The Senate

Legal and Constitutional Affairs Legislation Committee

Migration Amendment (Protecting Babies Born in Australia) Bill 2014

February 2015

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Ms Sophie Dunstone, Committee Secretary

Mr Patrick Wall, Parliamentary Graduate

Mr Simon Jones, Administrative Officer

Ms Jo-Anne Holmes, Administrative Officer

Suite S1.61 Telephone: (02) 6277 3560

Parliament House Fax: (02) 6277 5794

CANBERRA ACT 2600 Email: legcon.sen@aph.gov.au

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Introduction and background

The referral

1.1 On 18 June 2014, the Migration Amendment (Protecting Babies Born in Australia) Bill 2014 (the Bill) was introduced into the Senate by Senator Sarah Hanson-Young.[1] The next day, on the recommendation of the Selection of Bills Committee,[2] the Senate referred the Bill to the Legal and Constitutional Affairs Legislation Committee (the committee) for enquiry and report by 28 October 2014.[3] On 28 October 2014 the Senate granted an extension of time for reporting until 10 February 2015.[4]

Background

At the time of the Bill's introduction

1.2 At the time that the Bill was introduced, a child born in Australia's migration zone[5] who was not an Australian citizen (or an excluded maritime arrival) and who did not have a current visa was an 'unauthorised maritime arrival'. He or she was unable to apply for a visa and was required to be taken 'as soon as reasonably practicable' to a regional processing country. This conclusion is the result of a series of steps of reasoning involving the interaction between a number of provisions of the *Migration Act 1958* (the Act) as it stood at the time of the Bill's introduction.

1.3 First, as the child was born in the migration zone and was a non-citizen at the time of their birth, they were taken to have entered the migration zone at birth. This was because of the operation of section 10, which provided as follows:

> A child who:
>
> (a) was born in the migration zone; and
>
> (b) was a non-citizen when he or she was born;
>
> shall be taken to have entered Australia when he or she was born.

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1 *Journals of the Senate*, No. 32—18 June 2014, p. 905.

2 *Journals of the Senate*, No. 33—19 June 2014, p. 914.

3 *Journals of the Senate*, No. 33—19 June 2014, p. 916.

4 *Journals of the Senate*, No. 61—28 October 2014, p. 1629.

5 By section 5 of the *Migration Act 1958*:

> ***"migration zone"*** means the area consisting of the States, the Territories, Australian resource installations and Australian sea installations and, to avoid doubt, includes:
>
> (a) land that is part of a State or Territory at mean low water; and
>
> (b) sea within the limits of both a State or a Territory and a port; and
>
> (c) piers, or similar structures, any part of which is connected to such land or to ground under such sea;
>
> but does not include sea within the limits of a State or Territory but not in a port.

1.4 Secondly, because they did not enter by aircraft, the child was taken to have entered Australia by sea at the time of their birth. Section 5AA(2)(a) stated that:

> (2) A person ***entered Australia by sea*** if:
>
> > (a) the person entered the migration zone except on an aircraft that landed in the migration zone;
> >
> > (b) the person entered the migration zone as a result of being found on a ship detained under section 245F (as in force before the commencement of section 69 of the Maritime Powers Act 2013) and being dealt with under paragraph 245F(9)(a) (as in force before that commencement); or
> >
> > (ba) the person entered the migration zone as a result of being on a vessel detained under section 69 of the Maritime Powers Act 2013 and being dealt with under paragraph 72(4)(a) of that Act; or
> >
> > (c) the person entered the migration zone after being rescued at sea.

1.5 Thirdly, because the child did not hold a current visa at the time of their birth, section 14 made them an 'unlawful non-citizen'. By the operation of section 78, non-citizen children born in Australia are taken to have been granted a visa unless neither of their parents holds a visa (or unless the only visa held by either parent is a special purpose visa). Section 189 requires that unlawful non-citizens be detained.

