection (department) or state or territory child welfare agencies. Delegated guardians are then responsible for the care and welfare of the IGO minor. A delegated guardian can then place an IGO minor into the care of a custodian, a person or organisation to provide for the day-to-day care of the child and make decisions about routine matters. Custodians must consult a delegated guardian on non-routine matters and inform the delegated guardian about any critical incidents that involve the minor. The Minister retains ultimate responsibility for the IGO minor

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16 Joint Select Committee on Australia's Immigration Detention Network, *Final Report*, March 2012, p. 126, at [http://www.aph.gov.au/~media/wopapub/senate/committee/immigration\\_detention\\_ctte/report/report\\_pdf.ashx](http://www.aph.gov.au/~media/wopapub/senate/committee/immigration_detention_ctte/report/report_pdf.ashx) (accessed 7 January 2015).

17 Joint Select Committee on Australia's Immigration Detention Network, Parliament of Australia, *Final Report*, March 2012, p. 126 (Recommendation 19), at [http://www.aph.gov.au/~media/wopapub/senate/committee/immigration\\_detention\\_ctte/report/report\\_pdf.ashx](http://www.aph.gov.au/~media/wopapub/senate/committee/immigration_detention_ctte/report/report_pdf.ashx) (accessed 7 January 2015).

18 *Immigration (Guardianship of Children) Act 1946* (Cth), s. 4AAA.

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

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

21 *Immigration (Guardianship of Children) Act 1946* (Cth), s. 7.

and for ensuring appropriate arrangements are in place to protect the child's interests and foster the well-being of the child.<sup>22</sup>

1.19 Where an IGOC minor is being held in immigration detention, including an alternative place of detention, support services are provided by case managers, mental health support teams, medical staff, interpreting services and education staff. Where an IGOC minor is in community detention he or she will attend school and have access to health care. Government policy provides that unaccompanied minors should be accommodated in the community wherever possible. Unaccompanied minors and vulnerable families are moved from detention facilities into community-based accommodation until their immigration status is resolved.<sup>23</sup>

1.20 Upon the grant of a protection visa, an IGOC minor is moved into the Unaccompanied Humanitarian Minors (UHM) Program, which provides the child with welfare, supervision and settlement support. The Commonwealth, state and territory governments work together to oversee the national delivery of the UHM program. The UHM program provides those children living with an approved custodian or carer with the oversight of the relevant state or territory child welfare agency. If the UHM is being cared for in a group-house arrangement, the child is provided with a live-in carer, managed by a non-government service provider appointed as their custodian.<sup>24</sup>

1.21 In its submission to the AHRC's 2014 inquiry, the department noted that it was aware of calls to transfer guardianship responsibilities to an independent guardian. The department argued that there is no inherent conflict of interest between the Minister's responsibilities under the Migration Act and those under the IGOC Act after practical considerations have been taken into account. The department stated that:

The Government's view is that this is a perceived conflict of interest rather than an actual conflict of interest because exercise of the powers is generally separated and because steps, such as the provision of independent advice or assistance to IGOC minors, are taken to manage the possibility of a conflict between the Minister's different roles.<sup>25</sup>

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22 Department of Immigration and Border Protection, 'How does the minister's guardianship work?' at <http://www.immi.gov.au/faqs/Pages/how-does-the-ministers-guardianship-work.aspx> (accessed 7 January 2015).

23 Department of Immigration and Border Protection, 'How do we care for unaccompanied minors until their immigration status is resolved?', at <http://www.immi.gov.au/FAQs/Pages/how-do-we-care-for-unaccompanied-minors-until-their-immigration-status-is-resolved.aspx> (accessed 7 January 2015).

24 Department of Immigration and Border Protection, 'What is the Unaccompanied Humanitarian Minors Program?' at <http://www.immi.gov.au/FAQs/Pages/what-is-the-unaccompanied-humanitarian-minors-program.aspx> (accessed 7 January 2015).

25 Department of Immigration and Border Protection, *Submission 45 to the Australian Human Rights Commission's National Inquiry into Children in Detention 2014*, pp 60–61, at <https://www.humanrights.gov.au/sites/default/files/Submission%20No%2045%20-%20Department%20of%20Immigration%20and%20Border%20Protection.pdf> (accessed 7 January 2015).

1.22 The department admitted that some delegated guardians may have, or have previously had, decision-making delegations under the Migration Act, but it reassured the AHRC that:

If a delegated guardian has previously, or may in the foreseeable future, be making a Migration Act decision involving an IGOC minor for whom they are the delegated guardian, that officer should not continue to exercise their guardianship delegation, and another delegated guardian (or the alternative delegated guardian) for the IGOC minor should exercise the delegation if required instead.<sup>26</sup>

1.23 The department reiterated that a delegated guardian will generally:

...be required to make decisions of the kind faced by natural parents such as decisions relating to medical care, education and extra-curricular activities...These decisions do not, generally, give rise to a conflict of interest and are made in the child's best interests taking account of the views of experts and the child.<sup>27</sup>

### **International obligations**

1.24 Australia is a signatory to the United Nations Convention on the Rights of the Child (CRC). One of the main guiding principles of the CRC is respect for the best interests of the child. Article 3 of the CRC reads:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.<sup>28</sup>

1.25 Furthermore, Article 18(1) of the CRC specifies that a legal guardian is primarily responsible for 'the upbringing and development of the child' and that the 'best interests of the child will be their basic concern'.<sup>29</sup>

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26 Department of Immigration and Border Protection, *Submission 45 to the Australian Human Rights Commission's National Inquiry into Children in Detention 2014*, p. 61, at <https://www.humanrights.gov.au/sites/default/files/Submission%20No%2045%20-%20Department%20of%20Immigration%20and%20Border%20Protection.pdf> (accessed 7 January 2015).

