

Chapter 1

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 zone⁵ 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.

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.