1.6 Fourthly, because they were taken to be an unlawful non-citizen who entered Australia by sea, subsection 5AA(1) of the Act made the child an 'unauthorised maritime arrival':

> (1) For the purposes of this Act, a person is an ***unauthorised maritime arrival*** if:
>
> > (a) the person entered Australia by sea:
> >
> > > (i) at an excised offshore place at any time after the excision time for that place; or
> > >
> > > (ii) at any other place at any time on or after the commencement of this section; and
> >
> > (b) the person became an unlawful non-citizen because of that entry; and
> >
> > (c) the person is not an excluded maritime arrival.[6]

6 By subsection 5AA(3), an 'excluded maritime arrival' is: a citizen of New Zealand who holds and produces a current New Zealand passport; a non-citizen who holds and produces a current passport that includes an authority to reside indefinitely on Norfolk Island; or a member of a prescribed class of persons.

1.7 The Act imposes certain restrictions on unauthorised maritime arrivals. In particular, the Act provides that:

- visa applications made by unauthorised maritime arrivals who are in Australia and who are unlawful non-citizens are not valid (unless the Minister determines otherwise) (s 46A);
- unauthorised maritime arrivals *must* be taken to a country designated as a regional processing country 'as soon as reasonably practicable' (s 198AD(2)) unless:
    - an officer considers it necessary to return them to Australia (s 198AD(4));
    - the Minister determines otherwise (s 198AE);
    - there is no designated regional processing country (s 198AF); or
    - each designated regional processing country has advised that it will not accept the unauthorised maritime arrival (s 198AG); and
- certain legal proceedings relating to unauthorised maritime arrivals may not be instituted against the Commonwealth (s 494AA).

1.8 In conclusion, under the legal régime that existed at the time of the Bill's introduction, a non-citizen child born in Australia's migration zone without a visa was unable to apply for one and was required to be taken to a regional processing country 'as soon as reasonably practicable' (unless they were an excluded maritime arrival). This analysis is supported by the recent decision of the Federal Circuit Court of Australia in *Plaintiff B9/2014 v Minister for Immigration*.[7]

1.9 The legislative circumstances that give rise to this conclusion are of relatively recent invention. They were brought about by the amendments made to the Act by the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013*, which sought to give effect to the recommendation of the Expert Panel on Asylum Seekers that all persons who enter Australia by irregular maritime means should be given the same legal status, regardless of whether they reached the Australian mainland or not.[8] This recommendation was motivated by the Expert Panel's desire to ensure that there is no incentive for asylum seekers to take further risks at sea by attempting to reach the mainland.[9]

1.10 Prior to those amendments coming into effect, the restrictions outlined in paragraph 1.7 were imposed on 'offshore entry persons', who were unlawful non-citizens who had entered Australia at an offshore place that had been excised from the migration zone for the purposes of imposing the restrictions. A child born in the non-

7 [2014] FCCA 2348.

8 The Hon Christopher Bowen MP, Minister for Immigration and Citizenship, *House of Representatives* Hansard, 31 October 2012, p. 12 738.

9 *Report of the Expert Panel on Asylum Seekers*, August 2012, [3.72], [3.73].

excised parts of the migration zone was not an offshore entry person and therefore not subject to the restrictions.

Since the passage into law of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014

1.11 The analysis above is somewhat complicated by the fact that, after the Bill was introduced, the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 was passed by both Houses of Parliament (with amendment).[10] Schedule 6 of that Bill (which was not amended by either House) also addressed the situation of unlawful non-citizen children born in Australia. As the committee explained in its report into that Bill:

> 2.18 Schedule 6 would—if passed—amend the *Migration Act* to seek to ensure that unlawful non-citizen children have the same status and are subject to the same removal power as their parents. Non-citizen children of 'transitory persons' are to be transitory persons themselves; non-citizen children of 'unauthorised maritime arrivals' are to be likewise classified.
>
> 2.19 These changes were explained as follows by the Minister in his second reading speech:
>
> > The amendments contained in schedule 6 reinforce the government's view that the children of [illegal maritime arrivals] who are born in Australia are included within the existing definition of 'unauthorised maritime arrival'…in the Migration Act. This will ensure that, consistent with their parents, these children are subject to offshore processing and are unable to apply for a visa while they remain in Australia, unless I have personally intervened to allow a visa application.
> >
> > The government will also extend the definition of a [unauthorised maritime arrival] to the children of [illegal maritime arrivals] born in a regional processing country. This amendment supports the government's intention that [illegal maritime arrival] families in regional processing countries should be treated consistently and that children born to an [illegal maritime arrival] ought not be treated separately from their family in the protection assessment process.
> >
> > Amendments will also be made to the Migration Act to ensure provisions relating to 'transitory persons' operate consistently.[11]

The Explanatory Memorandum explained that Schedule 6 would:

- clarify, with retrospective effect, that children born to unauthorised maritime arrivals (UMAs) under the Migration Act either in Australia or in a regional processing country are also UMAs for the purposes of the Migration Act;

10 *Journals of the Senate*, No. 74—5 December 2014, p. 2018.

11 Senate Legal and Constitutional Affairs Legislation Committee, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [Provisions]*, pp 14-15.

- clarify, with retrospective effect, that children born to transitory persons [that is, persons who have already been taken to a regional processing country] either in Australia or in a regional processing country are also transitory persons for the purposes of the Migration Act;
- ensure that children born in Australia to a parent who is a transitory person can also be taken to a regional processing country; [and]
- clarify, with retrospective effect, that any visa application of the child of a UMA or transitory person is invalid, unless the Minister has allowed the application, or the application of that child's parent, to be made[.][12]

1.12 As the committee outlined in its report into that Bill, submitters expressed a range of concerns relating to Schedule 6, including: that regional processing centres are not equipped to deal with newborn children; that Schedule 6 creates a risk of family separation; that Schedule 6 penalises children for the decisions of their parents; that the provisions apply retrospectively; that Schedule 6 could deny Australian citizenship to children who are entitled to it; and that Schedule 6 could interfere with the birth registration process, thereby rendering newborn children stateless where they would otherwise not be.[13]

The proposed amendments

1.13 At the time at which it was introduced, the Bill sought to amend the Act so as to avoid the conclusion that a non-citizen child born in Australia's migration zone without a visa was unable to apply for one and was required to be taken to a regional processing country 'as soon as reasonably practicable' (unless they were an excluded maritime arrival). It sought to do so by amending subsection 5AA(2)(a) (the first paragraph of the definition of 'entered Australia by sea') to read:

> (2) A person ***entered Australia by sea*** if:
>
> (a) the person entered the migration zone except:
>
> (i) on an aircraft that landed in the migration zone; or
>
> (ii) by being born in the migration zone; or
>
> Note: Non-citizens born in the migration zone are taken to have entered Australia when they are born: see section 10.

1.14 The amendment would have applied to children born on or after the commencement of the amended definition.

1.15 The amendment would have meant, therefore, that children born in the migration zone were no longer deemed to have entered Australia by sea. This would

12 Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, pp 4-5.

13 Senate Legal and Constitutional Affairs Legislation Committee, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [Provisions]*, pp 31-37.

have meant that they would not be unauthorised maritime arrivals and would not have been subject to the restrictions outlined in paragraph 1.7.

1.16 Since the passage into law of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, however, the passage of the Bill in its current form would not be sufficient to bring about this aim. Further legislation would be required to amend the definitions of 'unauthorised maritime arrival' and 'transitory person', for example.

1.17 Legislation introduced and passed following the introduction of the Bill presently under consideration has rendered the latter redundant. Given, however, that the submitters to the inquiry have clearly dedicated a significant amount of time to their submissions and given that this is an issue that may continue to feature in public debate (and may be the subject of future proposed legislation), the committee has decided to conduct the ordinary review of the submissions received.