27 Department of Immigration and Border Protection, *Submission 45 to the Australian Human Rights Commission's National Inquiry into Children in Detention 2014*, p. 61, at <https://www.humanrights.gov.au/sites/default/files/Submission%20No%2045%20-%20Department%20of%20Immigration%20and%20Border%20Protection.pdf> (accessed 7 January 2015).

28 United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Art. 3, at <http://www.refworld.org/docid/3ae6b38f0.html> (accessed 7 January 2015).

29 United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 22, Art. 18, at <http://www.refworld.org/docid/3ae6b38f0.html> (accessed 7 January 2015).

1.26 Article 22 of the CRC requires State Parties to ensure 'a child who is seeking refugee status or who is considered a refugee...receive[s] appropriate protection and humanitarian assistance'.<sup>30</sup>

1.27 One of the obligations under the CRC is that Australia must periodically submit reports to the UN Committee and appear before the UN Committee to explain how the rights contained in the CRC are being implemented in Australia. Australia's most recent report was submitted in 2008 and its most recent appearances before the UN Committee were on 4 and 5 June 2012.<sup>31</sup> In response to Australia's written and oral testimony, the UN Committee stated that:

...the Committee stresses the need for...[Australia] to pay particular attention to ensuring that its policies and procedures for children in asylum seeking, refugee and/or immigration detention give due primacy to the principle of the best interests of the child.<sup>32</sup>

1.28 The committee notes that this assessment provided by the UN Committee pre-dates the policies and conduct of the current government.

1.29 Australia is due to submit a combined fifth and sixth report to the committee on 15 January 2018.<sup>33</sup>

### **Provisions of the bill**

1.30 The Bill consists of five Parts and a Schedule. Part 1 sets out preliminary matters specifying the objects of the legislation, the principles underlying the legislation and relevant definitions. Clause 6 provides a definition for the term 'unaccompanied non-citizen child', restricting it to unaccompanied individuals under the age of 18, who enter Australia as non-citizens and who do not have an appropriate visa or other authority for entry into Australia.

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30 United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 22, Art. 22, at <http://www.refworld.org/docid/3ae6b38f0.html> (accessed 7 January 2015).

31 Attorney-General's Department, 'Human rights treaty body reporting' at <http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/default.aspx> (accessed 7 January 2015). In 2008, the Australian Government, through the Attorney-General's Department (AGD), submitted its fourth report under the CRC to the UN Committee: Australian Government, 'Consideration of reports submitted by States parties under article 44 of the Convention: Fourth periodic report of States parties due in 2007', CRC/C/AUS/4, at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fAUS%2f4&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fAUS%2f4&Lang=en) (accessed 7 January 2015).

32 United Nations Committee on the Rights of the Child, Sixtieth session 29 May–15 June 2012, 'Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations: Australia', CRC/C/AUS/CO/4, 28 August 2012, p. 8, at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/AUS/CO/4&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/AUS/CO/4&Lang=En) (accessed 7 January 2015).

33 Attorney-General's Department, 'Human rights treaty body reporting' at <http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/default.aspx> (accessed 7 January 2015).

1.31 Part 2 of the Bill defines the scope of the proposed role of Guardian. Clause 12 of the Bill would require that the written consent of the Guardian is needed for a unaccompanied non-citizen child to leave Australia. Clause 13 of the Bill would allow the Guardian to place a child in the custody of a specified person. Part 2 of the Bill would establish offences in respect of certain dealings with unaccompanied non-citizen children.

1.32 Part 3 of the Bill would establish and define the role of the Guardian. Clauses 19 and 20 of the Bill would empower the Guardian to cooperate and consult with other agencies and delegate his or her authority to a Public Service employee acting at a Senior Executive Service level. Division 3 of Part 3 sets out the general terms and conditions of appointment of the Guardian and provides for the appointment of an acting Guardian in specified circumstances.

1.33 Part 4 of the Bill would establish the Office, outlines the functions of the Office and describes the procedural requirements for engaging staff and consultants for the Office.

1.34 Finally, Part 5 of the Bill deals with miscellaneous matters including funding of the Office, reporting and review requirements, provision of immunity from civil proceedings and powers to make regulations.

1.35 The Schedule to the Bill proposes to make amendments to the IGO Act, ceasing its application in relation to unaccompanied non-citizen children. The Schedule also makes amendments to the Migration Act in recognition of the new role of Guardian for Unaccompanied Children.

### **Parliamentary Joint Committee on Human Rights**

1.36 On 27 August 2014, the Parliamentary Joint Committee on Human Rights tabled its Tenth Report of the 44th Parliament.<sup>34</sup> The report included comments on the Guardian for Unaccompanied Children Bill 2014 concluding:

The committee considers that the bill promotes the rights of children and is therefore compatible with human rights.<sup>35</sup>

### **Acknowledgement**

1.37 The committee thanks the organisations and individuals who made submissions.

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34 *Journals of the Senate*, No. 47–27 August 2014, p. 1318.

35 Parliamentary Joint Committee on Human Rights, 'Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*: Bills introduced 7–17 July 2014 Legislative Instruments received 21 June–25 July 2014', *Tenth Report of the 44th Parliament*, p. 34, at <http://www.aph.gov.au/~media/Committees/Joint/PJCHR/10th/Tenth%20Report%20of%20the%2044th%20Parliament.pdf> (accessed 7 January 2015).