Other parliamentary committees

1.18 The Parliamentary Joint Committee on Human Rights has examined the Bill and concluded that it 'does not appear to give rise to human rights concerns'.[14]

1.19 The Senate Standing Committee for the Scrutiny of Bills had no comment to make on the Bill.[15]

Conduct of the inquiry

1.20 As per the usual practice, the committee advertised the inquiry on its website and wrote to a number of stakeholders inviting submissions by 29 August 2014. Details of the inquiry were also placed on the committee's website (http://www.aph.gov.au/senate_legalcon).

1.21 The committee received six written submissions and one item of correspondence, which have been listed at Appendix 1. All of these have been published on the committee's website.

1.22 The committee decided not to hold a public hearing.

Acknowledgement

1.23 The committee thanks all those who made submissions to the inquiry for their assistance.

14 Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 (Eighth Report of the 44th Parliament)*, p. 22.

15 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 7 of 2014*, p. 33.

Chapter 2

Key Issues

2.1 The committee received six submissions and one piece of correspondence. All of these were received prior to the passage of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, so they address the law as it stood at the time that the Bill was introduced.

2.2 All submissions supported the Bill (though some recommended further changes).[1] The one piece of correspondence, which was received from the then-Secretary of the Department of Immigration and Border Protection, implicitly opposed the Bill.

2.3 All evidence presented to the committee raised issues with the state of affairs as it stood at the time, the changes proposed in the Bill, or both. This chapter will examine these issues.

Issues with the current state of affairs

2.4 As explained in chapter 1, the state of affairs at the time of the Bill's introduction was that a child born in Australia's migration zone who was not an Australian citizen (or an excluded maritime arrival) and who did not have a current visa was an 'unauthorised maritime arrival'. He or she was unable to apply for a visa and was required to be taken 'as soon as reasonably practicable' to a regional processing country. Legislation introduced and passed since that time has strengthened this conclusion and has also made such children 'transitory persons'.

2.5 Submissions received by the committee raised five types of concern with the arrangements as they stood at the time of the Bill's introduction, namely that:

(a) they appear to be the unintended consequence of a number of amendments made to the Act at different times;

(b) they subject children to unacceptable conditions in regional processing centres that will harm their health and wellbeing;

(c) they violate international human rights law;

(d) they deny stateless children born in Australia of their right to Australian citizenship under the *Australian Citizenship Act 2007*; and

(e) they risk subjecting non-stateless children to statelessness.

2.6 This section will deal with each concern in turn.

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1 Australian Human Rights Commission, *Submission 1*, p. 1; Civil Liberties Australia, *Submission 2*, p. 2; UnitingJustice Australia, *Submission 3*, p. 1; Refugee Council of Australia, *Submission 4*, p. 1; Associate Professor Michelle Foster, Scientia Professor Jane McAdam and Davina Wadley, *Submission 5*, p. 2; Refugee Advice and Casework Service, *Submission 6*, p. 1.

Unintended consequences

2.7 The submission of the Australian Human Rights Commission noted that, as things stood at the time of the Bill's introduction, the Act appeared to have required the detention and taking to a regional processing country of a child born to non-citizen parents without any visa, regardless of how the parents came to be in Australia.[2] That is, this conclusion was not limited to the children of parents who were themselves unauthorised maritime arrivals. The Commission gave the example of a woman who arrived in Australia by air, overstayed her visa and then gave birth to a non-citizen child. On the Commission's interpretation of the provisions as they stood at the time, 'the child will be deemed to have "entered Australia by sea" and be liable to be detained and then taken to a regional processing country', even though neither of the child's parents are so liable.[3]

2.8 The Commission suggested that this result is an unintended consequence of insufficient consideration being given to the interaction between section 5AA and section 10 when the former was inserted into the Act in 2013.[4] In particular, the Commission highlighted that (a) the Report of the Expert Panel on Asylum Seekers, which was the impetus for the 2013 amendments, made no reference to changing the status of people born in Australia, and (b) that nowhere in the Explanatory Memorandum to the Bill that inserted section 5AA was it mentioned that the intention of that section was to deem non-citizens born in Australia to have entered by sea.[5] In fact, the breadth of section 5AA was explained in the Explanatory Memorandum as being 'intended to cover all possible situations where a person can enter Australia by sea' (aside from certain, non-relevant exceptions).[6] The Refugee Council of Australia also considered that this state of affairs was an 'anomaly' and an unintended consequence of the 2013 amendments.[7]

2.9 Since the passage into law of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, it can no longer be said that the law as it applies to unlawful non-citizen children born in Australia is an unintended consequence. Schedule 6 of that Act deliberately makes such children 'unauthorised maritime arrivals' and 'transitory persons'. As the Australian Human Rights Commission submitted to the committee in relation to that legislation, however, it does not 'address the anomaly that babies born in Australia to unlawful

2 *Submission 1*, p. 2.

3 *Submission 1*, p. 2.

4 *Submission 1*, p. 2.

5 *Submission 1*, pp 2-3.

6 Explanatory Memorandum to the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, para. 53.

7 *Submission 4*, p. 2.

non-citizens who arrived in Australia by air would be liable to be detained and then taken to a regional processing country'.[8]

Conditions in regional processing centres

2.10 A number of submissions expressed concern about requiring children born in Australia to be sent to regional processing countries on the basis that the conditions in regional processing centres are detrimental to the health and wellbeing of children. Civil Liberties Australia, for example, argued that the detention centres on Christmas Island, Manus Island and Nauru are 'wholly unsuitable' for children.[9] The submission pointed to a range of inquiries, reports and other evidence in support of that proposition,[10] including the allegation of the Australian Churches Refugee Taskforce that the detention of children on Nauru and Manus Island is 'state sanctioned child abuse'.[11]

2.11 UnitingJustice referred to 'the devastating effects of detention on the health and wellbeing of children',[12] whilst the Refugee Advice and Casework Service expressed concern about 'the long term toll that an extended period of restrictive detention is currently having on this generation of child asylum seekers' health and emotional wellbeing' because:

> currently neither Nauru nor Manus have the resources and facilities available to properly discharge our obligations to:
>
> - provide protection and assistance towards children seeking asylum;
> - provide recovery and social reintegration for children who have suffered trauma;
> - provide detention which is not arbitrary and as a measure of last resort for the shortest appropriate period of time;
> - treat children with respect and humanity, in a manner that takes into account their age and developmental needs; and
> - enable family reunification.[13]

2.12 The submission of the Refugee Council of Australia supported the passage of the Bill on the grounds that it is 'a means of exempting children who were born in

8 Senate Legal and Constitutional Affairs Legislation Committee, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [Provisions]*, p. 37.

9 *Submission 2*, p. 2-3.

10 *Submission 2*, pp 3-5.

11 *Submission 2*, p. 4.

12 *Submission 3*, p. 2.

13 Refugee Advice and Casework Service, *Submission 6*, pp 4-9.

Australia from the punitive policy regime targeting asylum seekers who arrive by boat'.[14]

International human rights law

2.13 Submissions raised concerns that the state of affairs that existed at the time of the Bill's introduction did not comply with international human rights law.[15] The submission of Associate Professor Foster, Scientia Professor McAdam and Ms Wadley expressed the view that:

> In light of the overwhelming evidence detailing children's vulnerability to the impacts of detention, Australia's policy of detaining children is very likely to be in breach of a number of our obligations under international law, including:
>
> - article 3(2) of the [Convention of the Rights of the Child] (in all actions concerning children …. the best interests of the child shall be a primary consideration);
> - article 22 of the [Convention of the Rights of the Child] (right of child asylum seekers to receive appropriate protection and humanitarian assistance);
> - article 24 of the [Convention of the Rights of the Child] (right to highest attainable standard of health);
> - article 28 of the [Convention of the Rights of the Child] (right to education);
> - article 37 of the [Convention of the Rights of the Child] (right not to be subjected to torture or other cruel, inhuman, or degrading treatment or punishment; no arbitrary deprivation of liberty);
> - article 2 of the [International Covenant on Civil and Political Rights] (right to an effective remedy);
> - article 7 of the [International Covenant on Civil and Political Rights] (freedom from torture or to cruel, inhuman, or degrading treatment or punishment);
> - article 9 of the [International Covenant on Civil and Political Rights] (freedom from arbitrary detention);
> - article 10(1) of the [International Covenant on Civil and Political Rights] (if deprived of their liberty, the right to be treated with humanity and with respect for the inherent dignity of the human person);
> - article 16 of [Convention against Torture] (freedom from cruel, inhuman, or degrading treatment or punishment); and

14 Refugee Council of Australia, *Submission 4*, p. 1.

15 *Submission* 1, p. 3; *Submission 2*, pp 7-9; *Submission 3*, pp 1-2; *Submission 4*, p. 2; *Submission 5*, p. 6; *Submission 6*, pp 4, 5-6

- article 15 of the [Convention on the Rights of People with Disabilities] (freedom from torture or cruel, inhuman, or degrading treatment or punishment).[16]

2.14 The Foster et al submission also argued that transferring children born in Australia to regional processing countries may interfere with their right to the immediate registration of their birth, as guaranteed in the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights.[17]

2.15 Furthermore, the submission of the Australian Human Rights Commission noted that, in the case of children who are deemed to be unauthorised maritime arrivals but whose parents are not, the current state of affairs would appear to violate a child's right not to be separated from their parents, as provided for in article 9 of the Convention on the Rights of the Child.

2.16 A number of submissions expressed the view that—in contrast to the situation that prevailed at the time of the Bill's introduction—the Bill is consistent with international human rights law.[18] The submission of the Australian Human Rights Commission, for example, considered that the Bill is consistent with article 37(b) of the Convention on the Rights of the Child,[19] which prohibits the unlawful or arbitrary deprivation of a child's liberty. The Commission also considered the Bill to be consistent with the right protected by article 22 of the Convention on the Rights of the Child, namely the right of children who are refugees or who are seeking refugee status to receive appropriate protection and humanitarian assistance.[20]

Denying stateless children their right to Australian citizenship

2.17 The Convention on the Reduction of Statelessness, to which Australia is a party, requires Australia to 'grant its nationality to a person born in its territory who would otherwise be stateless'. This obligation is given effect to in subsection 21(8) of the *Australian Citizenship Act 2007*, which provides that a person is eligible for Australian citizenship if they were born in Australia and if they are not and have never been the national or citizen of any country, nor entitled to acquire the nationality or citizenship of any country.

2.18 Civil Liberties Australia argued that removing a stateless child that was born in Australia to a regional processing country would effectively deny them the right in Australian law to apply for Australian citizenship.[21] The Refugee Council of Australia considered it to be 'completely unacceptable to subject a child who has a legitimate

16 *Submission 5*, p. 6.

17 *Submission 5*, pp 6-9.

18 *Submission 1*, p. 3; *Submission 5*, p. 2.

19 *Submission 1*, p. 3.

20 *Submission 1*, pp 3-4.

21 *Submission 2*, pp 5-7.

claim to Australian citizenship to policies which would be unlawful if applied to any other Australian child'.[22]

2.19 Drawing on concerns (outlined above) that births may not be appropriately registered, the Foster et al submission argued that, if the births of children born to stateless persons are not registered, the children will have difficulty proving that they were born in Australia and thereby establishing their right to Australian citizenship under subsection 21(8).[23] This may lead to a denial of the right to a grant of Australian citizenship for individuals who would otherwise be stateless. The children would also be denied their right to acquire a nationality, as contained in article 24(3) of the International Covenant on Civil and Political Rights and article 7(1) of the Convention on the Rights of the Child.

2.20 According to Foster et al, the passage of the Bill would give the children in question better access to birth registration and reduce their chances of remaining stateless.[24]

2.21 Similar concerns were raised during the committee's inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014.[25] In response, the committee recommended that the Department of Immigration and Border Protection ensures that the birth registration process is completed before any child born in Australia is removed to a regional processing country.[26]

Subjecting non-stateless children to statelessness

2.22 In the case of children born to parents who are *not* stateless, the Foster et al submission argued that the absence of registration may make it difficult for the children to prove a link to their parents and their parents' nationality, thereby rendering them at risk of statelessness.[27] This would also be a denial of the right to acquire a nationality. Again, the passage of the Bill would give the children in question better access to birth registration and reduce their chances of becoming stateless in the first place.[28] These concerns were also addressed by the committee's recommendation in relation to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 that the Department

22 *Submission 4*, p. 2.

23 *Submission 5*, p. 9.

24 *Submission 5*, p. 10.

25 Senate Legal and Constitutional Affairs Legislation Committee, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [Provisions]*, pp 36-37.

26 Senate Legal and Constitutional Affairs Legislation Committee, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [Provisions]*, p. 40.

27 *Submission 5*, pp 9-10.

28 *Submission 5*, p. 10.

of Immigration and Border Protection ensures that the birth registration process is completed before any child born in Australia is removed to a regional processing country.[29]

Issues in relation to the Bill

2.23 The key issue raised in relation to the Bill in the submissions and the correspondence was the impact that it would have on family unity.

2.24 The committee received correspondence from Mr Martin Bowles, the then Secretary of the Department of Immigration and Border Protection. Mr Bowles explained that 'the inclusion of the children of [unauthorised maritime arrivals] who are born in the migration zone within the definition of [unauthorised maritime arrival] [is] used to implement the Government's offshore processing and offshore resettlement policies'. He went on to explain that:

> If this Bill were to be enacted, it would result in [unauthorised maritime arrivals] being subject to offshore processing whose children are exempt from offshore processing, requiring inconsistent treatment of members of the same family unit and therefore separation of the family unit.
>
> In summary, this Bill directly contradicts current Government policy.[30]

2.25 Conversely to this, the Australian Human Rights Commission and the Refugee Advice and Casework Service argued that the state of affairs that existed at the time of the Bill's introduction could also lead to the separation of the family unit, either:

(a) because a child is born to parents who arrived in Australia by plane but do not have a current visa (meaning that the child is subject to offshore detention but the parents are not);[31] or

(b) because the '"no exceptions" approach to Ministerial discretion' separates family members who arrive in Australia at different times.[32]

2.26 The Foster et al submission raised a concern that the Bill may lead to children having a different legal status—and different protection entitlements—to their parents.[33] If the parents were unauthorised maritime arrivals, for example, the Bill would have the result that the child would be able to apply for a protection visa but the parents would not (unless the minister exercised his discretion under section 198AD of the Act to allow them to apply for a protection visa). The Bill could, therefore,

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29 Senate Legal and Constitutional Affairs Legislation Committee, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [Provisions]*, p. 40.

30 Mr Martin Bowles, Letter to the Committee Secretary, 31 August 2014.

31 *Submission 1*, p. 4

32 Refugee Advice and Casework Service, *Submission 6*, p. 4.

33 *Submission 5*, pp 10-11.

encourage the separation of children from parents and thereby breach a number of human rights obligations.

2.27 The Australian Human Rights Commission and the Refugee Council of Australia raised similar concerns.[34] They suggested that further legislative change may be required to ensure that the child's parents (and possibly other members of their family) were not taken to a regional processing country.[35] Alternatively, the Commission suggested that the minister could make a determination under section 198AE of the Act that the parents were not required to be taken to a regional processing country.[36]

2.28 Finally, the Foster et al submission also noted with concern that, even if the Bill were passed, the newborn child would still be subject to onshore detention under section 189 of the Act (unless the parents were stateless or the minister were to grant a bridging visa under section 73 of the Act).[37]

Committee comment

2.29 As noted in chapter 1, the passage of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 has rendered this Bill largely redundant. If passed in its present form, it would not affect the change that its proponent seeks. For that reason, and for the reasons that the committee gave for recommending that the Legacy Caseload Bill be passed, the committee recommends that this Bill not be passed.

Recommendation 1

2.30 The committee recommends that the Bill not be passed.

Senator the Hon Ian Macdonald
Chair

34 *Submission 1*, p. 4.

35 *Submission 1*, p. 4; *Submission 4*, p. 2.

36 *Submission 1*, p. 4.

37 *Submission 5*, p. 11.

Labor Senators' Additional Comments

1.1 Labor Senators note that the Chair's report explores the impact the passing (with amendment) of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, in particular Schedule 6, has on this Bill.

1.2 Schedule 6 of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 clarifies the well understood principle of the Act that a child inherits the immigration status of the parent. Any other position would be a considerable departure from a significant principle underpinning our immigration system.

1.3 Labor Senators also note that further legislation would now be required to amend the definitions of 'unauthorised maritime arrival' and 'transitory person', as per the aims of this Bill. Legislation has now been passed by the Government that essentially renders this Bill redundant.

Senator Sue Lines **Senator Catryna Bilyk**

Australian Greens Dissenting Report

1.1 At the time that this Bill was introduced and referred to inquiry dozens of babies born on Australian soil, to asylum seekers parents, were awaiting imminent deportation to Australia's offshore detention centres. Despite these babies being born in Australia, the Government argued that they were taken to have entered Australia by sea and therefore subject to transfer to offshore immigration detention.

1.2 The Australian Greens out rightly rejected the government's position. These babies were born in Australia, they did not enter Australia by sea or by air, they were born safely on Australian soil and they deserved to remain in Australia.

1.3 Submitters to the inquiry wholeheartedly supported the intention of the Migration Amendment (Protecting Babies Born in Australia) Bill 2014. Refugee law experts and advocates raised particular concern about the Government's intentions to deport new born babies to Australia's offshore detention centres as the act would defy international law and put vulnerable children at risk.

1.4 When Australia signed the Convention on the Rights of the Child in December 1990 we agreed that any laws or actions affecting children should put their best interests first and protect and uphold their basic rights. As argued by submitters to the inquiry the Government's actions risk breaching these obligations and putting children in even greater danger.

1.5 The Australian Greens agree with the majority of the submitters that newborn babies would be subject to unacceptable conditions in the camps on Nauru. We know that the wellbeing of these children is compromised every day and that irreparable damage is caused. The health risks to children who are detained indefinitely in immigration detention centres have been well documented by medical experts across the country. Despite this evidence the Government continues to detain vulnerable children indefinitely in offshore centres.

1.6 The passing of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* last year enshrined the deportation of Australian born babies into law. Babies born in Australia to asylum seeker parents will spend their early childhood locked up in Australia's detention centres, making them effectively stateless.

1.7 The Australian Greens believe that all children, born in Australia to asylum seeker parents, should remain in Australia and have the opportunity to live their lives free from fear and persecution.

Recommendation 1

The Australian Greens recommend that babies born in Australia to asylum seekers parents be allowed to remain in Australia and be granted citizenship rights.

Senator Sarah Hanson-Young

Appendix 1

Public submissions

Submissions

1 Australian Human Rights Commission (AHRC)

2 Civil Liberties Australia

3 UnitingJustice Australia

4 Refugee Council of Australia

5 Professor Jane McAdam, Associate Professor Michelle Foster and Davina Wadley

6 Refugee Advice & Casework Service (Aust) Inc.

Additional Information

Additional Information

1. Department of Immigration and Border Protection - correspondence received 3 September 2014